BRITISH COLUMBIA

WCAT ***Workers' Compensation Appeal Tribunal***

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
Website: http://www.wcat.bc.ca
Telephone: (604) 664-7800
Toll Free: 1-800-663-2782
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2005 ANNUAL REPORT OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

For the year January 1 to December 31, 2005

Submitted by:
Jill Callan, Chair
March 1, 2006

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March 1, 2006

The Honourable Michael de Jong
Minister of Labour and Citizens' Services
Room 310
Parliament Buildings
PO Box 9052, Stn Prov Gov't
Victoria, BC V8W 9E2

Dear Minister:

RE: Workers' Compensation Appeal Tribunal 2005 Annual Report

I am pleased to forward the 2005 Annual Report of the Workers' Compensation Appeal Tribunal for the year ended December 31, 2005. This report has been prepared for your review pursuant to section 234(8) of the *Workers Compensation Act*.

Yours truly,

Jill Callan
Chair

GLOSSARY

Act	*Workers Compensation Act*, R.S.B.C. 1996, c. 492
Administrative Tribunals Act	*Administrative Tribunals Act*, S.B.C. 2004, c. 45 (Bill 56)
Appeal Division	Appeal Division of the Workers' Compensation Board
BCCAT	British Columbia Council of Administrative Tribunals
MRP	Medical Review Panel
MRPP	*Manual of Rules of Practice and Procedure*
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, which operates under the name WorkSafeBC
Workers Compensation Amendment Act (No. 1)	*Workers Compensation Amendment Act, 2002* S.B.C. 2002, c. 56. (Bill 49)
Workers Compensation Amendment Act (No. 2)	*Workers Compensation Amendment Act (No. 2), 2002,* 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, 2005 was WCAT's second full calendar year of operations. During the year, WCAT vice chairs completed merit decisions on 8,179 appeals. A further 2,739 appeals were withdrawn or disposed of through summary decisions. In total, WCAT disposed of 10,918 appeals in 2005.

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.

I am pleased to report that, as of December 31, 2005, the backlog inherited from the Review Board and Appeal Division had been reduced to 989 appeals. As of that date, a total of 21,457 backlog appeals or 96% of the backlog had been eliminated. As of February 28, 2006, the backlog had been reduced by 98.6% to 308 appeals. The backlog appeals that remained outstanding were mainly those in which the panels found it necessary to obtain further evidence or submissions in order to fully and fairly consider the merits and appeals in which the appellant requested delays. In addition to completing backlog appeals, WCAT also decided new appeals, which are subject to the 180-day statutory time frame set out in section 253(4) of the *Workers Compensation Act*.

Our completion of the adjudication of the backlog appeals would not have occurred without the commitment of all WCAT vice chairs and staff to the goal of ensuring that the parties to appeals receive decisions in as timely a manner as possible. I wish to express my gratitude to everyone at WCAT for their hard work and dedication to providing fair and timely decisions to the workers and employers of British Columbia.

We have placed significant demands on workers' compensation advocates, who represented parties at oral hearings and provided written submissions on the backlog appeals, while also representing parties to new appeals. I would like to take this opportunity to thank them for their cooperation and their role in enabling WCAT to successfully eliminate the backlog.

We look forward to the challenges that 2006 will bring and to operating in the post-backlog environment.

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 (Act)*, sections 231 to 260. Part 4 came about as a result of the passage of the *Workers Compensation Amendment Act (No. 2)* and came into force by regulation on March 3, 2003. On December 3, 2004, Part 4 of the Act was significantly amended by sections 174 to 188 of the *Administrative Tribunals Act*. The *Administrative Tribunals Act* also added section 245.1 to Part 4 of the Act and provided 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.

(a) Changes in 2005

There were no amendments to either the Act or the *Administrative Tribunals Act* affecting WCAT in 2005.

(b) Jurisdiction

WCAT deals with compensation, prevention, and assessment decisions, and also provides 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. Under section 251 of the Act there is a process 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 *Manual of Rules of Practice and Procedure* (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. There were no amendments made to the MRPP in 2005.

(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 LABOUR AND CITIZENS' SERVICES SERVICE PLAN

The workers' compensation system is one of the core service areas covered by the Service Plan of the Ministry of Labour and Citizens' Services (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 2005 FOR WCAT (JANUARY 1 - DECEMBER 31)	
CATEGORY	***COST***
Salaries	$ 9,588,805
Supplementary Salary Costs	$ 59,013
Employee Benefits	$ 2,379,993
Per Diem - Boards and Commissions	$ 972,669
Travel	$ 142,093
Centralized Management Support Services	$ 310,813
Professional Services	$ 231,888
Information Systems	$ 874,058
Office and Business Expenses	$ 458,794
Amortization expenses	$ 637,561
Building Occupancy	$ 913,418
Other Expenses	$ 6,091
TOTAL EXPENDITURES	$ 16,575,196

6. APPOINTMENTS

Pursuant to section 232(2)(b) of the *Workers Compensation Act,* appointments and reappointments of Vice Chairs are made by the Chair in consultation with the Minister of Labour and Citizens' Services.

EXECUTIVE & MANAGEMENT AS OF DECEMBER 31, 2005

NAME	***POSITION***	***END OF TERM***
Jill Callan	Chair	March 2, 2006 (OIC#105/03)
Luningning Alcuitas-Imperial	Sr. Vice Chair & Registrar	February 28, 2010
Larry Campbell	Sr. Vice Chair & Chief Operating Officer	February 28, 2010
Norman J. Denney	Vice Chair & Deputy Registrar	February 28, 2008
Daphne A. Dukelow	Team Leader	February 28, 2010
William J. Duncan	Team Leader	February 28, 2010
Michelle Gelfand	Vice Chair, Quality Assurance	February 28, 2010
Kevin Johnson	Vice Chair & Deputy Registrar	February 28, 2008
Jane MacFadgen	Team Leader	February 28, 2010
Susan Polsky Shamash	Sr. Vice Chair & Tribunal Counsel	February 28, 2010
Dale Reid	Vice Chair, Inventory Strategist	February 28, 2010
Douglas Strongitharm	Vice Chair & Deputy Registrar	March 31, 2006
Lois Williams	Team Leader	February 28, 2010

VICE CHAIRS AS OF DECEMBER 31, 2005	
NAME	***END OF TERM***
Steven Adamson	February 28, 2008
Cathy Agnew	February 28, 2010
Beatrice K. Anderson	February 28, 2010
Wallace I. Auerbach	February 28, 2008
W. J. (Bill) Baker	February 28, 2006
Hélène Beauchesne	March 31, 2006
Frances G. Bickerstaff	August 31, 2006
Sarwan Boal	February 28, 2007
Dana G. Brinley	February 28, 2007
Michael Carleton	February 28, 2010
Baljinder Chahal	August 31, 2006
Lesley A. Christensen	February 28, 2007
Melissa Clarke	September 5, 2007
David A. Cox	August 31, 2006
Guy W. Downie	February 28, 2008
Andrew J. M. Elliot	August 31, 2006
Georgeann Glover	February 28, 2006
Margaret C. Hamer	August 31, 2006
S. Marlene Hill	February 28, 2007
James Howell	March 31, 2006
Lisa Hirose-Cameron	September 5, 2007
Warren Hoole	September 5, 2007
Inderjeet Hundal	March 31, 2006
Nora Jackson	February 28, 2010
Cynthia J. Katramadakis	March 31, 2006
Nancy Keithly	March 31, 2007
Joanne Kembel	February 28, 2006
Brian King	August 31, 2006

VICE CHAIRS AS OF DECEMBER 31, 2005	
NAME	***END OF TERM***
Rob Kyle	February 28, 2007
Randy Lane	February 28, 2010
Janice A. Leroy	February 28, 2008
Duncan H. MacArthur	March 31, 2006
Iain M. Macdonald	February 28, 2010
Julie C. Mantini	February 28, 2006
Susan Marten	February 28, 2010
Heather McDonald	February 28, 2010
Ralph McMillan	March 31, 2007
Renee Miller	February 28, 2006
Herb Morton	February 28, 2010
Marguerite Mousseau	February 28, 2010
Elaine Murray	February 28, 2006
Lorne Newton	February 28, 2010
Debbie Nider	February 28, 2006
P. Michael O'Brien	February 28, 2008
Isabel Otter	February 28, 2007
Paul Petrie	February 28, 2008
Ian J. Puchlik	February 28, 2008
Michael Redmond	February 28, 2006
Deirdre Rice	February 28, 2008
Guy Riecken	February 28, 2006
James Sheppard	February 28, 2008
Shelina Shivji	March 31, 2006
Debbie Sigurdson	February 28, 2008
Earl A. Simm	February 28, 2008
Timothy B. Skagen	March 31, 2006
Gail Starr	February 28, 2007
John Steeves	December 31, 2006

VICE CHAIRS AS OF DECEMBER 31, 2005	
NAME	***END OF TERM***
Anthony F. Stevens	February 28, 2010
Don Sturrock	February 28, 2007
Eric S. Sykes	August 31, 2006
David Towill	February 28, 2006
David Van Blarcom	February 28, 2007
Deborah Vivian	March 31, 2006
Andrew J. Waldichuk	February 28, 2006
Kathryn P. Wellington	February 28, 2007
Teresa White	December 31, 2009
Lynn M. Wilfert	February 28, 2007
Judith Williamson	March 31, 2006
Suzanne K. Wiltshire	March 31, 2006
Erik W. Wood	March 31, 2006
Sherryl Yeager	February 28, 2010

VICE CHAIR DEPARTURES IN 2005		
NAME	***EFFECTIVE DATE***	***ORIGINAL APPOINTMENT DATE***
Julie Brassington	October 4, 2005	March 3, 2003
Dan Cahill	April 29, 2005	March 3, 2003
Ernie MacAulay	March 2, 2005	March 3, 2003
Cecil S. Memory	March 2, 2005	March 3, 2003
Janet Patterson	July 21, 2005	March 3, 2003
Leigh Sheardown	February 28, 2005	March 3, 2003

7. EDUCATION

WCAT is committed to excellence in decision making. Having adopted a competency-based recruitment process, WCAT also recognizes 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 2005, the WCAT education group organized 18 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 2005, 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 2005:

1.	January 13, 2005	Medical Review Panel Certificates
2.	January 27, 2005	The Visiting Specialists and Hand Clinics
3.	February 3, 2005	WorkSafeNet – Introduction and Overview
4.	February 10, 2005	The Medical Piece of the Appeal Process
5.	February 7-11, 2005	Permanent Disability Awards
6.	February 17, 2005	Field Investigations

7.	March 3, 2005	Occupational Rehabilitation 1, Functional Evaluation Unit
8.	March 16, 2005	Interorganizational Training: Evidence - Fact or Fiction
9.	April 4-8, 2005	Permanent Disability Awards
10.	May 5, 2005	Time/Case Load Management
11.	June 2, 2005	Interorganizational Training: Can I Work? Diagnostic Testing; Basic Science 101
12.	July 7, August 11 & September 8, 2005	Reconsiderations/Reopenings/New Matters; Chronic Pain
13.	September 15, 2005	How to Conduct an Efficient ISYS Search
14.	September 18, 2005	Legislation and the MRPP for new Vice Chairs
15.	September 22/23, 2005	BCCAT's Hearing Skills Course for new Vice Chairs
16.	October 13, 2005	How to Use E-File Effectively On-Line
17.	November 2, 2005	Interorganizational Training: Everything You Want to Know About Opinion Evidence Provided by Experts, But Are Afraid To Ask
18.	November 17, 2005	The Second Opinion – IHPs and Other Medical Evidence; WCAT's Annual Medical Examination

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 2005. The performance of vice chairs will continue to 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 three summary charts.

The first chart (Number of Active Appeals in Inventory) shows WCAT's quarterly progress in reducing the inventory of backlog appeals. At December 31, 2004, the backlog had been reduced from 22,446 appeals to 5,939 appeals. At December 31, 2005, the backlog stood at 989 appeals. This represented a reduction of 96% of the backlog since WCAT's inception.

At December 31, 2005, WCAT's active inventory of new and transitional appeals stood at 3,918 appeals.

WCAT's total active inventory at year end was 4,907 appeals compared to 9,882 at the end of 2004. This represented a 50% reduction in the total appeals inventory during 2005.

The second chart (Number of Active Appeals at each of the Last 12 Month-Ends) shows WCAT's monthly progress in 2005 in reducing the inventory of backlog appeals.

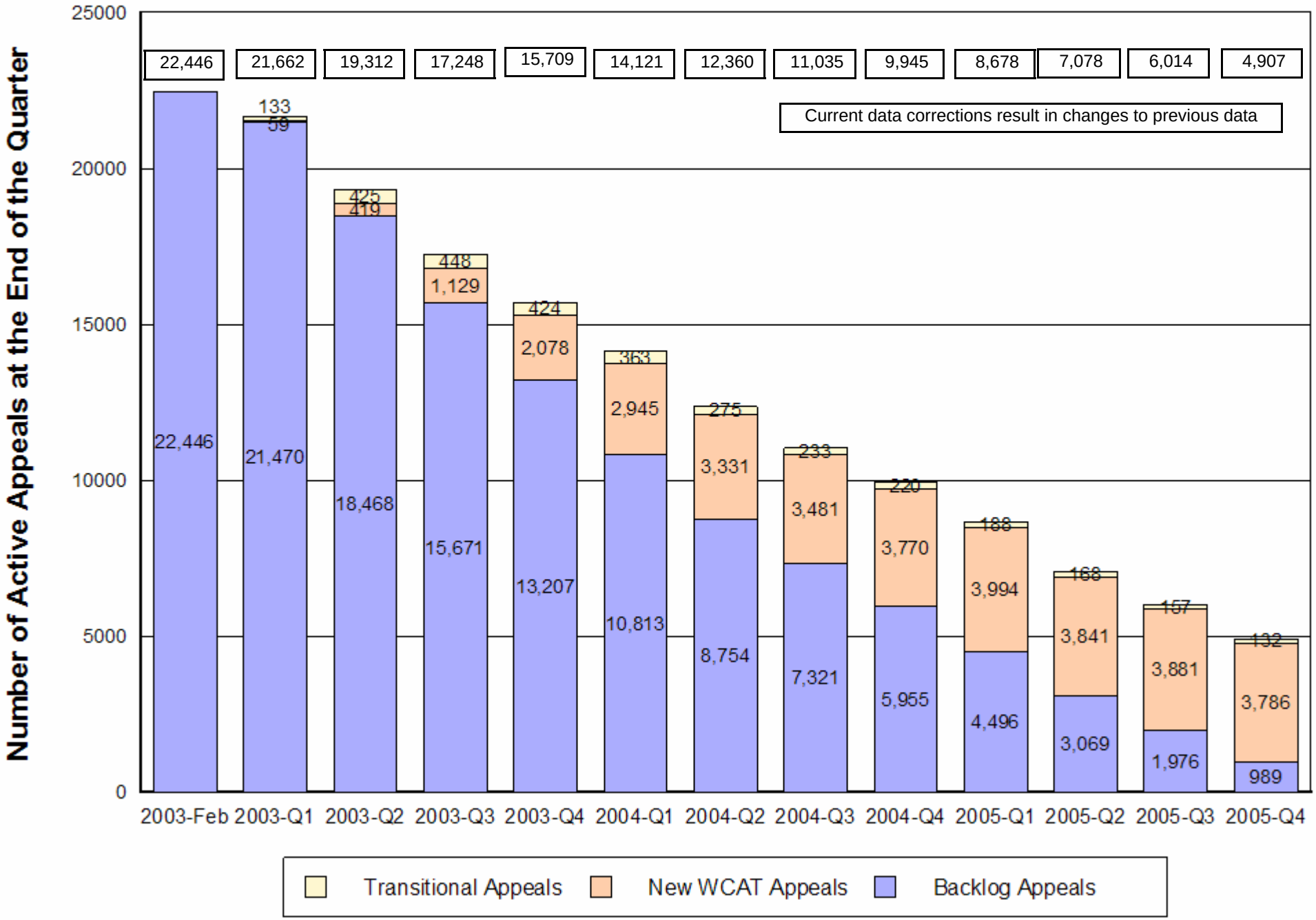
The third chart (Total Intake and Output) shows a monthly summary of new appeals (including reactivated appeals), completed appeals, and appeals that were abandoned, withdrawn, or suspended during the year.

These charts include all appeals, including backlog appeals inherited from the Review Board and the Appeal Division, new appeals, and transitional appeals. WCAT records appeals by their date of initiation. 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.

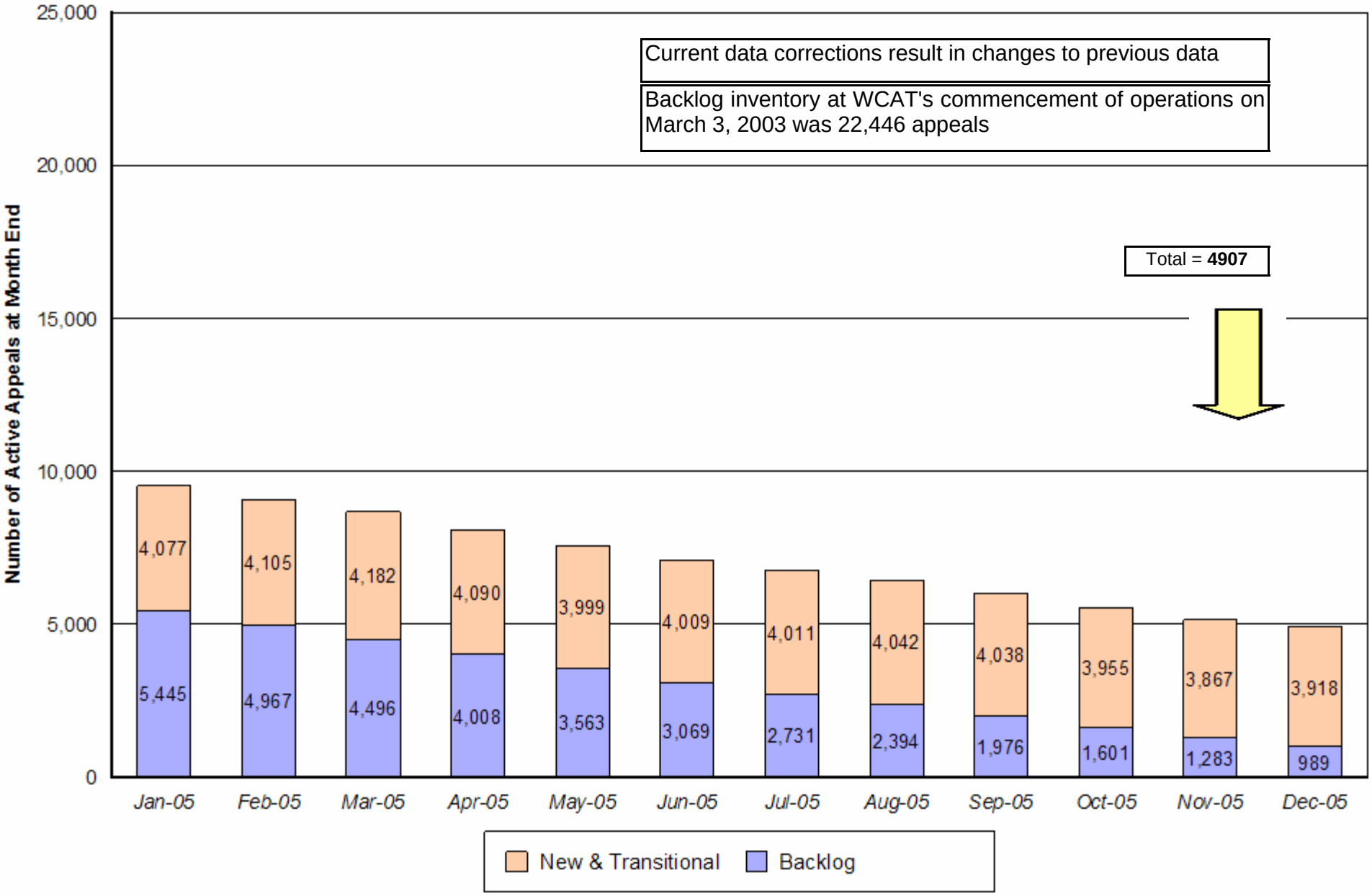
Workers' Compensation Appeal Tribunal

Number of Active Appeals in Inventory



Workers' Compensation Appeal Tribunal

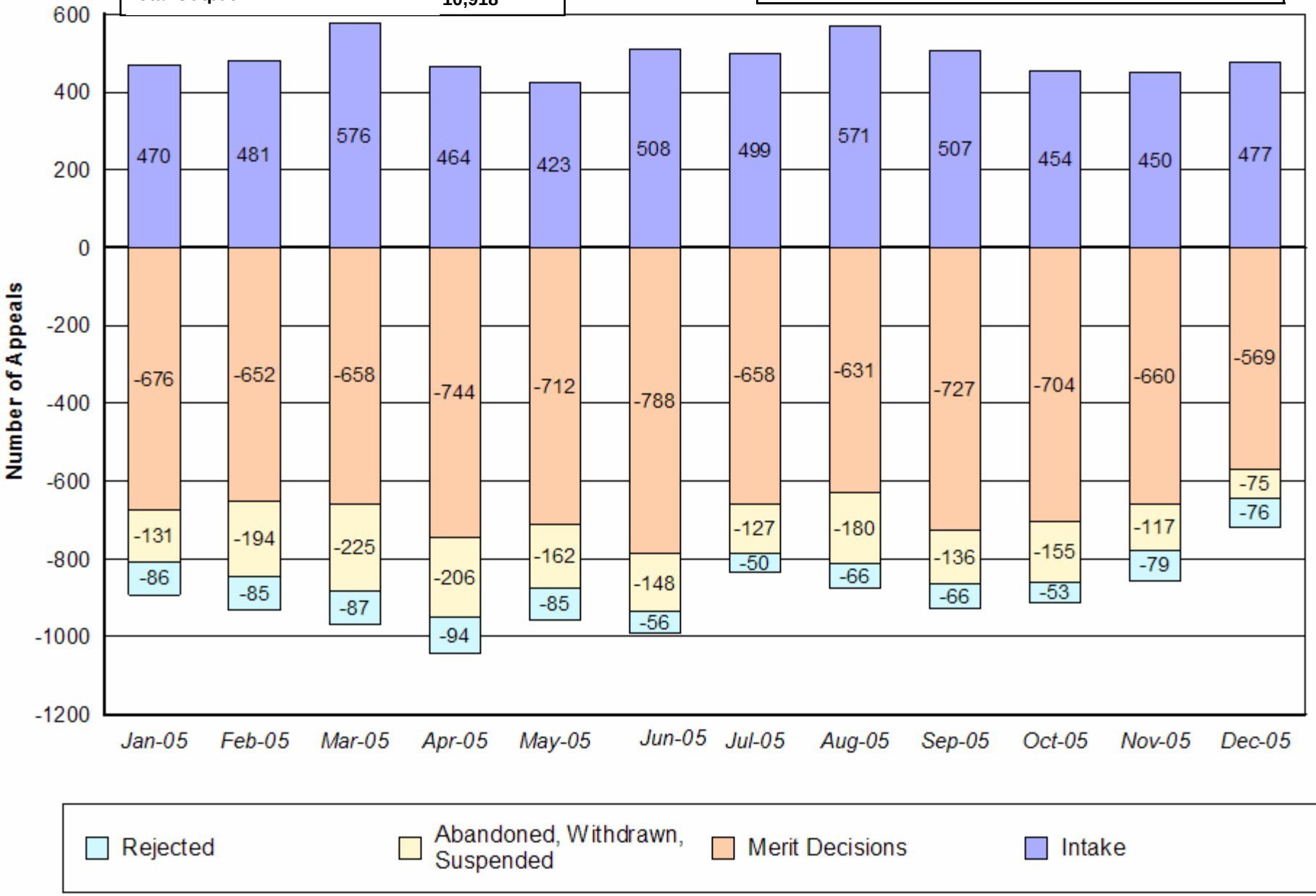
Number of Active Appeals at each of the Last 12 Month-Ends



Workers' Compensation Appeal Tribunal
Total Intake and Output in Past 12 Months

In 12-Month Period:	
Total Intake	**5,880**
Completed	8,179
Abandoned, Withdrawn, Suspended	1,856
Rejected	883
Total Output	**10,918**

Current data corrections result in changes to previous data



9.2 BACKLOG APPEALS

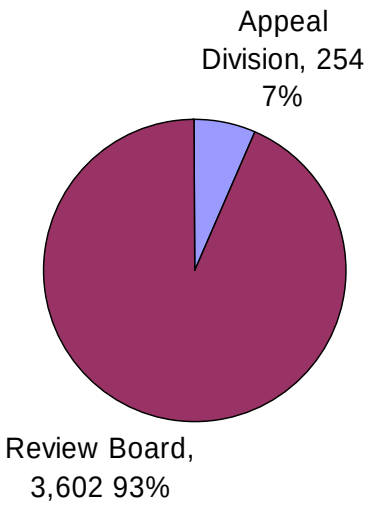
(a) Reactivated Backlog Appeals

WCAT reactivated 56 eligible appeals in 2005 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 backlog appeals, but are included as "intake" in the preceding summary chart (Intake and Output).

(b) Number of Merit Decisions

WCAT made 3,856 merit decisions on backlog appeals in 2005.

Categories of Merit Decisions on Backlog Appeals



The 3,856 decided backlog appeals were comprised almost entirely of compensation appeals (3,677 or 95.4%). Other decided appeals and applications were in the categories of relief of costs (147), assessments (15), certificates for court actions (15), and prevention (2).

(c) Outcomes of Backlog Decisions

WCAT made 3,856 decisions on Review Board and Appeal Division backlog appeals. There were 3,602 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. "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.

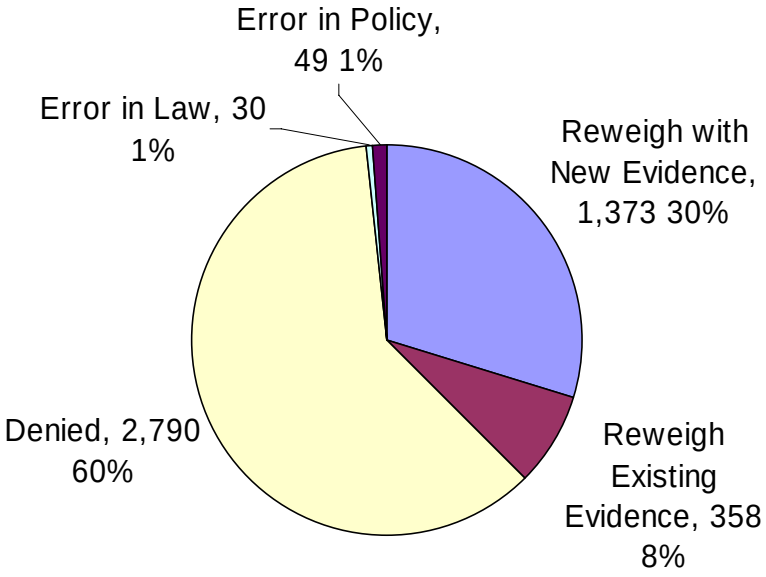
There were 254 merit decisions made on Appeal Division backlog applications and appeals. Fifteen of these were decisions concerning applications for certificates for court actions. The types and outcomes of the remaining 239 appeals were as follows:

		Outcome	
Appeal Type	**Number of Decisions**	**Confirmed**	**Varied**
Relief of Costs	147	63%	37%
Compensation	75	48%	52%
Assessments	15	60%	40%
Prevention	2	50%	50%

(d) Reasons for Issue Outcomes

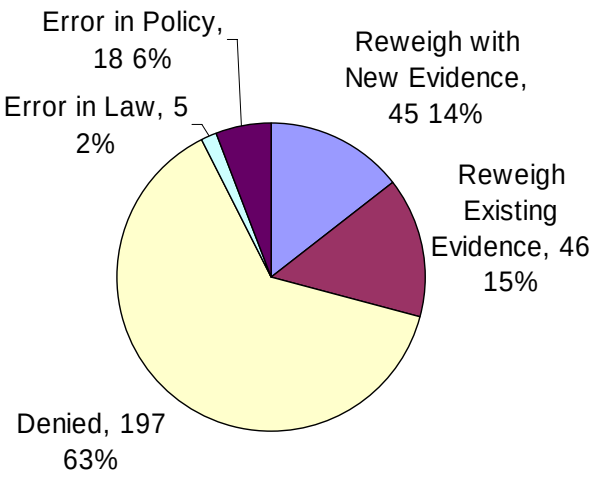
There were 4,600 disputed issues decided in the appeal outcomes for the Review Board backlog. The following chart shows the percentage of the issues that were denied and, if the issues were allowed or allowed in part, the reasons for allowing the issues.

Issue Reasons - Review Board



There were 311 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.

Issue Reasons - Appeal Division



(e) Summary Decisions on Backlog Appeals

WCAT made a total of 1,166 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 (971 - 83%) confirmed that the appellant had abandoned or withdrawn the appeal.

Of the remaining 195 summary decisions, 128 appeals (11%) were initiated in error or did not arise from decisions that were appealable, and 67 appeals related to other issues.

(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	36	25	11
Reconsideration of Appeal Division decision	12	5	7

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 reviewed by 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 2005, which were initiated under the transitional provisions set out in Part 2 of the *Workers Compensation Amendment Act (No. 2)*. 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.

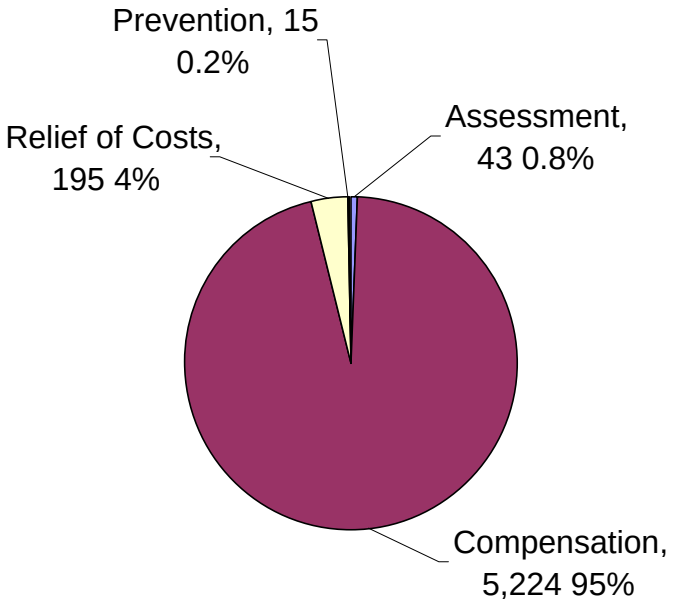
(a) Intake

WCAT received 5,824 new appeals and applications in 2005. Of these, 5,796 appeals (99%) were new appeals and applications arising from decisions made on or after March 3, 2003. The remaining 28 new appeals were transitional appeals.

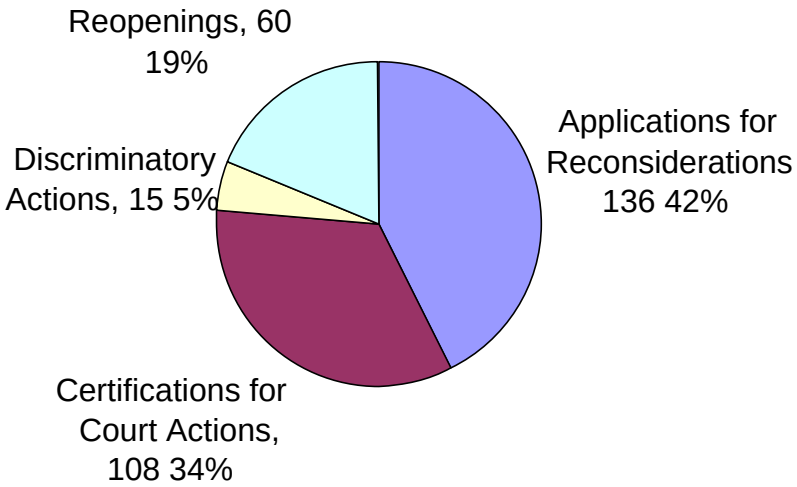
SOURCE	INTAKE
Review Division	5,477
Direct	319
Transitional	28
TOTAL	**5,824**

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

New Appeals from Review Division by Type



New Direct Appeals by



(b) Merit Decisions

WCAT made 4,323 merit decisions on new and transitional appeals and applications in 2005. These were comprised of 4,257 merit decisions on new appeals and applications, and 66 merit decisions on transitional appeals.

(c) Outcomes of Merit Decisions

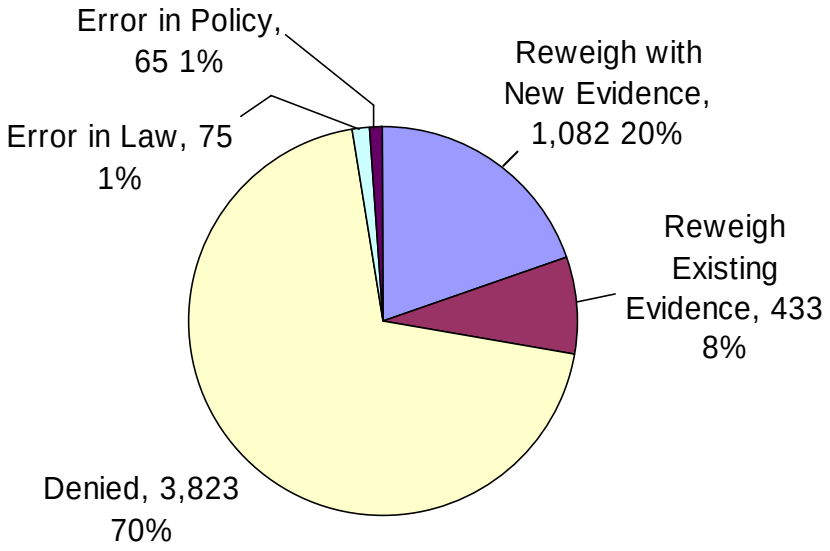
Of the 4,257 merit decisions on new appeals and applications, 58 decisions concerned applications for certificates for court actions. The remaining 4,199 merit decisions concerned appeals from decisions of the Review Division or WCB officers. The table below shows the outcomes of WCAT's decisions on those appeals and the 66 transitional appeals. "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	3,973	66%	34%
Relief of Costs	146	79%	21%
Assessments	33	67%	33%
Reopenings	28	93%	7%
Prevention	11	27%	73%
Discriminatory Actions	8	63%	37%
Transitional Appeals	66	59%	41%

(d) Reasons for Issue Outcomes

There were 5,478 disputed issues decided in the 4,199 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.

Issue Reasons for New Appeals



(e) Summary Decisions

WCAT made 1,573 summary decisions on new and transitional appeals. Of these decisions, 771 (49%) confirmed that the appellant had abandoned or withdrawn the appeal. WCAT found that a further 557 appeals (35%) were initiated in error or did not arise from decisions that were appealable to WCAT. A further 62 summary decisions suspended appeals.

Of the remaining 183 summary decisions, 140 concerned requests for extensions of time to appeal, and 35 were requests for reconsideration. Eight related to other issues.

(f) Requests for Extensions of Time

WCAT considered 252 requests for extensions of time to appeal decisions made on or after March 3, 2003. One hundred and twelve of these requests were allowed and 140 were denied.

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	1,346	26%	71%	29%
Section 23 – Permanent Partial Disability	1,018	20%	61%	39%
Section 6 – Occupational Disease	532	10%	72%	28%
Section 29 – Temporary Total Disability	517	10%	75%	25%
Section 96(2) – Reopenings / Reconsiderations	419	8%	80%	20%

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 4,915 appeals (60.1% of the total) using the read and review method. WCAT decided 3,264 appeals (39.9% of the total) after convening an oral hearing.

(b) Oral Hearing Weeks

In 2005, 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
Cranbrook	11
Castlegar	6
Courtenay	14
Fort St. John	6
Kamloops	20
Kelowna	29
Nanaimo	22
Prince George	17
Prince Rupert	1
Terrace	10
Victoria	39
Williams Lake	5
Total outside Richmond	**180**
Richmond	300
GRAND TOTAL	**480**

(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 2005. 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	92.3%	7.1%	0.6%
Discriminatory Action	70.8%	29.2%	0.0%
Direct Reopening	96.3%	3.7%	0.0%
Prevention	14.3%	85.7%	0.0%
Reconsiderations	89.3%	9.9%	0.8%

(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 2005.

	PERCENT REPRESENTED WHERE APPELLANT IS:		
TYPE OF APPEAL	**Worker**	**Employer**	**Dependant**
Assessment	NA	77.8%	NA
Compensation	76.0%	85.7%	76.4%
Relief of Costs	NA	92.7%	NA
Discriminatory Action	17.6%	100.0%	NA
Direct Reopening	49.5%	25.0%	NA
Prevention	40.0%	74.2%	NA
Reconsiderations	72.1%	84.6%	NA

10. PRECEDENT PANEL DECISIONS

Pursuant to section 238(6) of the *Workers Compensation Act* (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 issued two precedent panel decisions in 2005. No precedent panel decisions were pending at the end of 2005.

(a) Application of Interest Policy (#50.00)

Decision: *WCAT-2005-03622-RB*
Decision Date: July 8, 2005
Panel: H. Morton (Presiding Member), W. Duncan, S. Polsky Shamash

WCAT Precedent Panel Decision – Application of Policy – Meaning of "all decisions" in Policy Item #50.00 of the Rehabilitation Services and Claims Manual, Volumes I and II – Payment of Interest on Retroactive Benefits – Resolution of the Panel of Administrators Number 2001/10/15-03 "Calculation of Interest" – Retroactivity – Retrospectivity – Immediate Effect – Blatant Board Error – Decision of the Governors No. 36 "Retroactivity of Policy Changes"

- New item #50.00 of *Rehabilitation Services and Claims Manual, Volumes I and II* (RSCM I and II) applies to all initial interest decisions on or after November 1, 2001. The term "all decisions" in the Resolution of the Panel of Administrators Number 2001/10/15-03 "Calculation of Interest" (Resolution) means all initial interest decisions.

- An initial interest decision is distinct from a decision regarding a worker's entitlement to retroactive benefits generally. The Workers' Compensation Board (WCB) has the authority to make new policy which applies immediately to the initial adjudication of a particular subject matter.

- New item #50.00 (RSCM I and II) does not apply to an appellate decision unless the new policy applied to the interest decision that is being appealed. Thus, on appeal, the former policy applies where the initial interest decision was made before November 1, 2001. The new policy applies where the initial interest decision was made on or after November 1, 2001.

The Resolution amended item #50.00 relating to the payment of interest. The Resolution provided that the effective date of the new item #50.00 is November 1, 2001 and that it "will apply to all decisions to award or charge interest on or after that date".

The panel concluded that "all decisions" in the Resolution means all initial interest decisions. The panel agreed with the interpretation provided in *Appeal Division Decision #2002-1383*. Although the panel thought that the literal meaning of the phrase includes both initial adjudicative decisions as well as appellate decisions, it determined that the phrase as found in the Resolution was not intended by the WCB to include appellate decisions. The panel gave the following reasons in support of its conclusion:

(1) as some application sections of other WCB resolutions expressly include appellate decisions, the absence of an express reference in the Resolution indicates a WCB intention not to apply the new policy to appellate decisions,

(2) given that the WCB variously includes or excludes appellate decisions from policy application statements, the WCB often intentionally requires the workers' compensation system to apply different policies to the same issue, and

(3) Decision of the Governors No. 36 "Retroactivity of Policy Changes" (which continues to be binding policy) established or recognized a presumption that a changed policy will not apply retroactively before the date on which the new policy was approved.

Given the panel's conclusion that the former policy continues to apply to workers whose entitlement to interest has already been initially determined, it found that the policy change was retrospective, not retroactive in its application. Given the panel's conclusion that the Resolution was not retroactive, the panel did not need to address the worker's submission that the WCB has no authority under the *Workers Compensation Act* (Act) to approve retroactive policy changes.

In this case, the worker suffered a low back disc herniation 15 years after a work related back injury. The disc herniation was not accepted on the claim. On review, the former Workers' Compensation Review Board (Review Board), prior to the effective date of the new interest policy, accepted the condition and awarded the worker retroactive wage loss benefits. The Review Board did not expressly decide whether the worker was entitled to interest on the retroactive benefits. After the effective date of the new interest policy, the WCB implemented the Review Board decision but did not address whether interest was payable. After the implementation decision, the worker requested interest on the retroactive wage loss benefits. The WCB applied the new interest policy and denied the worker's request (WCB Decision). The WCB Decision was made on the basis that there was no "blatant Board error" when the WCB decided not to accept the disc herniation on the claim.

The worker requested a review of the WCB Decision. As a result of the *Workers Compensation Amendment Act (No. 2),* the worker's review was continued and completed as a WCAT appeal. The WCAT chair appointed a precedent panel under section 238(6) of the Act to hear the appeal.

On appeal, the panel confirmed the WCB Decision and denied the worker's appeal. Thus, the worker was not entitled to interest on the retroactive wage loss benefits. On the issue of which interest policy to apply, the WCB correctly applied the new interest policy as the WCB Decision was the initial decision concerning interest and the date of the WCB Decision was after the effective date of the new interest policy. On the issue of whether there was a "blatant Board error", the WCAT panel found that, although the initial decision not to accept the disc herniation on the claim was reversed by the Review Board, the decision to accept the condition involved merely a different judgment with respect to the weighing of the evidence, with the benefit of new evidence from the neurosurgeon who operated on the worker.

(b) Scope of WCAT's Jurisdiction under Section 239(2)(c)

Decision: *WCAT-2005-06624*
Decision Date: December 13, 2005
Panel: J. Callan (Chair and Presiding Member), H. Morton, S. Polsky Shamash

WCAT Precedent Panel Decision – Permanent Disability Award – Scope of WCAT's Jurisdiction under Section 239(2)(c) of Workers Compensation Act (Act) – Local Range Interpretation Versus Global Range Interpretation – Impairment of the Lumbar Spine – Sections 23(1), 23(2), 238(6), 239(2)(c), and 250(3) of the Act – Section 8 of the Interpretation Act – Policy Item #39.10 of the Rehabilitation Services and Claims Manual, Volume I – Items #75 and #76 of the Permanent Disability Evaluation Schedule in the Rehabilitation Services and Claims Manual, Volume II – Item #8.20 of WCAT's Manual of Rules of Practice and Procedure

A WCAT precedent panel was assigned to determine whether, in applying items #75 and #76 of the Permanent Disability Evaluation Schedule (Schedule) in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) concerning the lumbar spine, WCAT has broad jurisdiction to consider the worker's appeal based on the maximum of 24% (the global range interpretation), or limited jurisdiction to consider only the portion of the award pertaining to loss of flexion for which a range in excess of 5% is provided (the local range interpretation). The panel concluded that the global range interpretation is correct because it best fits with item #39.10 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), the wording in the Schedule, sections 23(1) and 23(2) of the *Workers Compensation Act* (Act), the reasoning expressed by Alan Winter in the *Core Services Review of the Workers' Compensation Board* (March 2002)[1] (Core Review), the statements of the Minister regarding the intent of section 239(2)(c), and section 8 of the *Interpretation Act*. The local range

[1] Report available at: http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf.

interpretation would unduly restrict appeal rights. The panel found that the global range interpretation applies to items #75 and #76 of the Schedule contained in RSCM II.

The worker appealed his pension award for disability of his lumbar spine. The award was made under the Schedule in RSCM II. The issue assigned to the panel was whether WCAT has jurisdiction only over the flexion component of the award because it is the only loss that has a range greater than 5% (the local range interpretation), or whether it has jurisdiction over the entire award because the range for the whole of the lumbar spine is 24% (the global range interpretation).

Pursuant to section 239(2)(c) of the Act, WCAT does not have jurisdiction to hear an appeal from a review officer's decision respecting the application of the Schedule where the scheduled percentage of impairment range does not exceed 5%. The global range interpretation best fits with item #39.10 of RSCM I which states that the Schedule is a set of guide-rules, not a set of fixed rules. A decision-maker is free to apply other variables relating to the degree of physical impairment in arriving at a final pension. Inasmuch as item #76 of the Schedule sets a maximum award of 24% of total disability for impairment of the lumbar spine, and item #39.10 and the explanation in the Schedule both support the application of the Schedule as a set of guide-rules, there is room for the exercise of discretion in the making of the award. Limiting WCAT's jurisdiction by reference to the ranges set for particular aspects of the disability would seem to have the effect of treating these ranges as a set of fixed rules, rather than recognizing the exercise of discretion contemplated by policy.

The global range interpretation is also more consistent with sections 23(1) and 23(2) of the Act. Section 23(1) stipulates that "the impairment of earning capacity must be estimated from the nature and degree of the injury". This wording supports viewing the injury to the worker's lumbar spine on a global basis. The worker did not sustain separate injuries in respect of his limitations in flexion or extension, or the other factors taken into consideration in making the pension award.

Section 23(2) provides that the WCB may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases. Again, the rating schedule is a guide which relates to specified injuries. The panel considers that the intent was to evaluate the overall effects of the injury.

The panel found that the local range interpretation would unduly restrict appeal rights. Where a worker suffers an injury to their spine, it would be more appropriate to assess this disability on a global range approach, rather than separating it into multiple discrete injuries or impairments affecting different ranges of movement or other measurable components. While the global range approach includes consideration of these separate components of the disability, the pension award is for the overall effects of the worker's injury and disability.

Finally, the global range interpretation best accords with the reasoning expressed in the Core Review, the wording of the Schedule, the statements of the Minister regarding the

intent of section 239(2)(c), and section 8 of the *Interpretation Act*. Upon considering the analyses in prior WCAT decisions and submissions from the representative groups, the panel found persuasive the reasons which support a global range interpretation of the Schedule.

In view of section 250(3), the panel carefully restricted its decision to the issues necessary to the consideration of this particular appeal. The panel found that the global range interpretation applies to items #75 and #76 of the Schedule contained in RSCM II. The binding effect of this decision is restricted to pension awards for disabilities of the lumbar spine.

11. REFERRALS TO THE CHAIR (SECTION 251)

Pursuant to section 251(1) of the Act, WCAT may refuse to apply a policy of the board of directors of the WCB only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If, in an appeal, a WCAT panel considers that a policy should not be applied, that issue must be referred to the chair, and the chair must determine whether the policy should be applied.

Pursuant to section 251(4) of the Act, if the chair determines that the policy should be applied, the chair must refer the matter back to the panel and the panel is bound by that determination. However, if the chair determines that the policy should not be applied, the chair must send a notice of this determination, including the chair's written reasons, to the board of directors of the WCB and suspend any appeal proceedings that the chair considers to be affected by the same policy. After giving an opportunity to the parties of all affected appeals to make submissions, the board of directors has 90 days to review the policy, determine whether WCAT may refuse to apply it, and refer the matter back to WCAT. Pursuant to section 251(8), the determination of the board of directors is binding upon WCAT.

In 2005, the chair issued three decisions in respect of section 251 referrals she received from WCAT panels. The referrals related to items #39.01 RSCM I, #1.03(b)(4) RSCM I and II, and #55.40 and #59.22 RSCM I.

In relation to the item #39.01 referral, the chair determined that the policy is not patently unreasonable.

In relation to the item #1.03(b)(4) RSCM I and II referral, the chair determined that the policy is patently unreasonable and provided notice of her determination to the board of directors. The board of directors disagreed and determined that the policy is not patently unreasonable and is binding upon WCAT. The original WCAT panel applied the policy in its decision and found that the worker was not entitled to a reassessment of his permanent disability award as any deterioration in his permanent disability after June 30, 2002 would involve a recurrence of his disability and would be subject to the provisions of section 23.1, which in turn meant that he would not be entitled to any additional permanent disability benefits. The worker subsequently brought an application for judicial review of the WCAT decision and the board of directors

determination (*Soldan v. Workers' Compensation Board and Workers' Compensation Appeal Tribunal*, Vancouver Registry No. L053151). No hearing date has yet been set.

In relation to the item #55.40 and #59.22 RSCM I referral, the chair determined that item #55.40 is patently unreasonable but item #59.22 is not patently unreasonable. The chair gave notice of the #55.40 determination to the board of directors. The board of directors agreed with the chair and determined that WCAT is not required to apply the policy. On December 13, 2005 the board of directors issued *Resolution of the Board of Directors 2005/12/13-03*[2] which amended the policy to remove the impugned sections.

(a) Chronic Pain (#39.01 RSCM I)

Decision: *WCAT-2005-06524* **Panel:** J. Callan, Chair
Decision Date: December 7, 2005

Section 251 Referral to the Chair – Permanent Disability Award – 2.5% Award for Chronic Pain – Policy Item #39.01 of the Rehabilitation Services and Claims Manual, Volume I – Patently Unreasonable Interpretation – Fettering of Discretion – Sections 23(1), 23(2), 23(3), and 251 of the Workers Compensation Act

Item #39.01 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) can rationally be supported by former section 23(1) and is not patently unreasonable under the *Workers Compensation Act* (Act). The policy takes the degree or extent of injury into account by establishing the threshold criteria for a worker becoming eligible for a chronic pain award. Section 23(1) has a long history of being viewed as establishing a method for determining impairment of earning capacity based on averages rather than the circumstances of individual workers, which is justified on the basis of presumed loss of earning capacity. The broad discretion granted under section 23(3) of the Act and the related policies in RSCM I enable decision-makers to apply the projected loss of earnings method when the 2.5% award does not adequately compensate the worker for his or her impairment of earning capacity.

The worker sought a chronic pain award under item #39.01 of RSCM I, which sets out that all workers who meet the criteria for a permanent disability award for chronic pain will be awarded a functional impairment award of 2.5% of total disability. The vice chair's concern about the policy was that it prescribes that all chronic pain awards must be 2.5% of total, and thus fetters the discretion of decision-makers who are granting awards for chronic pain under former section 23(1) of the Act. The issue in this section 251(3) determination was whether, for the purposes of former section 23, policy in item #39.01 of RSCM I is so patently unreasonable that it is not capable of being supported by the Act.

[2] Resolution is available at: http://www.worksafebc.com/regulation_and_policy/policy_decision/board_decisions/2005/december/default.asp

The chair firstly considered whether chronic pain awards are scheduled awards, and whether item #39.01 grants any discretion to a decision-maker to depart from the award of 2.5% of total. If chronic pain awards are scheduled awards, the 2.5% award prescribed by the impugned policy might be viewed as a starting point rather than the award that is to be granted in all cases that meet the requirements of item #39.01. The chair agreed with the analysis in *WCAT Decision #2004-04324* and concluded that an award under the impugned policy is not a scheduled award under former section 23(2) of the Act. She further concluded that the impugned policy does not grant any discretion to a decision-maker to set an award at an amount other than 2.5% of total. Although the first paragraph of item #39.01 states that "[t]his policy sets out guidelines for the assessment of section 23(1) awards", there is no suggestion in the policy or Workers' Compensation Board's (WCB's) Practice Directive #61 that the 2.5% is meant to merely be a guideline or starting point for assessing the award.

It is apparent from the WCB's discussion paper on chronic pain that policy-makers rejected the concept of establishing awards for various levels of chronic pain because of the inability to objectively verify various levels of pain. However, item #39.01 sets out thresholds that must be met in order for a worker to be entitled to an award for chronic pain. If pain is specific chronic pain, it must be "disproportionate to the associated objective physical or psychological impairment". If it is non-specific chronic pain, it again must be "disproportionate". In light of these thresholds, it is viable to conclude that item #39.01 takes the degree or extent of the injury into account by establishing the threshold criteria for a worker becoming eligible for a chronic pain award.

Section 23(1) has a long history of being viewed as establishing a method for determining impairment of earning capacity based on averages rather than the circumstances of individual workers, which is justified on the basis of presumed loss of earning capacity. The broad discretion granted under section 23(3) of the Act and the related policies in RSCM I enable decision-makers to apply the projected loss of earnings method when the 2.5% award does not adequately compensate the worker for his or her impairment of earning capacity. In light of the long established approach to the application of section 23(1), coupled with the broad discretion granted by section 23(3), the impugned policy is not patently unreasonable under the Act.

As a result of her analysis of section 23, the chair found it unnecessary to consider whether the board of directors can establish a policy that is a fixed and inflexible rule that exhausts the discretion granted by the Act, provided the policy is within the objective of the Act or within the margin of manoeuvre contemplated by the legislature.

As the *Workers Compensation Amendment Act (No. 2)* significantly amended section 23, and the appeal before the vice chair required the application of former section 23, the question of whether item #39.02 of the *Rehabilitation Services and Claims Manual, Volume II* is patently unreasonable under the current section 23 was beyond the scope of the vice chair's referral.

(b) Meaning of Recurrence (#1.03(b)(4) RSCM I and II)

Decision: *WCAT-2005-01710* **Panel**: J. Callan, Chair
Decision Date: April 7, 2005

Meaning of Recurrence of Disability – Section 35.1(8) of the Workers Compensation Act (Act) – Permanent Change in the Nature and Degree of a Worker's Permanent Disability – Policy Item #1.03(b)(4) of Rehabilitation Services and Claims Manual, Volume I and II – Sections 96(2) and 32 of the Act – Section 251 of the Act – Patently Unreasonable

The element of item #1.03(b)(4) of *Rehabilitation Services and Claims Manual, Volume I and II (*RSCM I and II) that characterizes a reopening of a worker's claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" was referred to the chair under section 251(2) of the *Workers Compensation* Act (Act). In this decision the chair concluded that the policy is so patently unreasonable that it is not capable of being supported by the Act. Thus, section 35.1(8) of the Act cannot be rationally interpreted to mean that there is a "recurrence" when a permanent disability for which a pension was granted under the former Act permanently gets worse or deteriorates after June 30, 2002.

In this case, the Workers' Compensation Board (WCB) accepted the worker's claim for asbestos-related pleural disease and in 2001 awarded him a permanent partial disability (PPD) award on a loss of function basis. The worker was 71 years old at the time. In 2003, the WCB considered whether to increase the worker's PPD award. However, as the Act had been amended effective June 30, 2002 and the current Act provided that PPD awards ended at the age of 65, the WCB concluded that the worker could not be granted an increase. Although not expressly stated in the decision, the rationale for the conclusion that the current provisions of the Act would be applicable to any increase in the worker's award was based on the application of item #1.03(b)(4) and the WCB having characterized any permanent deterioration in the worker's permanent disability as a "recurrence" under section 35.1(8).

The Review Division upheld the WCB's decision. On appeal, the worker argued that his PPD award should be reassessed and an increased PPD award paid under the former provisions of the Act on the basis that item #1.03(b)(4) is patently unreasonable. The vice chair who heard the appeal considered the policy patently unreasonable and referred the issue to the chair for decision under section 251(2) of the Act.

Section 35.1(8) provides that if on or after June 30, 2002 a worker has "a recurrence of a disability that results from an injury that occurred before [June 30, 2002], the WCB must determine compensation for the recurrence based on the current sections of the Act". Item #1.03(b)(4) provides that a recurrence includes any claim that is reopened for any "permanent changes in the nature and degree of a worker's permanent disability". Section 96(2) of the Act provides that the WCB may reopen a matter that has been previously decided by the WCB if since the decision was made in that matter

(a) there has been a significant change in a worker's medical condition that the WCB has previously decided was compensable, or (b) there has been a recurrence of a worker's injury.

The chair determined that item #1.03(b)(4) was patently unreasonable and not capable of being supported by the Act for the following reasons:

- The plain meaning of "recur" is "to occur again" and is a fundamentally different concept from a permanent change in a permanent condition. Such a permanent change should be characterized as a deterioration. "Deteriorate" means to "become progressively worse". Therefore, a deterioration is not synonymous with a recurrence. "Deterioration" and "recurrence" refer to fundamentally different processes.

- There is no reason to consider "recurrence" as having a specialized meaning in the worker's compensation context different from the ordinary dictionary meaning. Prior to the enactment of section 35.1(8), a "recurrence", in the context of the workers' compensation system, was not generally applied to a permanent deterioration of a permanent disability.

- It is consistent with the use of "recurrence" and "occurs" in section 32 of the Act to characterize a "permanent change in the nature and degree of a worker's permanent disability" as something that "occurs" rather than as a "recurrence".

- The application of the presumption against tautology leads to the conclusion that the legislature clearly intended that there be a difference between "a significant change in a worker's medical condition that the Board has previously decided was compensable" (the phrase that appears in section 96(2)(a)) and "a recurrence of a worker's injury" (the phrase that appears in section 96(2)(b)). In order for section 96(2)(a) to be meaningful, it must be interpreted as referring to something other than a recurrence. While acknowledging interpretative difficulties resulting from the language of section 96(2), the chair determined that the better interpretation of section 96(2) is that a reopening for a permanent deterioration in a permanent disability falls into the category of "a significant change in a worker's medical condition" rather than "a recurrence of a worker's injury".

The chair determined that for the purposes of section 251, a policy is patently unreasonable and not capable of being supported by the Act where it cannot be "rationally supported" by the Act. The chair rejected the contention that the WCAT chair is to apply a less stringent patently unreasonable standard than that applied by the courts on judicial review.

Determination of the Board of Directors

The board of directors issued its determination on August 11, 2005[3]. The board of directors determined that item #1.03(b)(4) RSCM I and II is not patently unreasonable and therefore must be applied by WCAT. The board of directors determined that the most plausible interpretation of section 35.1(8) is that "recurrence" includes changes in the extent of permanent partial disabilities as well as repeats of temporary total or partial disabilities. They found that this interpretation:

- is consonant with the important and overriding goal of the amendment legislation to ensure the future fiscal sustainability of the workers' compensation system through a change in the way in which future benefits are to be calculated and paid;
- is reflective of an apparent legislative intention to transfer new events on old claims into the amended Act as a transitional objective;
- is consonant with the interpretation of the word "recurrence" in compensation and insurance legislation and cases;
- eliminates inconsistent treatment of workers and differential calculations of benefits; and
- is consonant with the balance of section 35.1.

(c) Dependent Children's Benefits (#55.40, #59.22 RSCM I)

Decision: *WCAT 2005-04492-RB* **Panel:** J. Callan, Chair
Decision Date: August 26, 2005

Referral to the Chair Pursuant to Section 251 of the Workers Compensation Act (Act) – Policy items #55.40 and #59.22 of the Rehabilitation Services and Claims Manual, Volume I – Dependent Children's Benefits – Patently Unreasonable Interpretation – Section 17(3)(f) of the Act – Former Common Law Spouse – Living Separate and Apart – Compensable Death – No Dependent Spouse for Purposes of Section 17 of the Act

The issue in this section 251 referral was whether items #55.40 and #59.22 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), which deal with dependent children's benefits, are patently unreasonable. The worker had sons with his former common law spouse, and was living separate and apart from the children and

[3] The determination is available at: http://www.worksafebc.com/regulation_and_policy/policy_decision/board_decisions/2005/august/default.asp

their mother at the time of his compensable death. The children's mother was not a dependent spouse for the purposes of section 17 of the *Workers Compensation Act* (Act). The impugned element of item #55.40 provides that section 17(9) is applicable to this situation. The chair concluded that the impugned element of item #55.40 is patently unreasonable because section 17(9) does not apply when there is no dependent spouse. Item #59.22, which applies to orphans and other dependent children, should be applied to the appeal before the vice chair because it is consistent with section 17(3)(f) and not patently unreasonable.

The section 251(3) determination involved a deceased worker who was survived by dependent children but not by a spouse or common law spouse. The worker, who had previously been in a common law relationship, had two sons with his common law spouse, but was not living with the children's mother and their sons at the time of his compensable death. In *WCAT Decision #2004-04372-RB*, dated August 20, 2004, WCAT upheld a Workers' Compensation Board (WCB) decision to deny the children's mother benefits as a common law spouse under section 17(11) on the basis that at the time of the death, she and the worker did not support a common household in which they both lived. By a second decision, the WCB granted a monthly pension to each child under item #55.40 of RSCM I, which provides that the benefits are to be calculated in accordance with section 17(9). The mother appealed this second decision to WCAT on behalf of the children, seeking increased benefits for them. The issue in this determination was whether, for the purposes of former section 17, the impugned elements of items #55.40 and #59.22 are so patently unreasonable that they are not capable of being supported by the Act.

In the referral memorandum, the vice chair's concern about item #55.40 was restricted to that part of the policy that read "[s]ection 17(9) also applies where there is no spouse eligible to claim benefits, but a claim is made by children of the deceased who were living separate and apart from the worker". She contended that this element of the policy was patently unreasonable because section 17(9) cannot support a policy regarding a situation in which there is no dependent spouse. The vice chair's view was that because there was no dependent spouse, the dependent children of the deceased worker were entitled to the greater quantum of benefits payable under section 17(3)(f)(ii). The impugned statement in item #55.40 of RSCM I does not appear in *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

The vice chair also contended that item #59.22 restricts the application of section 17(3)(f) to orphans and that this is patently unreasonable. She did not consider whether it is possible to interpret this policy as being applicable to dependent children other than orphans.

The chair determined that item #59.22 should be applied to the appeal before the vice chair because it is consistent with section 17(3)(f) and not patently unreasonable. The vice chair in her referral memorandum assumed the application of item #59.22 is restricted to orphans. However, item #59.22 states that it applies "[w]here there is no surviving spouse or common-law wife or common-law husband eligible for monthly payments under [section 17]", which is virtually the same language used in

section 17(3)(f). It is reasonable and appropriate to interpret item #59.22 much more broadly than indicated by the vice chair, and be consistent with section 17(3)(f). The chair interpreted section 17(3)(f) to be applicable to dependent children other than orphans, because it also applies in situations where there is a surviving spouse or common law spouse who is not eligible for monthly benefits under section 17 and where the children have a surviving parent who is neither a surviving spouse nor a common law spouse.

The chair found the impugned element of item #55.40 could not be rationally supported by section 17(9). She concluded that section 17(9) is only applicable if, at the time of a worker's death, there is a dependent spouse who was living separate and apart from the worker. In this case, the children's mother was not a dependent spouse for the purposes of section 17. If there is no dependent spouse, section 17(9) is not applicable. The chair also considered whether section 17(17) is the basis of the impugned policy and concluded that it is not because the policy begins with the statement "[s]ection 17(9) also applies". She concluded that the impugned element of item #55.40 should not be applied to the adjudication of the appeal because it was patently unreasonable under the Act.

Determination of the Board of Directors

As stated above, the board of directors agreed with the chair and determined that WCAT is not required to apply item #55.40. On December 13, 2005, the board of directors issued *Resolution of the Board of Directors 2005/12/13-03*[4]*,* which amended the policy to remove the impugned sections.

[4] Resolution is available at: http://www.worksafebc.com/regulation_and_policy/policy_decision/board_decisions/2005/december/default.asp

12. 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 2005, WCAT received 136 applications for reconsideration and issued 47 reconsideration decisions. In total, 18 reconsideration applications were allowed. The outcomes of the reconsideration decisions were as follows:

Type of Reconsideration	Number of Reconsideration Decisions	Allowed	Denied
Statutory Grounds	6	2	4
Common Law Grounds	32	16	16
Both Grounds Alleged	9	0	9
TOTAL	**47**	**18**	**29**

12.1 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 because of 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*).

12.2 RECONSIDERATION DECISIONS ON COMMON LAW GROUNDS

The following 2005 WCAT reconsideration decisions determined that the WCAT panel responsible for the underlying decision committed an error of law going to jurisdiction.

(a) Breach of Natural Justice

Decision: *WCAT-2005-00778* **Reconsideration Panel:** H. Morton
Decision Date: February 14, 2005

The WCAT panel did not consider the worker's argument that the WCB misapplied the Permanent Disability Evaluation Schedule when it calculated his permanent disability functional impairment award. Although the worker did not raise the issue in his written submissions, he did in his notice of appeal. The panel breached the rules of natural justice by denying the worker the right to be heard.

Decision: *WCAT-2005-00904* **Reconsideration Panel:** H. Morton
Decision Date: February 22, 2005

The employer failed to appear for an oral hearing. The worker appeared and WCAT issued a decision. Although WCAT sent the employer a notice of hearing, the employer never received it. By issuing a decision in such circumstances the panel inadvertently breached the rules of natural justice and denied the employer the right to be heard.

Decision: *WCAT-2005-01087* **Reconsideration Panel:** H. Morton
Decision Date: February 28, 2005

This decision was a reconsideration of a 1994 Appeal Division decision. The reconsideration panel confirmed that WCAT has the authority to reconsider an Appeal Division decision. The panel allowed this reconsideration on common law grounds because the panel missed an issue that was before it on the appeal.

Decision: *WCAT-2005-01289* **Reconsideration Panel:** H. Morton
Decision Date: March 15, 2005

The WCAT panel considered an expert report which the worker had provided to the WCB after the oral hearing at WCAT and which had been produced on behalf of the worker. The panel did not give the worker an opportunity to make submissions regarding the report. The fact that the new evidence was provided to the WCB by the worker did not negate the worker's right to make submissions to the WCAT panel regarding the significance of the new evidence. The panel breached the rules of natural justice by denying the worker the right to be heard.

Decision: *WCAT-2005-02170* **Reconsideration Panel:** J. Steeves
Decision Date: April 28, 2005

This was a reconsideration of a 2003 Appeal Division decision. The panel failed to consider a significant medical report. Although the report had been received by the WCB prior to the panel's decision, the report was either overlooked or was not contained in the file before the panel. The panel breached the rules of natural justice by denying the worker the right to be heard.

Decision: *WCAT-2005-03571-AD* **Reconsideration Panel:** J. Steeves
Decision Date: July 6, 2005

This was a reconsideration of a 2002 Appeal Division decision which denied the employer an extension of time to appeal a decision. The employer provided submissions to the Appeal Division panel in which it denied having ever received the WCB decision, yet the panel stated in its decision that the employer did not dispute that it received the decision. The panel breached the rules of natural justice by denying the employer the right to be heard.

Decision: *WCAT-2005-04517* **Reconsideration Panel:** H. Morton
Decision Date: August 29, 2005

The WCAT panel did not refer to a medical report which was directly relevant to the essential issue on appeal. This failure gave rise to the inference that it was overlooked. Although the worker never referred to the report in the oral hearing, it was attached to the notice of appeal. The panel breached the rules of natural justice by denying the worker the right to be heard.

Decision: *WCAT-2005-04725* **Reconsideration Panel:** H. Morton
Decision Date: September 8, 2005

The WCAT panel determined that one of two appeals was withdrawn by the worker's representative at the oral hearing. Although a wage loss issue was specifically withdrawn at the hearing, the appeal contained additional issues which were not specifically withdrawn by the worker's representative. Considering the withdrawal of the wage loss issue as a withdrawal of the entire appeal involved a breach of natural justice. Alternatively, the panel's exercise of discretion regarding the withdrawal of the worker's appeal was patently unreasonable in that no evidentiary basis had been provided for finding that the worker intended to withdraw his appeal on any issue apart from the claim for further wage loss.

Decision: *WCAT-2005-05722* **Reconsideration Panel:** J. Callan, Chair
Decision Date: October 27, 2005

The WCAT panel was not provided with the parties' submissions prior to rendering its decision. The panel breached the rules of natural justice by denying the worker and the employer the right to be heard.

Decision: *WCAT-2005-05935* **Reconsideration Panel:** H. Morton
Decision Date: November 4, 2005

The WCAT panel determined that the worker's appeal was abandoned as a result of his failure to file a part 2 notice of appeal. Although the decision was fair and appropriate given the information available to WCAT at the time it was issued, with the benefit of the explanations provided by the worker on reconsideration, namely that he moved immediately after WCAT sent a reminder letter to him, and that WCAT had sent earlier letters to the worker that implied that his appeal would proceed in the absence of a part 2 notice of appeal, the process leading to the "abandonment" of his appeal was a breach of natural justice.

Decision: *WCAT-2005-06073* **Reconsideration Panel:** H. Morton
Decision Date: November 15, 2005

The WCAT panel determined that the worker was not entitled to a loss of earnings permanent disability award. The panel did not provide the worker with an opportunity to provide submissions as to whether this issue was within the panel's jurisdiction, and, if so, how this issue should be determined. It was not reasonable for the worker to have considered that this issue was before the panel because the Review Division had referred the issue back to the WCB, the worker had requested a review of the WCB's implementation decision stemming from that referral, and because section 4(d) of the *Workers Compensation Act Appeal Regulation* provides that decisions about whether or not to refer a decision back to the WCB under section 96.4(8)(b) of the *Workers Compensation Act* cannot be appealed to WCAT. The panel thus breached the rules of natural justice by denying the worker the right to be heard.

(b) Error of Law with Respect to Jurisdiction

Decision: *WCAT-2005-01984* **Reconsideration Panel:** H. Morton
Decision Date: April 19, 2005

The WCAT panel relied on a report obtained by the worker but denied the worker's request that the expense of the report be reimbursed. In doing so, the panel implicitly decided that section 7(1)(b) of the *Workers Compensation Act Appeal Regulation* limits WCAT's authority to order reimbursement of expenses to those expenses associated with a medical report that was obtained specifically for the purposes of an appeal before WCAT and not previously submitted to the WCB or other appeal body. This decision was jurisdictional as it related to the limits of WCAT's statutory authority and was therefore subject on reconsideration to be considered on a standard of correctness. Applying that standard, the reconsideration panel found that the WCAT panel committed a jurisdictional error as it adopted an overly restrictive interpretation of section 7(1)(b). Both a literal and purposive interpretation of section 7(1)(b) support a broader interpretation. The decision with respect to expenses was severed from the decision on the merits and voided.

(c) Patently Unreasonable Error

Decision: *WCAT-2005-00851* and *WCAT-2005-00853*
Reconsideration Panel: L. Alcuitas-Imperial
Decision Date: February 18, 2005

WCAT Registry staff issued a letter containing a preliminary decision dismissing the employer's appeal and advising the employer of the time limit to provide submissions in respect of the preliminary decision. The employer did not provide submissions and WCAT issued a summary decision affirming the preliminary decision. The employer said it never received the original letter. As there was no evidence that the original letter was sent to the employer or received by the employer, WCAT committed an error of law going to jurisdiction when it issued the summary decision as it made a patently unreasonable finding of fact, namely that the employer had received the letter.

Decision: *WCAT-2005-01290* **Reconsideration Panel:** H. Morton
Decision Date: March 15, 2005

The WCAT panel ignored, overlooked, or failed to apply without explanation, a policy that had obvious application to the case before it. The panel's failure to take into account a relevant policy amounted to a breach of section 250(2) of the *Workers Compensation Act*, which involved a failure to take a statutory requirement into account. Accordingly, the WCAT decision was set aside as patently unreasonable, on the basis set out in section 58(3)(d) of the *Administrative Tribunals Act*.

Decision: *WCAT-2005-05788* **Reconsideration Panel:** J. Steeves
Decision Date: October 28, 2005

The WCAT panel determined that the effective date of the worker's entitlement to an independence and home maintenance allowance was the date of the panel's decision. The panel provided no reasoning nor referred to any evidence to explain the choice of effective date. The finding was patently unreasonable.

13. NOTEWORTHY WCAT DECISIONS

WCAT issued a large number of noteworthy decisions in 2005. This section provides summaries only of those noteworthy WCAT decisions published in the *Workers' Compensation Reporter* in 2005 or that were pending publication at the end of the year. The summaries included here are shorter versions of the more complete noteworthy decision summaries found on the WCAT website.

WCAT Decision No's. 2005-01710, 2005-03622, and *2005-04492* are all noteworthy decisions that have been published, or were pending publication at the end of the year. As summaries for each have been included in the sections of the annual report relating to Referrals to the Chair (Section 251) and Precedent Panel Decisions, they have not been reproduced below.

All WCAT decisions from 2005, including noteworthy decisions and their summaries, are publicly accessible and searchable on the WCAT website[5]. The website also contains a document listing all noteworthy WCAT decisions, organized by subject. The current subject categories are:

1. SUBSTANTIVE ISSUES

1.1. Whether Person a Worker

1.2. Whether Injury Arose out of Employment (section 5)
- 1.2.1. General
- 1.2.2. Injuries Following Motions at Work
- 1.2.3. Unauthorized Activities

1.3. Whether Injury In the Course of Employment

1.4. Whether Occupational Disease Due to Nature of Employment (section 6(1)(b))
- 1.4.1. Activity Related Soft Tissue Disorders (ASTD)
- 1.4.2. Firefighters

[5] WCAT's website is available at: http://www.wcat.bc.ca

1.5. Specific Injuries
- 1.5.1. Mental Stress (section 5.1)
- 1.5.2. Shoulder Dislocation

1.6. Out of Province Injuries (section 8(1))

1.7. Compensation in Fatal Cases (section 17)
- 1.7.1. Calculation of Compensation for Dependants (17(3))
- 1.7.2. Spouses Living Separate and Apart (17(9))

1.8. Temporary Disability Benefits (sections 29 and 30)
- 1.8.1. Amount of Benefits
  - 1.8.1.1. Recurrence of Disability (section 32)
- 1.8.2. Duration of Benefits

1.9. Average Earnings
- 1.9.1. Calculating Average Earnings – General Rule (section 33.1)
  - 1.9.1.1. Long Term - Gross Earnings for Prior 12 Months
- 1.9.2. Calculating Average Earnings - Exceptions to General Rule
  - 1.9.2.1. Exceptional Circumstances (section 33.4)
  - 1.9.2.2. Casual Workers (section 33.5)
- 1.9.3. Whether Payments Included as Average Earnings
  - 1.9.3.1. Overtime
  - 1.9.3.2. Employment Insurance Payments (section 33(3.2))
- 1.9.4. Historical Versions of Act (Pre-Bill 49)
  - 1.9.4.1. Use of Class Averages (#67.21 RSCM I)
- 1.9.5. Transitional Issues

1.10. Vocational Rehabilitation (section 16)

1.11. Health Care Benefits (section 21)
- 1.11.1. General
- 1.11.2. Drugs (#77.00)

1.12. Permanent Disability Awards (section 22 and 23)
- 1.12.1. General
- 1.12.2. Loss of Function Awards (section 23(1))
- 1.12.3. Enhancement and Devaluation
- 1.12.4. Average Earnings
- 1.12.5. Specific Permanent Disabilities

1.13. Chronic Pain (items #39.01 and #39.02)

1.14. Protection of Benefits
- 1.14.1. Interest on Retroactive Changes to Benefits (#50.00)
- 1.14.1.1. Application of New Policy
- 1.14.1.2. Meaning of Blatant Board Error

1.15. Recurrence of Injury

1.16. Who is an Employer

1.17. Assessments
- 1.17.1. Assessable Payroll
- 1.17.2. Employer Classification
- 1.17.3. Change in Ownership
- 1.17.4. Experience Rating

1.18. Relief of Costs

1.19. Occupational Health and Safety
- 1.19.1. Discriminatory Actions

2. WCB PROCEDURAL ISSUES

2.1. Board Jurisdiction
- 2.1.1. Implementing Appellate Decisions

2.2. Creating Policy
- 2.2.1. Scope of Board's Duty to Consult when Creating Policy

2.3. What Constitutes a "Decision"?

2.4. What Board Policies are Binding?
- 2.4.1. Is Policy a Rigid Rule or Guideline?

2.5. Board Changing Board Decisions
- 2.5.1. Reopenings (section 96(2))
- 2.5.2. Reconsiderations (section 96(4))

2.6. Evidence
- 2.6.1. Burden of Proof (sections 250(4) and 99(3))

2.7. Federal Employees

2.8. Discriminatory Actions

2.9. Failure to Provide Information to Board (section 57.1)

2.10. Limitation of Actions (section 10)
2.10.1. Settlement of Legal Action by Worker (section 10(5))

2.11. Transitional Issues

2.12. Review Division Jurisdiction
2.12.1. Assessments
2.12.2. Refusal By Board to Make Decision
2.12.3. Breach of Natural Justice
2.12.4. Refusal to Review
2.12.5. Permanent Disability Awards

2.13. Costs (section 100)

3. WCAT PROCEDURAL ISSUES

3.1. Precedent Panel Decisions

3.2. Lawfulness of Policy Determinations (section 251)

3.3. WCAT Jurisdiction
3.3.1. Authority to Reduce Appellant's Entitlement
3.3.2. Decisions Not Formally Communicated
3.3.3. Medical Conditions not Formally Accepted
3.3.4. Application for Reopening
3.3.5. Permanent Disability Awards
3.3.5.1. Scheduled Awards
3.3.5.2. Average Earnings (Wage Rate)
3.3.5.3. Occupational Noise-Induced Hearing Loss
3.3.6. Vocational Rehabilitation
3.3.7. Constitutional Issues
3.3.8. Refusals by Review Division to Extend Time to Request a Review
3.3.9. Refusal by Board to Make Decision

3.4. Evidence
3.4.1. Burden of Proof
3.4.2. Credibility

3.5. Summary Dismissal of Appeal (section 31 of ATA)
3.5.1. Frivolous, Vexatious, or Trivial

3.6. Stay of Orders Pending Appeal (section 244)

3.7. Matters Sent Back to Board
3.7.1. Matters Referred Back to Board (section 246(3))

3.8. Certifications to Court (sections 10 and 257)

3.9. WCAT Reconsiderations
- 3.9.1. New Diagnosis
- 3.9.2. Breach of Natural Justice
  - 3.9.2.1. General
  - 3.9.2.2. Adequacy of Reasons
- 3.9.3. New Evidence
- 3.9.4. Appeal Division Decisions

3.10. WCAT Extensions of Time
- 3.10.1. Never Received Decision
- 3.10.2. Decision Mailed to Wrong Address
- 3.10.3. Late Mailing of Decision
- 3.10.4. Where Telephone Notice of Intent to Appeal Provided
- 3.10.5. Evidence Appears After Appeal Period Expires
- 3.10.6. Fraud or Misrepresentation At Issue in Underlying Claim
- 3.10.7. Acts or Omissions of Representative
- 3.10.8. Confusion Over Length of Time to Appeal

3.11. Abandoning a WCAT Appeal

3.12. Applications to WCAT to Stay an Appealed Decision (section 244)

3.13. Withdrawing a WCAT Appeal

3.14. Costs and Expenses

3.15. Transitional Appeals

13.1 SUBSTANTIVE ISSUES

(a) Whether a Person is a Worker

Decision: *WCAT-2005-04416-AD* **Panel:** H. Morton
Decision Date: August 23, 2005

Section 11 Determination – Negligent Medical Treatment of a Work Related Injury – Status of the Worker – Status of the Treating Physician – Injury Arising Out of and in the Course of Employment – Effect of Apparently Retroactive Policy contained only in Rehabilitation Services and Claims Manual, Volume II (item #22.00)

In a section 11 determination, a worker who suffers further injury as a result of negligence in the medical treatment of a work related injury is a worker within the meaning of Part 1 of the *Workers Compensation Act*, and any further injury arises out of and in the course of his employment. In coming to this conclusion the panel preferred an interpretation guided by an apparently retroactive policy contained only in *Rehabilitation Services and Claims Manual, Volume II*, even though it was unclear whether the policy was binding on a determination governed by *Rehabilitation Services and Claims Manual, Volume I*. If a physician is registered with the Workers' Compensation Board as an employer, his action or conduct in negligently treating a work related injury arises out of and in the course of employment, regardless of whether the physician himself purchased Personal Optional Protection coverage.

(b) Whether Injury Arose out of Employment

Decision: *WCAT-2005-04824* **Panel:** T. White, S. Adamson, B. Anderson
Decision Date: September 14, 2005

Whether an Injury Following a Motion in the Workplace is an Injury Arising Out of and in the Course of Employment – Item #15.20 of Rehabilitation Services and Claims Manual, Volume II

A three-member, non-precedent panel was appointed to decide this case because of the inconsistency of the approaches to these types of determinations. This decision sets out the questions to be answered in determining whether, under item #15.20 of the *Rehabilitation Services and Claims Manual, Volume II,* a motion in the workplace caused an injury arising out of and in the course of employment: first, is there a deteriorating condition which brings the injury within item #15.10, and renders it noncompensable? Second, was there an "accident," triggering the section 5(4) presumption that the accident occurred in the course of employment, or arose out of the employment? If neither applies, three broad questions must be answered in determining whether an injury following a motion in the workplace arises out of and in

the course of employment: (1) Did the motion alleged to have caused personal injury take place in the course of employment? (2) Did the motion have enough work connection? (3) Did the motion have causative significance in producing a personal injury?

(c) Permanent Disability Awards

Decision: *WCAT-2005-02770* **Panel**: R. Lane
Decision Date: May 30, 2005

Wage Rate for Permanent Disability Award Purposes – Long Term Wage Rate – Reviewable Decisions – Refusal to Review – Section 23(1) of the Workers Compensation Act (Act) – Sections 33.1 to 33.9 of the Act – Policy Items #39.00 and #66.00 of the Rehabilitation Services and Claims Manual, Volume II

Under the current provisions of the *Workers Compensation Act* (Act) and Workers' Compensation Board (WCB) policy, where the WCB has already determined a worker's long term wage rate, the worker's permanent disability award is calculated using that rate. Unlike the former Act and WCB policy, the WCB no longer has the authority to make a new wage rate decision when calculating a worker's permanent disability award. As the wage rate decision does not form part of the permanent disability award decision, the Review Division does not have the jurisdiction to review a permanent disability award decision where the only issue on review is the wage rate used by the WCB.

(d) Transitional Issues

Decision: *WCAT-2005-01826* **Panel**: E. Murray
Decision Date: April 13, 2005

Meaning of "Disability First Occurs" in section 35.1(4) of the Workers Compensation Act – Effective Date and Termination Dates of Permanent Partial Disability Award – Transitional Provisions for Permanent Disability Awards - Workers Compensation Amendment Act (No. 1) – Policy Item #1.03 of the Rehabilitation Services Claims Manual, Volumes I and II (RSCM I and II) – Item 41.00 RSCM I – Item #42.10 RSCM II

This decision is noteworthy as an example of an analysis of when permanent disability "first occurs" under section 35.1(4) of the *Workers Compensation Act* (Act). The WCAT panel found that the worker's injuries were first permanently disabling after the transition date of June 30, 2002 because the medical evidence showed that his 1974 injury healed well and did not cause any further problems until 2003. The WCAT panel also found that the worker's argument that an earlier permanent functional impairment evaluation would have revealed impairment was speculative and was not sufficient to alter the Workers' Compensation Board finding that the permanent disability arose in 2003.

13.2 WCAT PROCEDURAL ISSUES

(a) WCAT Jurisdiction

(i) Vocational Rehabilitation

Decision: *WCAT-2004-06588* **Panel:** H. Morton
Decision Date: December 13, 2004

WCAT's Jurisdiction over Workers' Compensation Board (WCB) Decisions on Vocational Rehabilitation – Role of the Vocational Rehabilitation Consultant in Adjudication of Claims – Relationship Between the Provision of Vocational Rehabilitation Assistance and WCAT's Determination of Loss of Earnings Permanent Disability Awards – WCAT's Authority to Refuse to Apply WCB Policy Under Section 251(1) of the Workers Compensation Act (Act) – Standard of Review on WCAT Reconsiderations Where Error of Law Going to Jurisdiction is Alleged – Sections 16, 23(3) and 239(2)(b) of the Act

WCAT's lack of jurisdiction over appeals from vocational rehabilitation decisions under section 16 of the *Workers Compensation Act* (Act) does not prevent WCAT from considering vocational rehabilitation evidence for the purpose of adjudicating other aspects of a worker's claim, such as whether a worker is entitled to a loss of earnings permanent disability award under section 23(3) of the Act. Therefore, section 16 does not interfere with a worker's right to have WCAT consider all evidence that is relevant to an appeal.

(ii) Refusal by WCB to Make a Decision

Decision: *WCAT-2005-01772*
Panel: J. Callan (Presiding Member), S. Adamson, M. Gelfand
Decision Date: April 11, 2005

Refusal by Workers' Compensation Board (WCB) to Make a Decision on Further Relief of Costs – Section 39(1)(e) of the Workers Compensation Act (Act) – Jurisdiction of Review Division and WCAT over Refusal to Make Decision – Meaning of "Should" in Section 246(3) of the Act – Authority of WCAT to compel WCB to Make Decisions Generally and Specifically under Section 246(3)

The Review Division does not have jurisdiction to review a decision by the Workers' Compensation Board (WCB) to refuse to make a decision in relation to compensation and assessment matters. WCAT does not have the general authority to order the WCB to issue decisions. WCAT does have the limited authority provided by section 246(3) of the *Workers Compensation Act* to require the WCB to make decisions in some circumstances, including to make a decision in respect of further relief of costs.

(iii) Hearing Loss

Decision: *WCAT-2005-01943* **Panel**: J. Sheppard
Decision Date: April 18, 2005

WCAT Jurisdiction over Hearing Loss Permanent Disability Awards – Rating Schedules – Permanent Disability Evaluation Schedule – Section 7(1) of the Workers Compensation Act (Act) – Section 23(1) and (2) of the Act – Section 239(2)(c) of the Act

Schedule D of the *Workers Compensation Act* (Act), entitled "Non-Traumatic Hearing Loss", is not a "rating schedule" compiled under section 23(2) of the Act. Therefore, section 239(2)(c) of the Act does not limit WCAT's jurisdiction to hear appeals from decisions relating to occupational noise-induced hearing loss permanent disability awards where Schedule D of the Act is used to determine the worker's award.

(iv) Scheduled Awards

Decision: *WCAT-2005-02034* **Panel**: M. Mousseau
Decision Date: April 22, 2005

WCAT's Jurisdiction over Decisions Based on Scheduled Awards with No Range or Range Less than 5% – Permanent Disability Awards – Section 239(2)(c) of the Workers Compensation Act (Act) – Section 23(1), 23(2), and 23(3) of the Act – Additional Factors

Pursuant to section 239(2)(c) of the *Workers Compensation Act* (Act), WCAT does not have the jurisdiction to hear an appeal from a review officer's decision respecting the application of the permanent disability evaluation schedule (PDES) under section 23(2) of the Act where the scheduled percentage has no range or has a range that does not exceed 5%.

However, the scheduled percentage may be only one of several elements used in order to arrive at an "estimate of impairment of earning capacity" as required under section 23(1) of the Act. Thus, WCAT has jurisdiction over other aspects of a permanent disability award decision under section 23(1), including chronic pain, whether the worker is entitled to a loss of earnings permanent disability award, and other variables which have not been included in the scheduled percentage.

(v) Refusals by Review Division to Extend Time to Request Review

Decision: *WCAT-2005-03420* **Panel**: S. Polsky Shamash
Decision Date: June 29, 2005

WCAT's Jurisdiction over Review Division Extension of Time Decisions – Section 2(1) of the Transitional Review and Appeal Regulation – Section 4(b) of the Workers Compensation Act Appeal Regulation – Sections 96.2(3) and 96.2(4) of the Workers Compensation Act – Section 31(1)(a) of the Administrative Tribunals Act

By virtue of section 239(2)(a) of the *Workers Compensation Act* (Act) and section 4(b) of the *Workers Compensation Act Appeal Regulation*, WCAT does not have the jurisdiction to hear appeals from decisions by the Review Division refusing to extend the 90-day time limit for workers to request a review of a Workers' Compensation Board decision from the Review Division. The statutory scheme is unequivocal in this respect.

(vi) Awarding Interest

Decision: *WCAT-2005-04320* **Panel:** M. Mousseau
Decision Date: August 17, 2005

Interest on Retroactive Vocational Rehabilitation Assistance – Reimbursement of Costs and Legal Expenses for Proceedings Necessitated by Allegedly Inappropriate Action by the Workers' Compensation Board – Section 239 of the Workers Compensation Act – Section 6(c) of the Workers Compensation Act Appeal Regulation

WCAT's jurisdiction is established by statute, in this case, section 239 of the *Workers Compensation Act* (Act). WCAT has no jurisdiction to address the awarding of interest in relation to a matter over which WCAT has no jurisdiction, such as vocational rehabilitation assistance. In any event, there is no statutory entitlement to interest on retroactive benefits except in the limited situations expressly addressed in the Act or Workers' Compensation Board policy. Section 6(c) of the *Workers Compensation Act Appeal Regulation*, allowing WCAT to award costs in exceptional circumstances, must be read within the context of the clear limitations on the authority of WCAT contained in the Act. When WCAT does not have jurisdiction over a matter, such as vocational rehabilitation assistance, WCAT cannot hear an appeal on the issue of legal fees alone.

(b) WCAT Reconsiderations

Decision: *WCAT-2004-05728* **Panel:** H. Morton
Decision Date: October 29, 2004

Failure of Panel to Consider in its Decision an Argument made by Party – WCAT Reconsideration – Error of Law Going to Jurisdiction – Natural Justice – #15.20 to #15.24 of WCAT's Manual of Rules, Practices and Procedures

A failure by a WCAT panel to consider in its decision an argument made by a party raises two related natural justice issues: the first, a party's right to be heard, and second, the adequacy of the reasons provided by the panel for its decision. However, it is not a requirement of natural justice that every argument is canvassed and every ruling and conclusion of the decision-maker be set out in the decision. The failure to acknowledge and address every point raised will not constitute a breach of the rules of natural justice although it is preferable for a panel to address the argument raised, even if only briefly for the purpose of explaining why the panel does not consider the argument relevant or persuasive.

(c) Extensions of Time

Decision: *WCAT-2005-04706* **Panel:** M. Gelfand
Decision Date: September 7, 2005

Extension of Time to Appeal – Appeal Filed Within 30 Days of Actual Receipt of the Decision Being Appealed – Section 243(3) of the Workers Compensation Act

Where a decision is sent out late and the worker appeals within 30 days of her receipt of the decision, an extension of time may be granted. A worker should not be deprived of the full 30-day statutory appeal period in which to consider her options or seek advice before initiating an appeal. The requirements for the exercise of discretion in section 243(3) of the Workers Compensation Act are met: the late mailing constitutes special circumstances which precluded the initiation of the appeal within the statutory time period.

14. 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. Under certain circumstances, the court may extend the time for applying for judicial review.

14.1 JUDICIAL REVIEW APPLICATIONS

The number of judicial review applications significantly increased in 2005. A total of 25 judicial review applications were filed and served on WCAT in 2005.

Section 57(1) of the *Administrative Tribunals Act* came into force in relation to WCAT decisions on December 4, 2004. A large proportion of the petitioners who filed and served judicial review applications on WCAT in 2005 have notified WCAT that the applications were filed in order to preserve their right to judicial review.

14.2 JUDICIAL REVIEW DECISIONS

Two judicial review applications were decided in 2005[6].

(a) *Wu v. British Columbia (Workers' Compensation Board and Workers' Compensation Appeal Tribunal)*, 2005 BCSC 1449

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

The worker brought a judicial review application of a WCAT decision upholding decisions of the Workers' Compensation Board (WCB) and the Workers' Compensation Review Board denying the worker vocational rehabilitation benefits beyond a certain date. WCAT found that the worker's job search record and the evidence of his job search activities failed to demonstrate a proactive, focused job search, as required by WCB policy. The court found that the appropriate standard of review was patent unreasonableness and further found that there was a rational basis for the conclusion reached by WCAT in that it had "properly characterized the issue, properly reviewed Mr. Wu's evidence, referred to policy and applied it". The application was dismissed.

[6] The full text of these decisions can be found on the Courts of British Columbia website at: http://www.courts.gov.bc.ca/.

(b) *Basura v. British Columbia (Workers' Compensation Board and Workers' Compensation Appeal Tribunal)*, 2005 BCSC 407

Decision Under Review: *WCAT-2003-03018*

This was an application for judicial review of a WCAT decision which found that the worker was not entitled to a permanent disability award as the worker's condition had resolved. The court found that the issue before WCAT was one of mixed fact and law. As the court determined that questions of mixed fact and law are not discretionary decisions, the court found that section 58(3) of the *Administrative Tribunals Act* did not apply because section 58(3) defines when a discretionary decision is patently unreasonable. The court thus applied the common law test to determine the applicable standard of review and determined that the applicable standard was patent unreasonableness, which the court summarized in this way: "if the decision is "openly, evidently, clearly" unreasonable, if it is without a rational basis, then it is patently unreasonable". The court found that there was a rational basis for the WCAT decision, and, as such, the decision could not be said to be patently unreasonable. The application was dismissed.

15. OTHER COURT DECISIONS

The following court decisions are of significance to WCAT and the workers' compensation system generally[7].

15.1 BRITISH COLUMBIA SUPREME COURT

(a) *Western Stevedoring Co. Ltd. v. WCB*, 2005 BCSC 1650

The employer challenged the Workers' Compensation Board's (WCB's) policies and practices with respect to a reserve set up under section 39(1)(e) of the *Workers Compensation Act* (Act). The employer alleged that the WCB's policies and practices prohibiting the assignment of the costs of the first ten weeks of any claim to the section 39(1)(e) reserve are patently unreasonable, given the apparent purpose of the section. The employer sought to have a penalty assessment the WCB imposed upon it quashed. The employer also sought declaratory relief as to how the WCB should make determinations under sections 39(1)(e).

The WCB argued that the employer had failed to exhaust its alternative remedies as it had not appealed the WCB's decision to WCAT. The WCB argued that the policy of its board of directors could be challenged at WCAT through the policy referral process set out in section 251 of the Act. The court rejected this argument, finding that the policy

[7] The full text of the decisions can be found on the Courts of British Columbia website at: http://www.courts.gov.bc.ca/.

referral process was not an adequate alternate remedy where the matter in issue is the legality of a WCB policy and the WCB makes the final decision on that issue. Apart from the issue of whether the policies and practices in question were patently unreasonable, the court found that the other matters raised by the employer in the application were amenable to internal review by the WCB and WCAT, such as the employer's argument that the WCB prematurely made certain decisions in respect of reserve allocations. By failing to avail itself of the internal reviews and appeals, the employer was barred from raising those matters on judicial review.

With respect to WCB policy, the court concluded that a policy of excluding the costs of the first ten weeks of longer claims from allocation to the section 39(1)(e) reserve was not patently unreasonable, given the multitude of considerations that the board of directors of the WCB is entitled to take into account in setting policy. The employer's application was dismissed. The court stated that the evidence relating to this issue in this case was minimal and that a different case might result in a different assessment by the court.

(b) *Hommell v. Cooke*, 2005 BCSC 658

This decision arose out of an action commenced by the plaintiff for injuries sustained in a motor vehicle accident. The defendant alleged that the plaintiff and the defendant were both workers at the time of the accident and that the plaintiff's action was thus barred by operation of section 10 of the *Workers Compensation Act* (Act). After the plaintiff received from the defendant a demand for documents and a request for an examination for discovery, the plaintiff requested that WCAT determine whether both parties were workers, pursuant to section 257(1) of the Act. The defendant continued to request discovery from the plaintiff, in part because he wished to use the information obtained in discovery to make his submissions to WCAT on the matter of the section 257 determination. The plaintiff resisted and the defendant brought an application in the action, seeking to force the plaintiff to comply.

A master of the Supreme Court of British Columbia adjourned the defendant's application until WCAT made its determination. The master ordered an adjournment rather than a stay because she was not certain whether she had jurisdiction to stay an application. The master also found that it would be an improper imposition of the Rules of Court on the exclusive jurisdiction of WCAT to make an order permitting discovery of the plaintiff for the purposes of using that evidence in the WCAT proceeding.

The defendant appealed the master's decision to a judge of the Supreme Court. The judge dismissed the defendant's appeal and upheld the adjournment, finding that the action was stayed pending the release of WCAT's decision. The court rejected the defendant's argument that the jurisdiction to determine whether an action is statute barred has shifted from WCAT to the court as a result of legislative changes made since the seminal Supreme Court of Canada decision in *Dominion Canners Limited v. Constanza*, [1923] S.C.R. 46, and concluded that WCAT has the jurisdiction to determine whether an action is statute-barred. It is for the court, however, to determine, in light of WCAT's determination, whether to stay the action. The court also determined

that while WCAT is entitled to review any information arising from pre-trial discoveries, the defendant was not entitled to seek an order that WCAT consider information obtained in pre-trial disclosure.

15.2 BRITISH COLUMBIA COURT OF APPEAL

(a) *Jones v. British Columbia (WCB)*, 2005 BCCA 458

The worker originally appealed a decision of the Supreme Court of British Columbia dismissing his application for judicial review of an Appeal Division decision denying his claim for a loss of earnings pension. That appeal was allowed and the Court of Appeal of British Columbia remitted the matter to the Supreme Court for rehearing. The application was reheard and dismissed for a second time. In relation to the second dismissal, the Supreme Court held that the Medical Review Panel (MRP) did not exceed its jurisdiction. The decision was neither incorrect nor patently unreasonable. Provided there was a medical basis for its findings, the MRP was permitted to elaborate on its answers and comment on non-medical issues. The worker had submitted that the Appeal Division wrongly considered itself bound by the MRP certificate when the certificate was outside the MRP's jurisdiction. He further submitted that, in any event, the certificate was patently unreasonable. The worker appealed the second Supreme Court decision dismissing his application.

On appeal, a majority of the Court of Appeal allowed the appeal in two separate sets of reasons. One majority judge found that as the worker was seeking an order in the nature of *mandamus* (an order of *mandamus* compels the performance of a statutory duty), it was not necessary to determine the standard of review. The other majority judge applied the functional and pragmatic approach and determined that the standard of review of the MRP certificate was reasonableness. Both majority judges found that the certificate was deficient in that the MRP had moved directly to the issue of pre-injury employment and employability and failed to set out the workers' physical capabilities for employment as the MRP had been directed to do by the Workers' Compensation Board (WCB). The reasons of the Supreme Court did not address the essential deficiency of the certificate. Given the consequences of the deficiency to the worker, and the lack of availability of other redress, the Court of Appeal exercised its discretion in favour of the worker and allowed the appeal. The MRP certificate was set aside to permit the matter to be dealt with, again, through the machinery established by the *Workers Compensation Act* (Act).

The WCB has sought leave to appeal this decision to the Supreme Court of Canada. The WCB filed its application with the court on October 24, 2005. As of the time of writing, the court had not decided the leave application.

(b) *Speckling v. British Columbia (WCB)*, 2005 BCCA 80

This was an appeal by the worker from a decision of the Supreme Court of British Columbia dismissing his application for judicial review of two decisions of the Appeal Division. The Supreme Court applied the standard of patent unreasonableness to the decisions and found that the Appeal Division had the jurisdiction to make the decisions it did and had ample evidence to support its decisions. On appeal, the worker claimed that the Supreme Court erred in not finding the decisions patently unreasonable on the basis that the Appeal Division did not consider all the evidence. He also claimed that the Appeal Division erred in improperly shifting the burden of proof with respect to credibility.

The appeal was dismissed. The correct standard of review of the two Appeal Division decisions was patent unreasonableness. These decisions were protected by a strong privative clause. The Workers' Compensation Board (WCB) had expertise in the matter. The purposes of the Act were best served by the WCB and not the courts. The question of whether the worker was injured while in the course of employment was a question of fact. The question of whether the Appeal Division decision was a medical decision was a question of mixed fact and law. These factors led to the highest level of deference. It was not for the court to second guess the conclusions drawn from evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. There was no evidence that the Appeal Division improperly or wrongly shifted the burden of proof. The appeal was dismissed.