

**Workers'
Compensation
Appeal
Tribunal**

**2006
Annual Report**

For the year January 1
to December 31, 2006



Workers' Compensation Appeal Tribunal
150 - 4600 Jacombs Road
Richmond, British Columbia V6V 3B1
Telephone: (604) 664-7800
Toll-Free: 1-800-663-2782
Fax: (604) 664-7898



WCAT

**Workers' Compensation
Appeal Tribunal**

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March 19, 2007

The Honourable Olga Ilich
Minister of Labour and Citizens' Services
Room 342
Parliament Buildings
P.O. Box 9052, Stn Prov Gov't
Victoria, BC V8W 9E2

Dear Minister:

I am pleased to forward the 2006 Annual Report of the Workers' Compensation Appeal Tribunal for the year ended December 31, 2006. This report has been prepared for your review pursuant to section 234(8) of the *Workers Compensation Act*.

Yours truly,

A handwritten signature in black ink that reads "Jill Callan".

Jill Callan
Chair

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Glossary

Act	<i>Workers Compensation Act</i> , R.S.B.C. 1996, c. 492
<i>Administrative Tribunals Act</i>	<i>Administrative Tribunals Act</i> , S.B.C. 2004, c. 45 (Bill 56)
Appeal Division	Appeal Division of the Workers' Compensation Board
BCCAT	British Columbia Council of Administrative Tribunals
MRP	Medical Review Panel
MRPP	<i>Manual of Rules of Practice and Procedure</i>
Review Board	Workers' Compensation Review Board
Review Division	Review Division of the Workers' Compensation Board
RSCM I	<i>Rehabilitation Services and Claims Manual, Volume I</i>
RSCM II	<i>Rehabilitation Services and Claims Manual, Volume II</i>
WCAT	Workers' Compensation Appeal Tribunal
WCB	Workers' Compensation Board, which operates under the name WorkSafeBC
<i>Workers Compensation Amendment Act (No. 1)</i>	<i>Workers Compensation Amendment Act, 2002</i> , S.B.C. 2002, c. 56 (Bill 49)
<i>Workers Compensation Amendment Act (No. 2)</i>	<i>Workers Compensation Amendment Act (No. 2)</i> , 2002, S.B.C. 2002, c. 66 (Bill 63)

1. Chair's Message

2006 was the third full calendar year of operations for the Workers' Compensation Appeal Tribunal (WCAT), which was established effective March 3, 2003. WCAT continued to be a high volume tribunal and received a total of 5,835 new appeals and applications during the year. Our vice chairs completed merit decisions on 5,027 appeals and applications. A further 1,812 were withdrawn or disposed of through summary decisions. We ended the year with an active inventory of 3,956 appeals, which will be decided under the 180-day statutory time frame prescribed by the *Workers Compensation Act (Act)*.

When the Workers' Compensation Review Board (Review Board) and the Appeal Division of the Workers' Compensation Board, operating as WorkSafeBC (WCB) ceased operations on February 28, 2003, they transferred over 22,400 appeals to WCAT. WCAT committed to complete those appeals within the first three years of its operations. I am very pleased to report that the backlog inherited from the Review Board and the Appeal Division was eliminated in the spring of 2006.

The elimination of the appeals backlog was a tremendous achievement, which required the commitment of all vice chairs and staff to the goal of ensuring that the parties to the backlog appeals received their decisions as quickly as possible. I wish to express my appreciation to everyone at WCAT for their dedication to providing fair and timely decisions to the workers and employers of British Columbia. I would also like to thank the parties' representatives, whose cooperation was essential to the timely elimination of the backlog.

In 2006, WCAT continued to adjudicate appeals under the new statutory provisions and policies that flowed from the 2002 and 2003 amendments to the Act. This report contains summaries of a variety of noteworthy decisions that were released during the year.

In 2007, WCAT will continue to develop its body of decisions, especially those related to the new legislation. We will also endeavour to enhance the accessibility of the appeal system through amending our standard letters and forms, redesigning our website, and reviewing and amending our *Manual of Rules of Practice and Procedure*.



Jill Callan, Chair

2. WCAT's Role Within the Workers' Compensation System

WCAT is an independent appeal tribunal external to the Workers' Compensation Board, operating as WorkSafeBC (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 and complaints regarding discriminatory actions. It also receives 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 resulted from 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 which 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 2006

There were no amendments to either the Act or the *Administrative Tribunals Act* affecting WCAT in 2006.

(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 or her delegate 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 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 or 2006.

(g) Public Access

Decisions are publicly accessible on WCAT's website, in a manner which protects the privacy of the parties (see 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. In 2003 WCAT established the goal of eliminating the appeals backlog transferred from the Review Board and the Appeal Division within a three-year period. WCAT achieved this goal in the spring of 2006.

5. Costs of Operation for 2006 Calendar Year

Category	
Salaries	\$ 9,422,696
Employee Benefits and Supplementary Salary Costs	\$ 2,252,538
Per Diem - Boards and Commissions	\$ 1,051,566
Travel	\$ 134,248
Centralized Management Support Services	\$ 279,762
Professional Services	\$ 226,556
Information Technology, Operations, and Amortization	\$ 1,829,238
Office and Business Expenses	\$ 459,264
Building Occupancy and Amortization	\$ 1,108,091
Total Expenditures	\$ 16,763,959

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, 2006

Name	Position	End Of Term
Jill Callan	Chair	March 2, 2009 (OIC#72/06)
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
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 Marten	Team Leader	February 28, 2010
Susan Polsky Shamash	Sr. Vice Chair & Tribunal Counsel	February 28, 2010
Douglas Strongitharm	Vice Chair & Deputy Registrar	March 31, 2008
David Van Blarcom	Team Leader	February 28, 2010
Kathryn P. Wellington	Team Leader	February 28, 2010

Vice Chairs as of December 31, 2006

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, 2009
Hélène Beauchesne	March 31, 2008
Sarwan Boal	February 28, 2009
Dana G. Brinley	February 28, 2010
Michael Carleton	February 28, 2010
Baljinder Chahal	August 31, 2009
Lesley A. Christensen	February 28, 2010
Melissa Clarke	September 5, 2007
David A. Cox	August 31, 2009

Vice Chairs as of December 31, 2006

Name	End of Term
Guy W. Downie	February 28, 2008
Daphne A. Dukelow	February 28, 2010
William J. Duncan	February 28, 2010
Andrew J. M. Elliot	August 31, 2009
Margaret C. Hamer	August 31, 2009
S. Marlene Hill	February 28, 2007
Lisa Hirose-Cameron	September 5, 2007
Warren Hoole	September 5, 2007
Nora Jackson	February 28, 2010
Cynthia J. Katramadakis	March 31, 2010
Nancy Keithly	March 31, 2007
Joanne Kembel	February 28, 2009
Brian King	August 31, 2009
Rob Kyle	February 28, 2009
Randy Lane	February 28, 2010
Janice A. Leroy	February 28, 2008
Iain M. Macdonald	February 28, 2010
Julie C. Mantini	February 29, 2008
Heather McDonald	February 28, 2010
Ralph McMillan	March 31, 2007
Herb Morton	February 28, 2010
Marguerite Mousseau	February 28, 2010
Lorne Newton	February 28, 2010
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, 2009
Dale Reid	February 28, 2010
Deirdre Rice	February 28, 2008
Guy Riecken	February 28, 2011
James Sheppard	February 28, 2008
Shelina Shivji	March 31, 2008
Debbie Sigurdson	February 28, 2008
Earl A. Simm	February 28, 2008
Timothy B. Skagen	March 31, 2008
Gail Starr	February 29, 2008
John Steeves	December 31, 2006

Vice Chairs as of December 31, 2006	
Name	End of Term
Anthony F. Stevens	February 28, 2010
Don Sturrock	February 28, 2010
Eric S. Sykes	August 31, 2007
Andrew J. Waldichuk	February 28, 2009
Teresa White	December 31, 2009
Lynn M. Wilfert	February 28, 2010
Lois Williams	February 28, 2010
Judith Williamson	March 31, 2008
Sherryl Yeager	February 28, 2010

Vice Chair Departures in 2006		
Name	Effective Date	Original Appointment Date
Wallace I. Auerbach	December 31, 2006	March 3, 2003
Frances G. Bickerstaff	August 31, 2006	March 3, 2003
Georgeann Glover	February 28, 2006	March 1, 2004
James Howell	March 31, 2006	April 1, 2003
Inderjeet Hundal	March 31, 2006	March 3, 2003
Duncan H. MacArthur	March 31, 2006	March 3, 2003
Renee Miller	December 20, 2006	March 1, 2004
Elaine Murray	February 17, 2006	March 1, 2004
Debbie Nider	February 28, 2006	March 1, 2004
John Steeves	December 31, 2006	January 1, 2005
David Towill	February 28, 2006	March 1, 2004
Deborah Vivian	March 31, 2006	April 1, 2003
Suzanne K. Wiltshire	March 31, 2006	March 3, 2003
Erik W. Wood	March 31, 2006	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 2006, the WCAT education group organized 20 educational and training sessions. Members of WCAT have attended these sessions both as participants and as educators/facilitators.

The content of the educational and training sessions covered the full range of WCAT operations. 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 2006, 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 2006:

1. January 12, 2006 Occupational Noise Induced Hearing Loss
2. February 2, 2006 WCAT's CASE Management System
3. March 9, 2006 Medical Causation
4. April 7, 2006 Continuing Legal Education Society:
Workers' Compensation – 2006 Update
5. April 20, 2006 Chronic Pain: A Case Study
6. May 4, 2006 Occupational Asthma
Reconsiderations and Judicial Reviews
7. May 17/24, 2006 Post-Decision Correspondence
8. May 18, 2006 Taking Jurisdiction Over Chronic Pain
9. June 1, 2006 Interorganizational Training: Changing Demographics;
Literacy – the Invisible and Silent Barrier
10. June 7/19, 2006 Findings of Fact
11. June 8, 2006 Spine Conditions
12. July 6, 2006 Compensable Consequences
13. October 5, 2006 Spine Conditions; Osteoarthritis
14. October 11/23 &
November 7/23, 2006 Section 5(4) – Definition of "Accident" and the
Rebuttable Presumption
15. October 12, 2006 WCAT Policy and Practice Issues
16. November 2, 2006 Activity-Related Soft Tissue Disorders
17. November 9, 2006 Computer Tips and Tricks
18. November 22, 2006 Interorganizational Training: Defining Workplace Status
19. December 7, 2006 Shoulder Conditions
20. December 14, 2006 Rules, Policies, and Guidelines

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 2006. 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 Backlog Appeals) shows WCAT’s quarterly progress in reducing the inventory of backlog appeals, which was eliminated in the spring of 2006.

The second chart (Number of Active Appeals) shows all appeals in inventory in 2006.

WCAT’s total active inventory at year end was 3,956 appeals compared to 4,907 at the end of 2005. This represented a 19% reduction in the total appeals inventory during 2006.

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

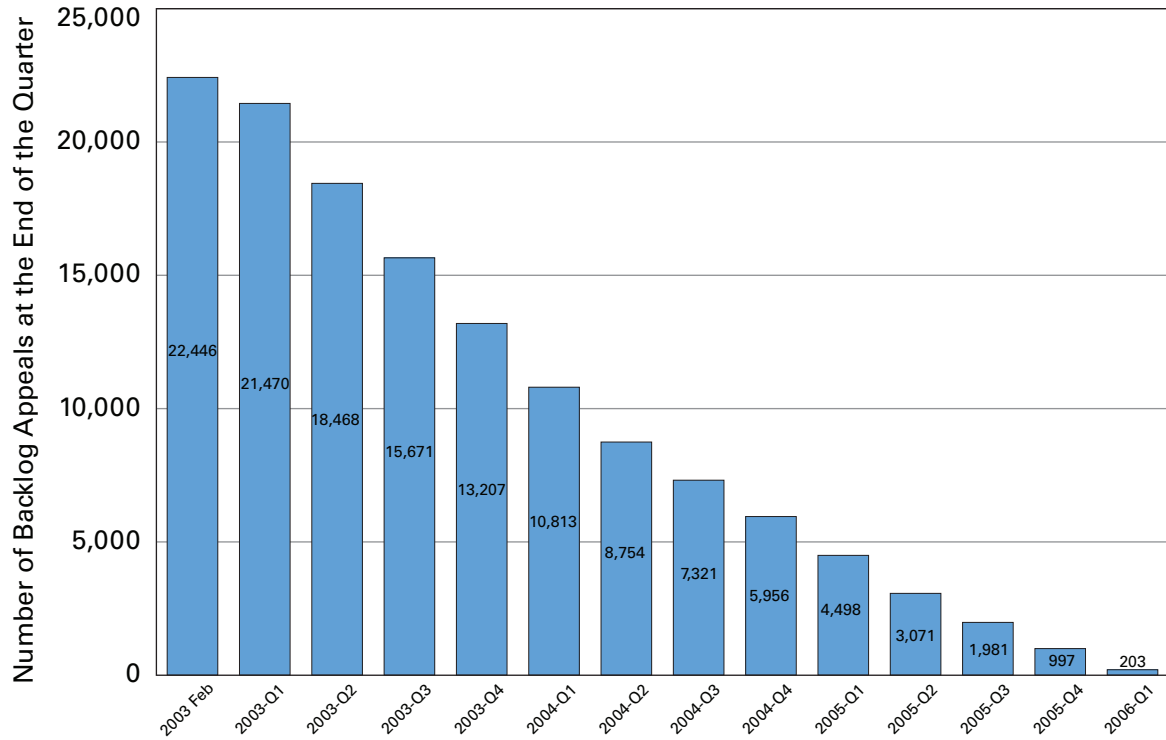
In 2006, WCAT varied the WCB decision in 44% of backlog appeals and confirmed the decision in 56% of backlog appeals. In adjudicating new appeals, WCAT varied 36% of the WCB decisions and confirmed 64%.

The second and third 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 details for these summary charts and other key statistical information.

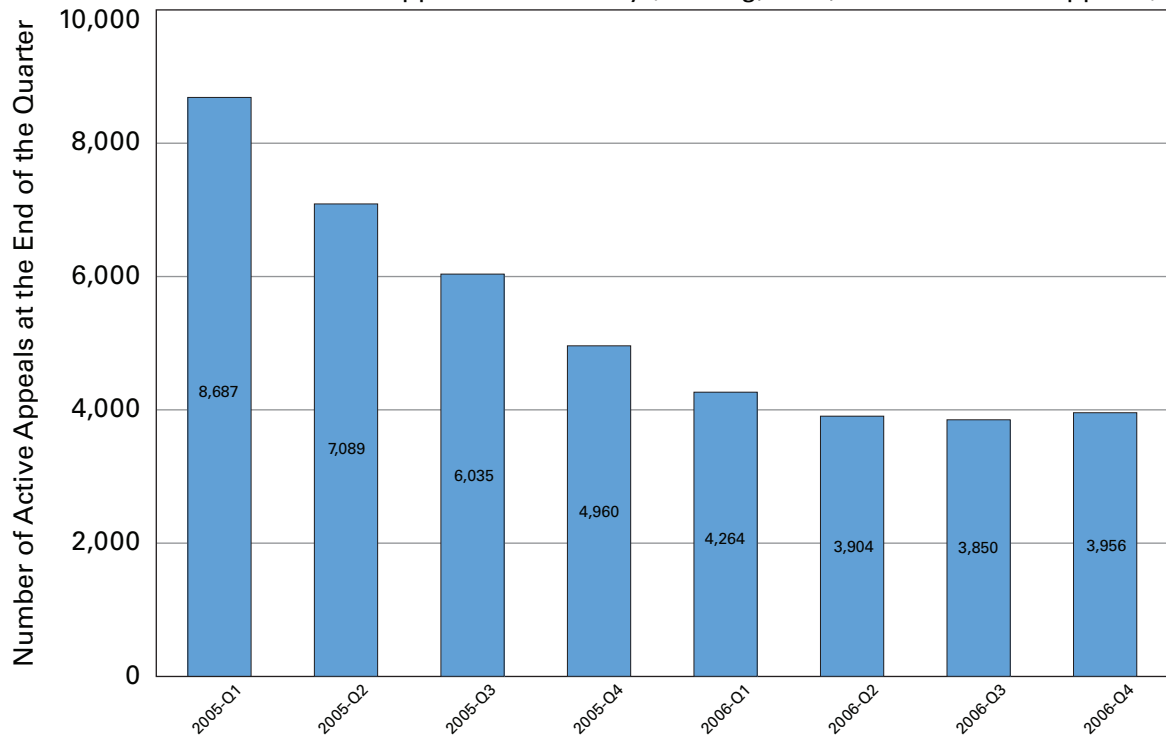
Workers' Compensation Appeal Tribunal

Number of Backlog Appeals in Inventory at each Quarter since Inception

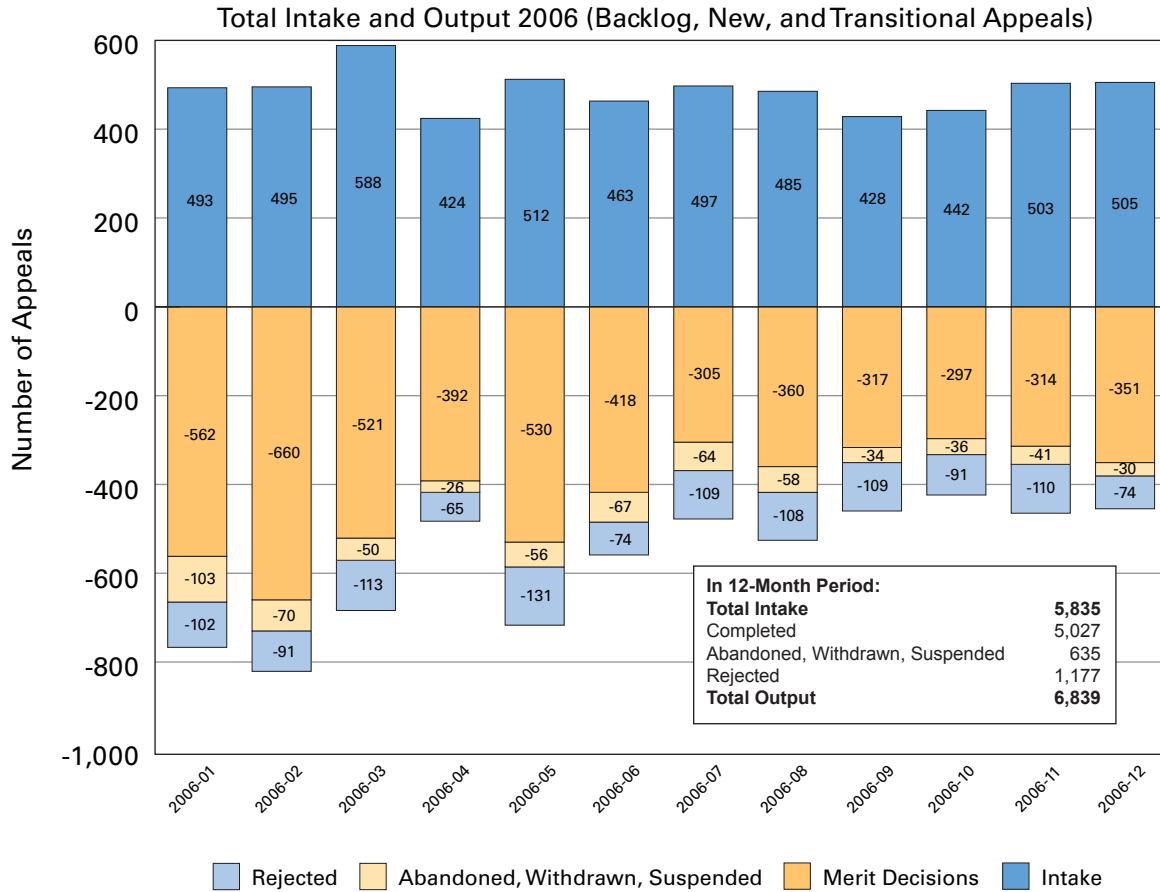


Workers' Compensation Appeal Tribunal

Number of Active Appeals in Inventory (Backlog, New, and Transitional Appeals)



Workers' Compensation Appeal Tribunal



9.2 Backlog Appeals

(a) Reactivated Backlog Appeals

WCAT reactivated 15 eligible appeals in 2006 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 completed 879 merit decisions on backlog appeals in 2006. The 879 decided backlog appeals were comprised almost entirely of compensation appeals (830 or 94%) and relief of costs (47). There was also one assessment appeal and one prevention appeal.

(c) Outcomes of Backlog Decisions

WCAT made 879 decisions on Review Board and Appeal Division backlog appeals. There were 798 merit decisions made on Review Board backlog appeals from decisions of WCB officers on compensation matters. WCAT varied the WCB’s decisions in 44% of these cases and confirmed 56%. “Vary” means that WCAT varied the decision of the previous decision-maker in whole or in part. “Confirm” means that WCAT agreed with the previous decision-maker.

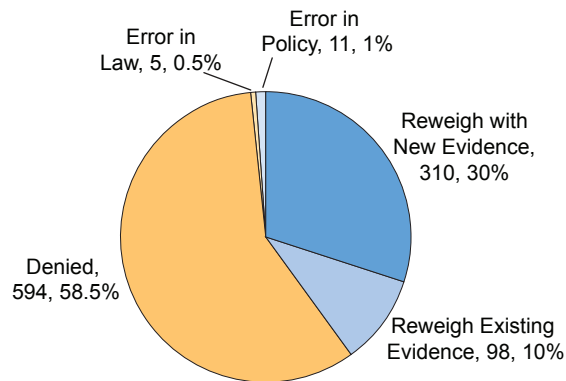
There were 81 merit decisions made on Appeal Division backlog applications and appeals. There was also one decision regarding a certificate to the court. The types and outcomes of the appeals were as follows:

Appeal Type	Number of Decisions	Outcome	
		Varied	Confirmed
Relief of Costs	47	47%	53%
Compensation	32	31%	69%
Assessments	1	100%	0%
Prevention	1	100%	0%

(d) Reasons for Issue Outcomes

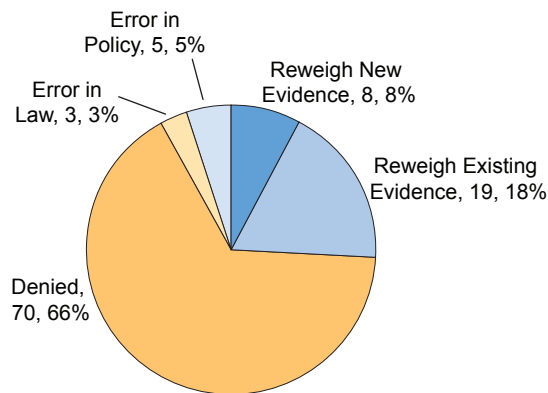
There were 1,018 disputed issues decided in the appeal outcomes for the Review Board backlog. The following chart shows the percentage of the issues that were denied and, if the issues were allowed or allowed in part, the reasons for allowing the issues.

Issue Reasons – Review Board



There were 105 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 93 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. In 61 of these decisions, WCAT dismissed the appeal or confirmed that the appellant had withdrawn it.

The remaining 32 summary decisions involved 16 appeals that were initiated in error or did not arise from decisions that were appealable, and 16 appeals related to other issues.

9.3 New and Transitional Applications and Appeals

New applications and appeals are comprised of:

- appeals to WCAT from decisions made by review officers in the Review Division and WCB officers;
- applications for certificates for court actions; and
- applications for reconsideration of WCAT and Appeal Division 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 WCAT and the Appeal Division, and applications for certificates for court actions.

In addition, WCAT received transitional appeals in 2006, which were initiated under the transitional provisions set out in Part 2 of the *Workers Compensation Amendment Act (No. 2)*.

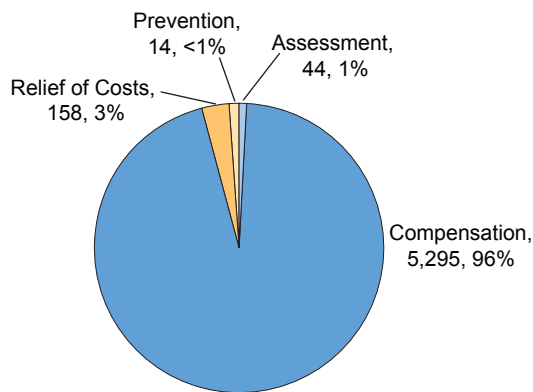
(a) Intake

WCAT received 5,833 new appeals and applications in 2006. Of these, 5,511 appeals (99%) were new appeals and applications arising from decisions of WCB review officers. Three hundred were direct appeals and applications. The remaining 22 new appeals were transitional appeals.

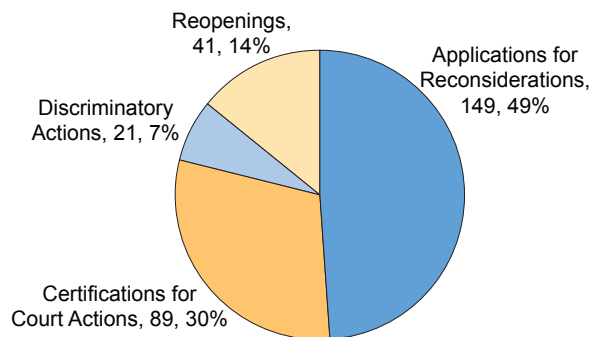
Source	Intake
Review Division	5,511
Direct	300
Transitional	22
Total	5,833

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 and Applications by Type



(b) Merit Decisions

WCAT made 4,148 merit decisions on new and transitional appeals and applications in 2006. These were comprised of 4,072 merit decisions on new appeals and applications, and 76 merit decisions on transitional appeals.

(c) Outcomes of Merit Decisions

Of the 4,072 merit decisions on new appeals and applications, 47 decisions concerned applications for certificates for court actions. The remaining merit decisions concerned appeals from decisions of the Review Division or WCB officers. “Vary” means that WCAT varied the decision of the previous decision-maker in whole or in part. “Confirm” means that WCAT agreed with the previous decision-maker.

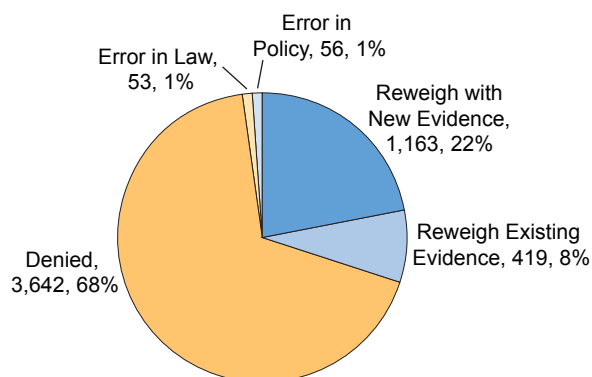
The table below shows the outcomes of WCAT’s merit decisions on new and transitional appeals.

New Appeals Appeal Type	Number of Decisions	Outcome	
		Varied	Confirmed
Compensation	3,704	36%	64%
Relief of Costs	270	24%	76%
Assessments	33	18%	33%
Reopenings	4	50%	50%
Prevention	4	50%	50%
Discriminatory Actions	8	12%	88%
Transitional Appeals	76	53%	47%

(d) Reasons for Issue Outcomes

There were 5,333 disputed issues decided in the 4,023 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 1,719 summary decisions on new and transitional appeals. In 501 (29%) of these decisions, WCAT dismissed the appeal or confirmed that the appellant had withdrawn it. WCAT found that 845 appeals (49%) were initiated in error or did not arise from decisions that were appealable to WCAT. A further 57 summary decisions suspended appeals.

Of the remaining 316 summary decisions, 149 concerned requests for extensions of time to appeal, and 165 concerned requests for reconsideration. Two related to other issues.

(f) Requests for Extensions of Time

WCAT considered 302 requests for extensions of time to appeal decisions made on or after March 3, 2003. One hundred and fifty-three of these requests were allowed and 149 were denied.

Top Five Issue Groups on New WCAT Appeals

Act	Merit Decisions	Percentage of Total Decisions	Allowed / Allowed in Part	Denied
Section 5 – Compensation for Personal Injury	1,320	27%	31%	69%
Section 23 – Permanent Partial Disability	1,066	22%	41%	59%
Section 6 – Occupational Disease	536	11%	32%	68%
Section 29 – Temporary Total Disability	421	9%	27%	73%
Section 96(2) – Reopenings / Reconsiderations	371	8%	19%	81%

9.4 General

(a) Appeal Paths

WCAT decides appeals and applications 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 fully and fairly consider the matter, after reading and reviewing the WCB's records and the submissions of the parties.

In 2006, WCAT decided a total of 5,027 backlog, new, and transitional appeals and applications. WCAT decided 3,250 appeals and applications (65% of the total) using the read and review method and decided 1,777 (35% of the total) after convening an oral hearing.

(b) Oral Hearing Weeks

In 2006, WCAT held oral hearings in 11 locations around the province. The following table shows the number of hearing weeks that WCAT held in each location.

Location	Number of Hearing Weeks
Castlegar	5
Courtenay	10
Cranbrook	10
Fort St. John	5
Kamloops	17
Kelowna	20
Nanaimo	19
Prince George	13
Terrace	6
Victoria	37
Williams Lake	6
Total outside Richmond	148
Richmond	295
Grand Total	443

(c) Appellants and Applicants

The vast majority of appeals and applications that WCAT received were from workers. The following table shows the percentage of appellants and applicants by the type of appeal. The percentages refer to appeals and applications that were active at some time during 2006. The table does not include assessment or relief of costs appeals as the appellant or applicant is always the employer in these types of appeals.

Type of Appeal or Application	Appellant/Applicant		
	Worker	Employer	Dependant
Compensation	91%	8%	1%
Discriminatory Action	63%	37%	0%
Direct Reopening	98%	2%	0%
Prevention	4%	96%	0%
Reconsiderations	89%	10%	1%

(d) Representation

The following table shows the percentage of appeals and applications for which the appellant or applicant had representation. These representatives may be workers' or employers' advisers, lawyers, consultants, or family members. The percentages refer to appeals and applications that were active at some time during 2006.

Type of Appeal	Percent Represented Where Appellant/Applicant Is:		
	Worker	Employer	Dependant
Assessment	NA	76%	NA
Compensation	78%	90%	80%
Relief of Costs	NA	94%	NA
Discriminatory Action	11%	73%	NA
Direct Reopening	43%	0%	NA
Prevention	100%	80%	NA
Reconsiderations	75%	89%	NA

10. Precedent Panel Decisions

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

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

WCAT did not issue any precedent panel decisions in 2006 and no precedent panel decisions were pending at the end of 2006.

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 2006, the chair issued one decision in respect of a section 251 referral she received from a WCAT panel. The referral related to item #40.20 *Rehabilitation Services and Claims Manual, Volume I* (RSCM I). The chair found that the policy is not so patently unreasonable that it is not capable of being supported by the Act and its regulations. The chair referred the matter back to the WCAT panel. A short summary of the chair's decision is reproduced below.

Decision: *WCAT-2006-01687* **Panel:** J. Callan, Chair
Decision Date: April 12, 2006

The issue in this section 251 determination was whether the fixed rule in item #40.20 of the RSCM I that states that payments under the "rule of 15^{ths}" will not be made to workers who receive loss of earnings pensions beyond age 65, is patently unreasonable and incapable of being supported by the Act, principally section 23. The chair determined that the impugned policy does not unlawfully fetter the discretion granted under section 23 of the Act or involve a patently unreasonable application of section 23. In arriving at that conclusion, the chair considered that payments under the rule of 15^{ths} appear to constitute a retirement benefit that is granted in addition to the compensation for permanent disability established under section 23, and also considered the fact that there is a legitimate rationale for the framework established under item #40.20.

12. Noteworthy WCAT Decisions

Noteworthy WCAT decisions are decisions that have been selected by WCAT staff because they provide significant commentary or interpretation of workers' compensation law or policy, comment on important issues related to WCAT procedure, or are useful to the compensation community. Noteworthy decisions are not binding on WCAT.

WCAT issued a large number of noteworthy decisions in 2006. This section provides summaries of only a small number of those decisions. The summaries included here are shorter versions of the more complete noteworthy decision summaries found on the WCAT website at www.wcat.bc.ca.

All WCAT decisions from 2006, including noteworthy decisions and their summaries, are publicly accessible and searchable on the WCAT website at www.wcat.bc.ca/research/appeal-search.htm. 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 Person an Employer
- 1.3. Whether Injury Arose out of Employment (section 5)
- 1.4. Whether Injury In the Course of Employment
- 1.5. Whether Occupational Disease Due to Nature of Employment (section 6(1)(b))
- 1.6. Specific Injuries
- 1.7. Compensable Consequences (item #22.00)
- 1.8. Out of Province Injuries (section 8(1))
- 1.9. Compensation in Fatal Cases (section 17)
- 1.10. Temporary Disability Benefits (sections 29 and 30)
- 1.11. Average Earnings
- 1.12. Vocational Rehabilitation (section 16)
- 1.13. Health Care Benefits (section 21)
- 1.14. Permanent Disability Awards (section 23)
- 1.15. Period of Payment (section 23.1)
- 1.16. Retirement Benefits
- 1.17. Chronic Pain (items #39.01 and #39.02)
- 1.18. Protection of Benefits
- 1.19. Recurrence of Injury (section 96(2)(b))
- 1.20. Assessments
- 1.21. Relief of Costs
- 1.22. Occupational Health and Safety

2. WCB PROCEDURAL ISSUES

- 2.1. Board Jurisdiction
- 2.2. Board Policy
- 2.3. Board Practice
- 2.4. What Constitutes a “Decision”
- 2.5. Board Changing Board Decisions
- 2.6. Evidence

- 2.7. Federal Employees
- 2.8. Discriminatory Actions
- 2.9. Mediation
- 2.10. Applications for Compensation (section 55)
- 2.11. Refusal to Submit to Medical Treatment (section 57(2)(b))
- 2.12. Failure to Provide Information to Board (section 57.1)
- 2.13. Limitation of Actions (section 10)
- 2.14. Transition Issues
- 2.15. Who May Request Review (section 96.3)
- 2.16. Review Division Jurisdiction
- 2.17. Costs (section 100)
- 2.18. Former Medical Review Panel

3. WCAT PROCEDURAL ISSUES

- 3.1. Standing to Appeal
- 3.2. Precedent Panel Decisions
- 3.3. Application of Board Policy
- 3.4. Lawfulness of Board Policy Determinations (section 251)
- 3.5. WCAT Jurisdiction
- 3.6. Evidence
- 3.7. Returning Matter to Board to Determine Amount of Benefits
- 3.8. Legal Precedents (section 250(1))
- 3.9. Summary Dismissal of Appeal
- 3.10. Matters Referred Back to Board (section 246(3))
- 3.11. Certifications to Court (sections 10 and 257)
- 3.12. WCAT Reconsiderations
- 3.13. Procedural Fairness/Natural Justice Issues
- 3.14. WCAT Extensions of Time (section 243(3))
- 3.15. Abandoning a WCAT Appeal
- 3.16. Applications to WCAT to Stay an Appealed Decision (section 244)
- 3.17. Withdrawing a WCAT Appeal
- 3.18. Costs and Expenses
- 3.19. Transitional Appeals

12.1 Substantive Issues

(a) Loss of Earnings Permanent Disability Awards

Decision: WCAT-2006-00573 **Panel:** G. Riecken

Decision Date: February 6, 2006

This decision is noteworthy for its consideration of the test of eligibility for a permanent disability award on a loss of earnings basis under the current Act. The panel concluded: (1) it is important when considering the suitability of an occupation to consider a worker's physical abilities to handle materials and equipment necessary for the occupation and, (2) in determining the worker's ability to continue in their pre-injury occupation or a similar occupation it is suitable to consider any medical restrictions as well as limitations.

(b) Administrative Penalties

Decision: WCAT-2006-01337 **Panel:** W. Hoole

Decision Date: March 22, 2006

Subsection 119(b) of the Act requires an owner to disclose a known hazard as soon as practicable to any person reasonably likely to come within the scope of that hazard. Generally, an owner will not discharge its obligation by providing information of a potential hazard only at such time as the owner is aware of a specific person's intention to engage in an activity likely to fall within the scope of that hazard, even in cases in which the person may have a legal obligation to give advance notice to the owner of their intention to engage in the activity. Section 196 of the Act authorizes the WCB to levy an administrative penalty against an owner. The term "employer" as used in that section includes "owners" or any other person who employs one or more workers.

(c) Cumulative Effects of Prior Injuries

Decision: WCAT-2006-01779 **Panel:** L. Hirose-Cameron

Decision Date: April 24, 2006

(1) The jurisdiction of a review officer is limited to the decisions contained in the WCB decision being reviewed, regardless of the desirability of addressing all possible matters so that parties are not required to cycle through the appellate system. (2) The WCB has the jurisdiction under section 5(1) of the Act to adjudicate entitlement arising out of the cumulative effects of prior injuries. (3) When considering an issue, it is not appropriate to ignore the reasoning of applicable court decisions raised by a party merely because section 99 of the Act provides that court decisions are not binding on the WCB.

(d) Mental Stress

Decision: WCAT-2006-02777 **Panel:** M. Mousseau

Decision Date: July 5, 2006

Workers are not entitled to compensation for mental stress under section 5.1 of the Act for the cumulative effects of trauma. The traumatic event must be generally recognized as traumatic: this involves direct personal observation of an actual or threatened death or serious injury and a lack of awareness that such an event was likely to happen.

(e) Industry Classification

Decision: WCAT-2006-03504 **Panel:** H. McDonald

Decision Date: September 11, 2006

The employer bears the onus of providing evidence to the WCB when disputing its industry classification. Evidence from financial statements and news releases may be sufficient to demonstrate an employer is engaging in mineral exploration activities for the purposes of determining its industry classification.

12.2 WCB Procedural Issues

(a) Reconsideration of WCB Decisions

Decision: WCAT-2006-02121 **Panel:** J. MacFadgen, D. Dukelow, I. Hundal

Decision Date: May 17, 2006

A three-member, non-precedent panel found that, in the absence of specific direction in the Act, or in WCB policy, the WCB does not have the authority, pursuant to section 96(5) of the Act, to reconsider an original WCB decision unless the reconsideration decision is communicated to the affected party within 75 days.

Decision: WCAT-2006-02669 **Panel:** R. Lane

Decision Date: June 27, 2006

In the absence of specific direction in the Act, or in WCB policy, the WCB does not have the authority, pursuant to section 96(5) of the Act, to reconsider an original WCB decision unless the reconsideration decision is communicated to the affected party(ies) within 75 days. Communication can be oral or written.

(b) Reconsideration of Medical Review Panel Decisions

Decision: WCAT-2006-02341 **Panel:** H. Morton

Decision Date: May 31, 2006

The effect of the amendments to the Act occasioned by the *Workers Compensation Amendment Act (No. 2)* is that Medical Review Panel certificates may not be reconsidered on the basis of significant new evidence.

(c) Role of WCB Medical Advisors and WCB Internal Guidelines

Decision: WCAT-2006-03608 **Panel:** D. Rice

Decision Date: September 20, 2006

(1) The role of a WCB medical advisor is to provide medical expertise, not to interpret and apply policy of the WCB. (2) The WCB may not rely on internal guidelines where to do so would result in ignoring binding WCB policy. (3) In general, it is possible to duplicate a worker's job in a work simulation.

12.3 WCAT Procedural Issues

(a) Applications for Certification under Section 257 of the Act

Decision: WCAT-2006-01356 **Panel:** H. Morton

Decision Date: March 23, 2006

WCAT has jurisdiction to issue a certification to the court under section 257 of the Act in a legal action involving a federal employee.

(b) Jurisdiction over Findings of Fact

Decision: WCAT-2006-01737 **Panel:** S. Polsky Shamash

Decision Date: April 20, 2006

Findings of fact are not decisions for the purpose of the reconsideration, reopening, review, and appeal provisions of the Act. WCAT does not have jurisdiction to hear appeals from findings of fact. There is a right to request a review and to appeal any entitlement decisions that flow from findings of fact.

(c) Withdrawing a WCAT Appeal

Decision: WCAT-2006-02601 **Panel:** H. Morton

Decision Date: June 22, 2006

This decision involved a reconsideration of a WCAT Registry decision to accept a worker's withdrawal of his appeal. WCAT does not have an obligation to enquire as to whether an unrepresented party understands the significance of the withdrawal of an appeal or to provide advice. WCAT is only obliged to follow fair procedures in accepting the withdrawal of an appeal.

(d) Attendance of Witnesses

Decision: WCAT-2006-02602 **Panel:** H. Morton

Decision Date: June 22, 2006

This decision involved a reconsideration of a WCAT decision. (1) Where a party wants WCAT to require adverse witnesses to attend an oral hearing for cross-examination, there is no breach of procedural fairness if the panel does not subpoena a witness if the worker did not make an express request that a specific witness be compelled to attend the hearing. (2) Even if a party presents arguments focusing on a particular option under a section of the Act, WCAT has a duty to consider

the full range of options permitted by the section, and there is no obligation to provide reasons that expressly address each of the options.

(e) Reconsiderations on New Evidence

Decision: WCAT-2006-02643 **Panel:** D. Dukelow

Decision Date: June 26, 2006

This was a reconsideration on new evidence grounds of a prior WCAT decision. New evidence does not have to be factual in order to meet the criteria under section 256 of the Act. A new medical opinion may also be considered if it could not have been obtained prior to the original WCAT decision. New evidence is material if it is relevant to the issue before the original panel. New evidence is substantial if it has weight and supports a different conclusion than that reached by the original panel – it does not need to provide a new diagnosis.

(f) Reasonable Apprehension of Bias

Decision: WCAT-2006-02830 **Panel:** J. Callan

Decision Date: July 11, 2006

This was a reconsideration of a WCAT decision. The fact that a panel has previously decided similar issues raised in an appeal, or has obtained evidence to assist with full consideration of the issues under appeal, does not raise a reasonable apprehension that the panel is biased so long as there is evidence that the panel is approaching the issues with an open mind.

Decision: WCAT-2006-03001 **Panel:** H. Morton

Decision Date: July 27, 2006

This was a reconsideration of a WCAT decision. A party that alleges bias on the part of a WCAT panel must communicate its objection as soon as practicable or WCAT will consider the party has waived its right to object on this basis.

(g) Standard of Review for Reconsideration on Common Law Grounds

Decision: WCAT-2006-02931 **Panel:** H. Morton

Decision Date: July 21, 2006

The standard of review on reconsideration must be determined by following the pragmatic and functional approach. The correctness standard is not appropriate for all jurisdictional issues.

(h) Returning Matter to WCB to Make Further Determinations

Decision: WCAT-2006-04061 **Panel:** H. Morton

Decision Date: October 30, 2006

This was a reconsideration of a WCAT decision. The obligation of WCAT to address an issue does not require, in all circumstances, that the WCAT decision provide a final resolution of all such issues so as to avoid the need for further adjudication by the WCB in implementing the WCAT decision.

13. WCAT Reconsiderations

WCAT decisions are “final and conclusive” pursuant to section 255(1) 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 - a jurisdictional error.

Applications involve a two-stage process. The first stage results in a formal written decision, issued by a WCAT panel, about whether there are grounds for reconsideration of the original decision. If the panel concludes that there are no grounds for reconsideration, WCAT takes no further action on the matter. If the panel decides that there are grounds for reconsideration, the original decision is reconsidered.

On an application to reconsider a WCAT decision on new evidence grounds, the panel will determine whether the evidence is substantial and material to the decision, and whether the evidence did not exist at the time of the hearing or did exist at that time, but was not discovered and could not through the exercise of reasonable diligence have been discovered. If the panel determines that there is new evidence, a panel will reconsider the original decision on the basis of the new evidence.

On an application to reconsider a WCAT decision on the basis of a jurisdictional error, a panel will determine whether such an error has been made. If the panel allows the application and finds the decision void, in whole or in part, a panel will hear the affected portions of the appeal afresh.

During 2006, WCAT received 149 applications for reconsideration and issued 179 stage one decisions. Of the stage one decisions issued, 77 determined that reconsideration grounds existed. The outcomes of the stage one reconsideration decisions were as follows:

Type of Reconsideration	Number of Reconsideration Decisions	Allowed	Denied
Statutory Grounds	23	10	13
Common Law Grounds	135	66	69
Both Grounds Alleged	21	1	20
Total	179	77	102

In order to maximize the number of vice chairs deciding backlog appeals, WCAT delayed the consideration of most stage one reconsideration applications it had received until the adjudication of the backlog was completed in the spring of 2006. Accordingly, the stage one reconsideration applications decided by WCAT in 2006 involved decisions from each of its years of operation. The majority of the decisions that were reconsidered in 2006 were released in 2004 and 2005.

13.1 Reconsideration on Common Law Grounds

WCAT has limited authority to set aside a WCAT decision where there has been a jurisdictional error (Act, section 253.1(5)). On an application to set aside a WCAT decision, WCAT applies the test set out in section 58 of the *Administrative Tribunals Act*. This test is the same test that the courts apply to WCAT decisions on judicial review.

There are three main types of jurisdictional error:

- breaches of the common law rules of natural justice and procedural fairness;
- patently unreasonable errors of fact or law or exercise of discretion in respect of matters over which WCAT has exclusive jurisdiction; and
- errors relating to matters other than the application of the rules of natural justice or findings of fact or law or exercise of discretion in respect of matters over which WCAT has exclusive jurisdiction.

In deciding whether WCAT has made a jurisdictional error by breaching the rules of natural justice and procedural fairness, WCAT will consider whether, in all of the circumstances, WCAT acted fairly (*Administrative Tribunals Act*, section 58(2)(c)).

In deciding whether WCAT has made a jurisdictional error by making an error of fact or law or exercise of discretion, WCAT will consider whether the finding of fact or law or exercise of discretion was made in respect of a matter over which WCAT has exclusive jurisdiction (*Administrative Tribunals Act*, section 58(2)(a)). If WCAT has exclusive jurisdiction over the matter, the test is whether the finding or exercise of discretion was “patently unreasonable”. The question of whether WCAT has exclusive jurisdiction over a matter is determined on a matter by matter basis.

A finding of fact or law is patently unreasonable if it is not capable of being rationally supported. In most cases, a patently unreasonable finding of fact will not be established because of the way a panel has weighed the evidence, even if another panel would have reached a different conclusion. Examples of patently unreasonable findings of fact would be findings based on no evidence, or the rejection of undisputed evidence without explanation.

An exercise of discretion is patently unreasonable if 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 (*Administrative Tribunals Act*, section 58(3)).

For errors relating to matters other than the application of the rules of natural justice and procedural fairness or findings of fact or law or exercise of discretion in respect of matters over which WCAT has exclusive jurisdiction, the test is whether the decision is correct.

In 2006, WCAT allowed 67 applications for reconsideration on common law grounds. Of those 67 allowed applications, 29 were allowed on the basis of a breach of natural justice, 35 were allowed on the basis of a patently unreasonable error of fact or law or exercise of discretion in respect of a matter over which WCAT has exclusive jurisdiction,

and 3 were allowed on the basis of an error with respect of a matter over which WCAT does not have exclusive jurisdiction. Of the 35 reconsideration applications allowed on the basis of a patently unreasonable finding or exercise of discretion, 11 were decisions involving WCAT decisions affected by the British Columbia Supreme Court decision *Cowburn v. Workers' Compensation Board of British Columbia* (see below under section 15.1 "B.C. Supreme Court Decisions").

13.2 Reconsideration Decisions on Common Law Grounds

The following 2006 noteworthy WCAT reconsideration decisions determined that the WCAT panel responsible for the underlying decision committed a jurisdictional error. All 2006 WCAT reconsideration decisions can be found on the WCAT website at www.wcat.bc.ca/research/appeal-search.htm.

(a) Breach of a Rule of Natural Justice

Decision: WCAT-2006-00208 **Reconsideration Panel:** H. Morton
Decision Date: January 19, 2006

This application was allowed on common law grounds because the WCAT panel failed to acknowledge and address the worker's request for an oral hearing and his expression of dissatisfaction with the denial of his request for an oral hearing. The panel failed to exercise his discretion to consider whether an oral hearing should be granted or to explain why the panel found that an oral hearing was not necessary. This was a breach of procedural fairness.

Decision: WCAT-2006-01332 **Reconsideration Panel:** H. Morton
Decision Date: March 22, 2006

This application involved a reconsideration of a decision by the WCAT Registry that a worker had abandoned his appeal. The application was allowed on the basis that WCAT breached the rules of natural justice. The worker's appeal had been deemed abandoned because he did not file a "Notice of Appeal - Part 2" by April 2003. However, by that time the Review Board had been replaced by WCAT and the worker had not been sent a letter by either the Review Board or WCAT advising him that WCAT would require compliance with the deadline set for filing the document.

Decision: WCAT-2006-02698 **Reconsideration Panel:** R. Lane
Decision Date: June 29, 2006

This application was allowed on the basis that the original panel breached the rules of natural justice with respect to the worker's right to be heard. Although there is no obligation on a decision-maker to identify each piece of evidence it has considered, there will be circumstances where a failure to identify a piece of evidence will lead to the conclusion that the evidence was not considered. In this case, the original panel did not acknowledge the existence of evidence on noise exposure that had been provided by the worker and that challenged similar evidence the WCB had relied on in its decision to deny the worker's claim.

Decision: *WCAT-2006-03001* **Reconsideration Panel:** H. Morton
Decision Date: July 27, 2006

This application was allowed on the basis that the original decision did not reveal that the panel considered the worker's request for a loss of earnings pension award. The reasons provided by the original panel on this issue did not show that the arguments of the worker's lawyer were heard. As well, the original panel did not explain the basis on which it reached its conclusion on this issue. This was a breach of natural justice with respect to the worker's right to be heard.

(b) Patently Unreasonable Error of Law

Decision: *WCAT-2006-01413* **Reconsideration Panel:** H. Morton
Decision Date: March 27, 2006

This application was allowed on the basis that the decision was patently unreasonable in failing to apply an applicable policy of the WCB in its determination that the worker's pension was governed by the current provisions of law and policy rather than the former provisions.

Decision: *WCAT-2006-02532* **Reconsideration Panel:** H. Morton
Decision Date: June 15, 2006

This application was allowed on the basis that the original panel issued a patently unreasonable decision. The original panel either failed to properly consider and apply the law as it related to the issue of appeal expenses or, alternatively, failed to provide adequate reasons such that it could be determined whether the panel applied the correct legal test.

Decision: *WCAT-2006-02805* **Reconsideration Panel:** R. Lane
Decision Date: July 7, 2006

This application was allowed on the basis that the original decision was patently unreasonable. The original panel's determination as to the effect an earlier Review Board decision had on its ability to address the issue raised by the worker's appeal was patently unreasonable. The original panel's misapprehension of the effect of the Review Division decision involved an obvious defect which produced a patently unreasonable decision as to its jurisdiction. That decision as to its jurisdiction resulted in the original panel not providing the worker with a decision concerning the merits of his appeal.

Decision: *WCAT-2006-03922* **Reconsideration Panel:** J. Callan
Decision Date: October 17, 2006

At issue in this application was whether there were common law grounds for reconsidering a decision that had applied item #1.03(b)(4) RSCM I and II, in light of both the B.C. Supreme Court decision in *Cowburn v. Workers' Compensation Board of British Columbia*, which found the policy patently unreasonable, and the retroactive amendment to the policy by the WCB board of directors. The panel granted the reconsideration on the basis that the underlying decision was patently unreasonable.

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 brought in respect of WCAT decisions significantly increased in 2006. A total of 68 judicial review applications were filed and served on WCAT in 2006. A total of 25 judicial review applications were filed and served on WCAT in 2005.

14.2 Judicial Review Decisions

Three judicial review applications were decided in 2006¹.

(a) *Albert v. British Columbia (Workers' Compensation Appeal Tribunal) et al., 2006 BCSC 838*

Decisions Under Review: *Appeal Division #2004-0005* and *WCAT-2004-01757*

A worker sought judicial review of a WCAT decision and a decision of the former Appeal Division of the WCB. The issues before WCAT had been first, whether the worker's 1979 to 1990 compensable injuries contributed to his 1993 compensable back injury, and second, whether he suffered a compensable injury in May 1997. WCAT denied the worker's appeal on both questions. The issue before the Appeal Division was whether a 1995 discectomy arose from a 1993 work-related aggravation of his pre-existing condition. The Appeal Division found it did not.

The British Columbia Supreme Court dismissed the petition. The standard of review applicable to WCAT and the Appeal Division was patent unreasonableness. Applying that standard, the court determined that both the Appeal Division's and WCAT's assessment of all of the evidence, including the medical evidence, was not patently unreasonable.

¹ The full text of these decisions can be found on the Courts of British Columbia website at: www.courts.gov.bc.ca/.

**(b) *Wyant v. British Columbia (Workers' Compensation Board) et al., 2006*
BCSC 680**

Decision Under Review: *WCAT-2005-01861*

The worker sought judicial review of a decision of WCAT on the ground that the decision was patently unreasonable and there was a breach of natural justice. In 1963, the worker was injured in an industrial accident while working in the logging industry. His claim for compensation was accepted by the WCB. Around 1976, the worker suffered a partial loss of vision due to a detached retina. In 2004, the WCB accepted the worker's claim that the detached retina was caused by the 1963 injury and awarded him a permanent functional impairment pension of 8% of a total disability based on the class average earnings for loader-operators in the third quarter of 1976. The worker argued that the average earnings rate used by the WCB was incorrect.

The Review Division found that there was no independent evidence to confirm that the worker had worked as a faller and therefore the WCB's use of the "loader-operator–logging" category was the most reasonable and best representation of the worker's long-term loss of earnings. However, the Review Division directed the WCB to use the class average in the loader operator category for the 12 months prior to the date of the injury. On appeal, WCAT confirmed the Review Division's direction and further directed that the WCB obtain a class average for "full-time and all workers" in the category "farmers" from the Alberta Workers' Compensation Board, as the only evidence available was that the worker was a farmer in Alberta in 1976.

The worker applied for judicial review on three main grounds: (1) WCAT had not satisfied its obligation to give reasons in its decision; (2) natural justice was offended when WCAT declined to hold an oral hearing; and (3) it was patently unreasonable for WCAT to deny the worker's appeal on the basis that there was no evidence independent of the worker's assertions concerning his pre-injury work history as a faller. The British Columbia Supreme Court dismissed the petition on all three grounds, finding that WCAT did give adequate reasons, did act fairly when it decided that the appeal could be determined without an oral hearing, and did not make a patently unreasonable finding in relation to the average earnings rate.

**(c) *Plesner v. BC Hydro and Power Authority, Workers' Compensation Appeal Tribunal and Workers' Compensation Board of British Columbia, 2006*
BCSC 1947**

Decision Under Review: *WCAT-2005-03861*

The worker sought judicial review of a WCAT decision that determined that he was not entitled to compensation for mental stress. Before the court, the worker relied primarily on the ground that the requirement set out in section 5.1 of the Act and item #13.30 RSCM II, namely that a worker is not entitled to compensation arising from mental stress unless there is an objectively verifiable traumatic event, violated the equality provisions in section 15 of the *Canadian Charter of Rights and Freedoms* (Charter), or was otherwise patently unreasonable.

Although the matter was raised under section 15 of the Charter, the British Columbia Supreme Court concluded that the matter should be remitted to WCAT for a rehearing on the basis that the reasons and findings in the WCAT decision were internally inconsistent. The court found that once WCAT accepted that a worker suffered from post-traumatic stress disorder arising out of a specific work-related event, that was dispositive of the causation question.

The worker has appealed the court's decision to the British Columbia Court of Appeal. WCAT has cross-appealed the decision, primarily on the basis that the court did not apply the appropriate standard of review. The appeal has not yet been heard.

15. Other Court Decisions

The following court decision is of significance to WCAT and the workers' compensation system generally².

15.1 British Columbia Supreme Court

Cowburn v. Workers' Compensation Board of British Columbia, 2006 BCSC 722

The worker sought judicial review of a Review Division decision which had determined that the provisions of the current Act applied to a 2005 deterioration of his physical condition and not the provisions of the Act that were in force prior to June 30, 2002.

The worker was a 75-year-old retired mill worker who was diagnosed with asbestos-related lung disease in 2002. In 2004, he applied for compensation and was granted a permanent disability award with an effective date of October 1998. The WCB determined that the Act as it read before June 30, 2002 applied to the worker's permanent disability award. In 2005, the worker applied for an increase in his award due to a deterioration in his condition. The WCB and the Review Division determined that the worker's entitlement to benefits were to be calculated under the provisions of the current Act. Those decisions relied on item #1.03(b)(4) RSCM I and II which provide that permanent changes, including deteriorations, in the nature and degree of a worker's permanent disability were to be treated as recurrences under section 35.1(8) of the Act.

The worker argued on judicial review that a deterioration of a permanent condition is not a recurrence and thus the provisions of the former Act should apply to his deterioration. The court allowed the petition and quashed the decision of the Review Division. The court found that the interpretation put forward by the WCB in its policy could not be sustained by the provisions of the Act. The court found that the interpretation of the word recurrence to include deterioration in the WCB policy was patently unreasonable.

² The full text of the decisions can be found on the Courts of British Columbia website at: www.courts.gov.bc.ca/.

This decision considered the identical issue raised in a 2005 referral to the WCAT chair under section 251 of the Act. That referral resulted in *WCAT Decision #2005-01710*, in which the chair found that item #1.03(b)(4) was patently unreasonable³. In response to the chair's decision the board of directors of the WCB determined that the policy was not patently unreasonable. As a result of the *Cowburn* decision the WCB has amended policy item #1.03(b)(4).

³ This decision was referenced in WCAT's 2005 Annual Report.