

Workers' Compensation Appeal Tribunal

2007 Annual Report

For the year January 1 to December 31, 2007



Photo courtesy of **Donna Hicks, WCAT**

Workers' Compensation Appeal Tribunal

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WCAT

**Workers' Compensation
Appeal Tribunal**

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March 6, 2008

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,

RE: Workers' Compensation Appeal Tribunal 2007 Annual Report

I am pleased to forward the 2007 Annual Report of the Workers' Compensation Appeal Tribunal for the year ended December 31, 2007. This report has been prepared for your review pursuant to section 234(8) of the *Workers Compensation Act*.

Yours truly,

A handwritten signature in cursive script 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)
AGSAA, 2007	<i>Attorney General Statutes Amendment Act, 2007</i> S.B.C. 2007, c. 14 (Bill 33)
Appeal Division	former Appeal Division of the Workers' Compensation Board
Board	Workers' Compensation Board, which operates under the name WorkSafeBC
BCCAT	British Columbia Council of Administrative Tribunals
FIPPA	<i>Freedom of Information and Protection of Privacy Act</i> , R.S.B.C. 1996, c.165
MRP	former Medical Review Panel
MRPP	<i>Manual of Rules of Practice and Procedure</i>
<i>Public Inquiry Act</i>	<i>Public Inquiry Act</i> , S.B.C. 2007, c. 9 (Bill 6)
Review Board	former 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
<i>Workers Compensation Amendment Act, 2002</i>	<i>Workers Compensation Amendment Act, 2002</i> S.B.C. 2002, c. 56 (Bill 49)
<i>Workers Compensation Amendment Act (No. 2), 2002</i>	<i>Workers Compensation Amendment Act (No. 2), 2002</i> , S.B.C. 2002, c. 66 (Bill 63)

1. Chair's Message

The Workers' Compensation Appeal Tribunal (WCAT) was established effective March 3, 2003. Over the first three years of our operations, much of our activity was focused on eliminating the backlog of appeals that we had inherited from the Workers' Compensation Review Board and the Appeal Division of the Workers' Compensation Board, operating as WorkSafeBC (Board).

In 2007, WCAT continued to be a high volume tribunal. We received a total of 5,166 appeals and applications. Our vice chairs completed merit decisions on 4,078 appeals and applications and issued summary decisions on a further 1,490. We ended the year with an active inventory of 3,613 appeals and applications. The appeals are subject to the 180-day statutory time frame prescribed by the *Workers Compensation Act* (Act).

Further statistical information is set out in the body of this report. This report also contains summaries of various decisions released by WCAT during the year, summaries of judgments rendered on judicial review applications, and information regarding referrals under section 251 of the Act.

The section 251 referral process has now operated for nearly five years. Section 251 establishes an exception to the requirement under section 250(2) of the Act that WCAT apply the applicable policy of the board of directors of the Board in making its decisions. The exception arises "if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations". If a WCAT panel finds that a policy is patently unreasonable, section 251 requires the panel to refer the policy to the WCAT chair for a determination as to whether the policy is patently unreasonable. If the chair finds the policy is not patently unreasonable, the panel must apply the policy in adjudicating the appeal. If the chair agrees that the policy is patently unreasonable, he or she must refer the policy to the board of directors and they have the authority to make the final decision as to whether the policy must be applied by WCAT.

Over the life of WCAT, I have issued six determinations under section 251(3). In several other cases, the board of directors has amended policies that were the subjects of section 251 referrals. By declaring that the amended policies were applicable to all decisions, including appellate decisions, the board of directors eliminated the need for a determination by the WCAT chair.

In closing, I would like to acknowledge the hard work and dedication of our administrative staff and vice chairs. In 2007 they again demonstrated their commitment to providing fair and timely decisions to the workers and employers of British Columbia.



Jill Callan, Chair

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

WCAT is an independent appeal tribunal external to the Workers' Compensation Board, operating as WorkSafeBC (Board). WCAT's mandate is to decide appeals brought by workers and employers from decisions of the Board. WCAT receives compensation, assessment, and prevention appeals from decisions of the Review Division. WCAT also receives direct appeals from Board 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 2007

In 2007, sections 189(2), 224(2)(j), 232(10), and 245.1 of the Act were amended by the *Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14 [Bill 33, 2007] (AGSAA, 2007).

Section 67 of the AGSAA, 2007 amended section 232(10) of the Act to permit an absent or incapacitated member of WCAT to return to less than full duty and permits a person appointed to replace the absent or incapacitated member to continue as a replacement until the absent or incapacitated member returns to full duty, unless the member's term expires.

Section 68 of the AGSAA, 2007 amended section 245.1 of the Act to refer to section 46.3 of the *Administrative Tribunals Act*. The AGSAA, 2007 added section 46.3 to the *Administrative Tribunals Act* and provides that a tribunal does not have jurisdiction to apply the *Human Rights Code* and that the section applies to all applications made to a tribunal before, on, or after the date that the section applies to the tribunal (which in WCAT's case was October 18, 2007).

Section 201 of the AGSAA, 2007 amended section 189(2) of the Act (which requires the Board to give notice to an employer if the Board varies or cancel an order) by striking out "by or under" and substituting "under". After the amendment, section 189(2) reads in part, "If the person given notice under subsection (1) ..."

Section 215 of the AGSAA, 2007 amended section 224(2)(j) of the Act (which empowers the Lieutenant Governor in Council to make Regulations) by striking out "under this Act or the regulations" and substituting "under this Act". After the amendment, section 224(2)(j) reads in part, "(j) prescribing any decisions or orders under this Act that may be appealed to the appeal tribunal ..."

The AGSAA, 2007 received royal assent on May 31, 2007, at which time section 215 came into force. Sections 67 and 68 came into force on October 18, 2007 (B.C. Reg. 311/2007). Section 201 came into force December 1, 2007 (B.C. Reg. 354/2007).

In 2007, section 61(2) of the *Administrative Tribunals Act*, which applies to WCAT by virtue of section 245.1 of the Act, was amended by the *Public Inquiry Act*, S.B.C. 2007, c. 9 [Bill 6, 2007].

Section 127 of the *Public Inquiry Act* amended section 61(2) of the *Administrative Tribunals Act* by adding a reference to section 44(1)(b) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165 (FIPPA). Section 61(2) provides that the FIPPA does not apply to certain documents and information related to the appeal process as enumerated in subsections 61(2)(a) to (f), other than those sections of the FIPPA enumerated in section 61(2). Section 44(1)(b) of the FIPPA, which was added to the enumerated sections in section 61(2), provides that “For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following: (a) attend, in person or by electronic means, before the commissioner to answer questions on oath or affirmation, or in any other manner; (b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information”. The entire *Public Inquiry Act* came into force on June 21, 2007 (B.C. Reg. 226/2007).

(b) Jurisdiction

WCAT hears appeals relating to 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, permanent disability award commutations, a permanent disability award decision concerning the percentage of disability where the range in the Board'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 from the date that WCAT receives from the Board the records relating to the decision under appeal. This time frame may be extended by the chair to a maximum of 90 days if the appellant requests additional time to make submissions or submit new evidence and the chair grants to the other parties a similar opportunity. 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. Lastly, an appeal may be suspended, and the appeal clock stopped, if WCAT is waiting for either a pending Board determination that was requested by a WCAT panel, a pending report from an independent health professional, or a pending Board decision respecting a matter that is related to an appeal.

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 Board officer's decision. The chair or the chair's delegate has the discretion to grant an extension of time to appeal where he or she 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 Board's 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 the lawfulness of policy may be referred to the chair and the Board's 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 Board's 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 a jurisdictional defect 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, 2006, or 2007.

(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. Costs of Operation for 2007 Calendar Year

The workers' compensation system is one of the core service areas of the Ministry of Labour and Citizens' Services. The costs of operating WCAT are reimbursed to the government from the Board accident fund. The 2007 costs of operation are detailed in the table below.

Category	Cost
Salaries	\$ 8,446,566
Employee Benefits and Supplementary Salary Costs	\$ 2,359,002
Per Diem - Boards and Commissions	\$ 445,595
Travel	\$ 111,440
Centralized Management Support Services	\$ 402,895
Professional Services	\$ 200,531
Information Technology, Operations and Amortization	\$ 1,098,531
Office and Business Expenses	\$ 467,501
Building Occupancy and Amortization	\$ 1,233,359
Total Expenditures	\$ 14,765,420

5. Appointments

Pursuant to section 232(2)(a) of the Act, the chair is appointed by the Lieutenant Governor in Council. Pursuant to section 232(2)(b) 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, 2007

Name	Position	End of Term
Jill Callan	Chair	March 2, 2009 (OIC #72/06)
Steven Adamson	Vice Chair & Deputy Registrar	February 28, 2011
Baljinder Chahal	Vice Chair & Deputy Registrar	August 31, 2009
Kevin Johnson	Vice Chair & Deputy Registrar	February 28, 2011
Heather McDonald	Vice Chair, Quality Assurance	February 28, 2010
Jane MacFadgen	Sr. Vice Chair & Registrar	February 28, 2010
Susan Marten	Team Leader	February 28, 2010
Susan Polsky Shamash	Sr. Vice Chair & Tribunal Counsel	February 28, 2010
David Van Blarcom	Team Leader	February 28, 2010
Kathryn P. Wellington	Team Leader	February 28, 2010
Teresa White	Team Leader	December 31, 2009

Vice Chairs As Of December 31, 2007

Name	End of Term
Cathy Agnew	February 28, 2010
Luningning Alcuilas-Imperial	February 28, 2010
Beatrice K. Anderson	February 28, 2010
W. J. (Bill) Baker	February 28, 2009
Hélène Beauchesne	March 31, 2011
Sarwan Boal	February 28, 2009
Dana G. Brinley	February 28, 2010
Larry Campbell	February 28, 2010
Michael Carleton	February 28, 2010
Lesley A. Christensen	February 28, 2010
Melissa Clarke	September 30, 2009
David A. Cox	August 31, 2009
Norman J. Denney	February 28, 2008
Daphne A. Dukelow	February 28, 2010

Vice Chairs As Of December 31, 2007

Name	End of Term
William J. Duncan	February 28, 2010
Andrew J. M. Elliot	August 31, 2009
Michelle Gelfand	February 28, 2010
Margaret C. Hamer	August 31, 2009
Lisa Hirose-Cameron	September 30, 2010
Warren Hoole	September 30, 2010
Nora Jackson	February 28, 2010
Cynthia J. Katramadakis	March 31, 2010
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, 2011
Iain M. Macdonald	February 28, 2010
Julie C. Mantini	February 28, 2011
Herb Morton	February 28, 2010
Marguerite Mousseau	February 28, 2010
Lorne Newton	February 28, 2010
P. Michael O'Brien	February 28, 2011
Paul Petrie	February 28, 2011
Ian J. Puchlik	February 28, 2008
Michael Redmond	February 28, 2009
Dale Reid	February 28, 2010
Deirdre Rice	February 28, 2011
Guy Riecken	February 28, 2011
James Sheppard	February 28, 2011
Shelina Shivji	March 31, 2009
Debbie Sigurdson	February 28, 2011
Timothy B. Skagen	March 31, 2011
Gail Starr	February 28, 2011
Anthony F. Stevens	February 28, 2010
Douglas Strongitharm	March 31, 2008
Don Sturrock	February 28, 2010

Vice Chairs As Of December 31, 2007	
Eric S. Sykes	August 31, 2009
Andrew J. Waldichuk	February 28, 2009
Lynn M. Wilfert	February 28, 2010
Lois Williams	February 28, 2010
Judith Williamson	March 31, 2011
Sherryl Yeager	February 28, 2010

Vice Chair Departures In 2007		
Name	Effective Date	Original Appointment Date
Guy W. Downie	February 21, 2007	March 3, 2003
S. Marlene Hill	February 28, 2007	March 3, 2003
Nancy Keithly	March 31, 2007	April 1, 2005
Ralph McMillan	February 21, 2007	April 1, 2005
Isabel Otter	February 28, 2007	March 3, 2003
Earl A. Simm	March 1, 2007	March 3, 2003

6. 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 externally, where resources permit. Additionally, through the professional development program, WCAT demonstrates its commitment to enhance and develop the professional knowledge and abilities of vice chairs.

In 2007, the WCAT education group organized 16 educational and training sessions. Members of WCAT 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.

WCAT is also represented on the Interorganizational Training Committee, which is composed of representatives from the various divisions of the Board 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 2007, members of WCAT also played an active role in the British Columbia Council of Administrative Tribunals and the Canadian Council of Administrative Tribunals (CCAT). They sat on various committees, taught courses, organized the CCAT international conference, and presented educational workshops at the conference, which was held in Vancouver.

The following is a list of sessions organized by WCAT for vice chairs and staff during 2007:

- | | | |
|-----|-----------------------------|--|
| 1. | February 6 &
and March 7 | WCAT Jurisdictional Issues |
| 2. | February 15 | Common Knee Conditions |
| 3. | March 8 | Interorganizational Training: The Inquiry System |
| 4. | March 15 | The Independent Health Professional Process |
| 5. | April 5 | Reconsiderations and Judicial Reviews of WCAT Decisions |
| 6. | April 5 | Pain Conditions |
| 7. | April 19 | Findings of Fact |
| 8. | May 17 | Additional Factors Outline |
| 9. | June 7 | The Roles of the Workers' and Employers' Advisers Offices |
| 10. | June 15 | Decision Writing |
| 11. | September 20 | Representative Procedural Requests and Vice Chair Responsibilities |
| 12. | October 24 &
November 7 | Preventing Violence in the Workplace |
| 13. | November 6 or 7 | Leadership Development |
| 14. | November 8 | Post-Hearing and Late Submissions |
| 15. | December 5 | Interorganizational Training: The Board's Claims Management Solutions (CMS) System |
| 16. | December 6 | Pension Issues |

7. 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 2007. The performance of vice chairs will continue to be regularly evaluated on an ongoing basis.

8. Statistics

8.1 Overview of Appeals Inventory

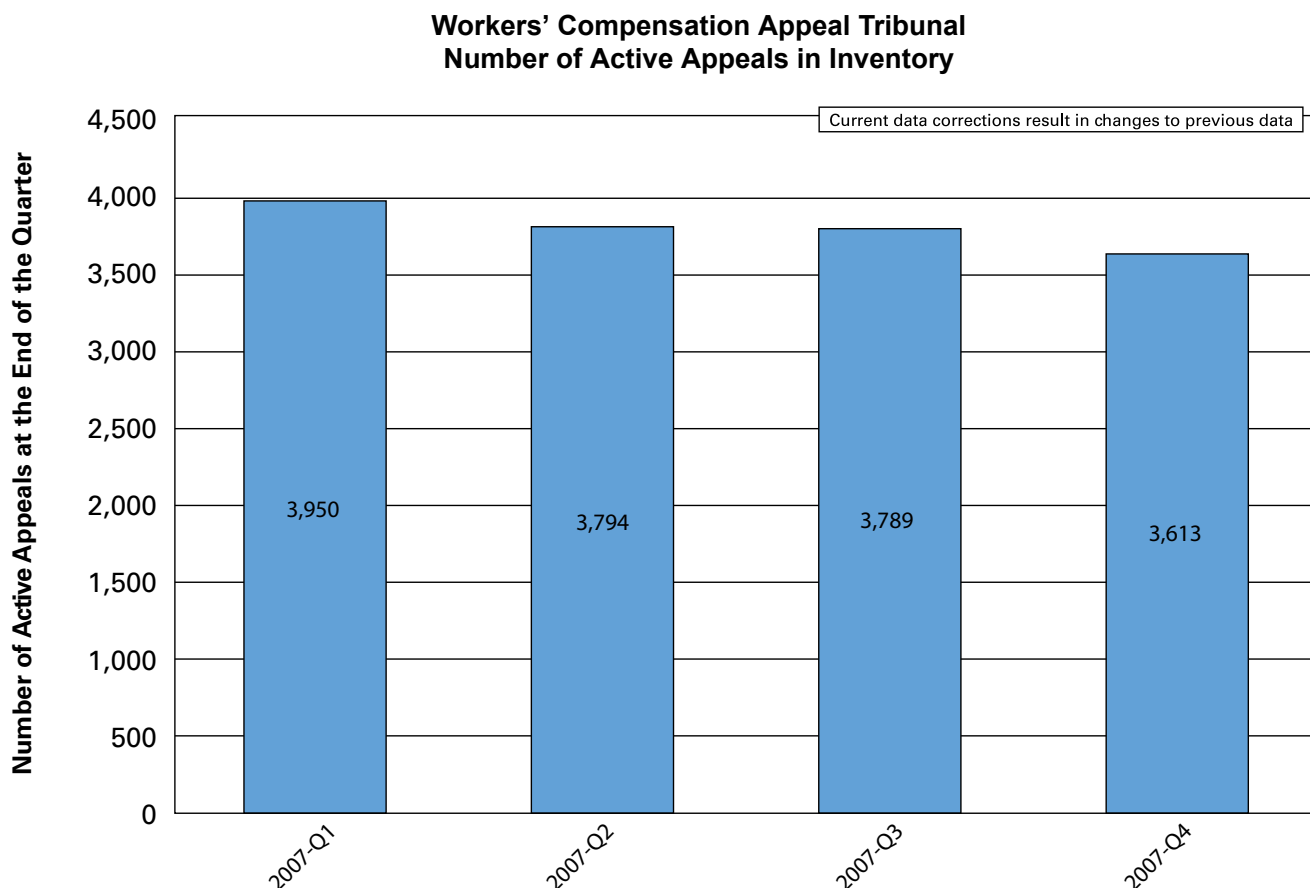
This section contains two charts providing a high level overview of the status of our appeals inventory for 2007.

The first chart (Number of Active Appeals) provides the number of appeals in our inventory at the end of each quarter of 2007. WCAT's total active inventory at December 31, 2007 was 3,613 appeals compared to 3,956 at the end of 2006. This represented a 9% reduction in the appeals inventory during 2007.

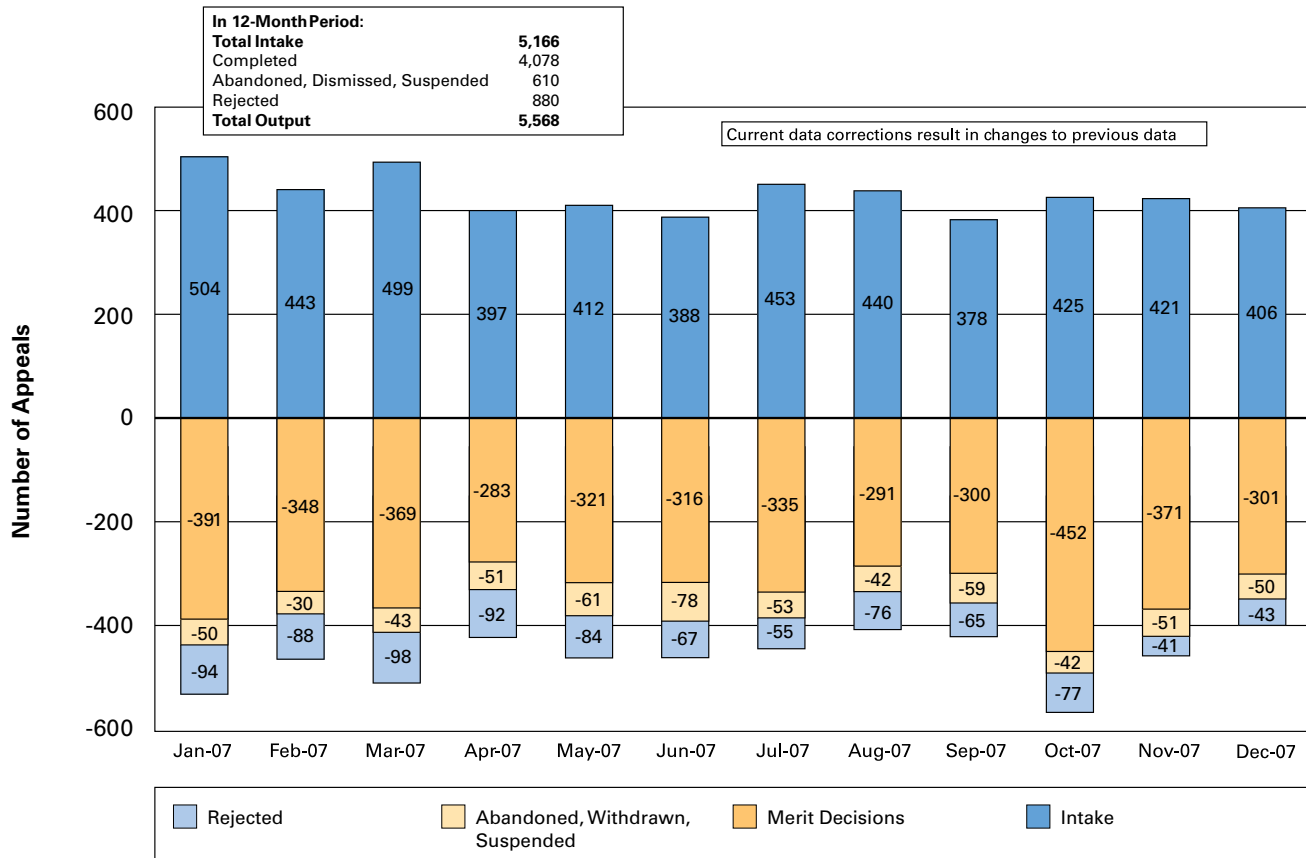
The second chart (Total Intake and Output) provides monthly statistics regarding our intake of appeals (including reactivated appeals) and our output, which includes completed appeals, rejected appeals, and appeals that were dismissed, withdrawn, or suspended.

In 2007, WCAT varied the Board decision in 36% of appeals and confirmed the decision in 64% of 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.



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



8.2 Applications and Appeals

Applications and appeals are comprised of:

- appeals to WCAT from decisions made by review officers in the Board's Review Division and direct appeals from decisions of other Board 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 Board 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.

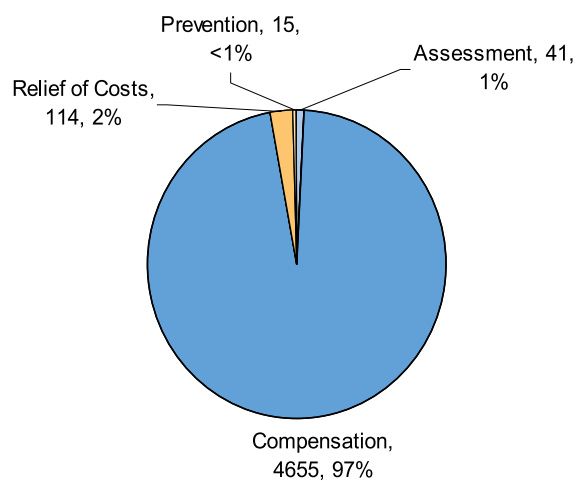
(a) Intake

WCAT received 5,166 appeals and applications in 2007. Of these, 4,826 appeals (99%) arose from decisions of Board review officers and 340 were direct.

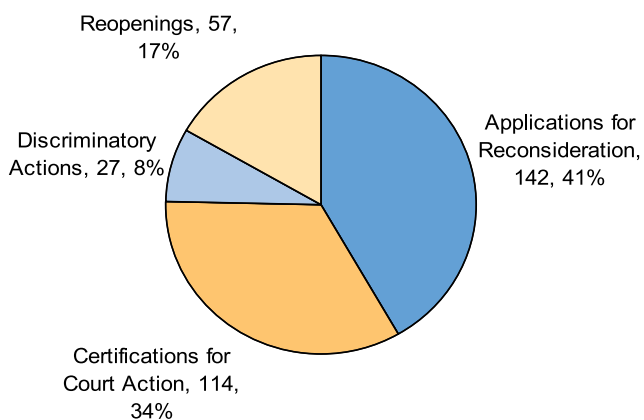
Source	Intake
Review Division	4,826
Direct	340
Total	5,166

The following two charts show the breakdown of the types of appeals and applications we received in 2007.

Appeals from Review Division by Type



Direct Appeals and Applications by Type



(b) Merit Decisions

WCAT made 4,078 merit decisions on appeals and applications in 2007.

(c) Outcomes of Merit Decisions

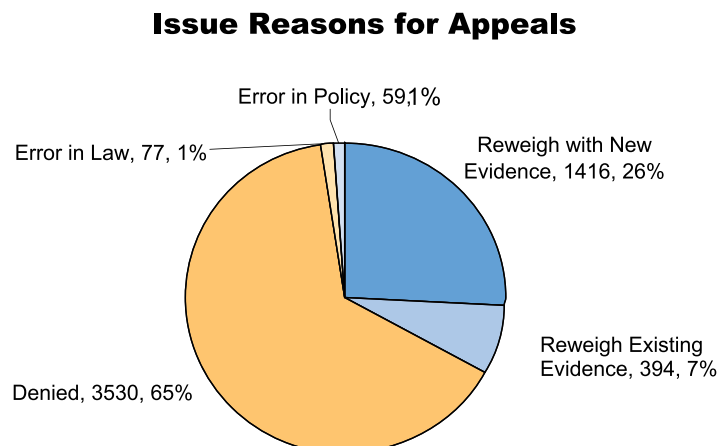
Of the 4,078 merit decisions, 42 decisions concerned applications for certificates for court actions. The remaining 4,036 merit decisions concerned appeals from decisions of the Review Division or Board officers, which may be varied, confirmed, or cancelled by WCAT. “Vary” means that WCAT varied the decision of the previous decision-maker in whole or in part. “Confirm” means that WCAT agreed with the previous decision-maker. “Cancel” means that WCAT set aside the decision of the previous decision-maker without a new or changed decision being provided in its place.

The table below shows the percentages of WCAT’s merit decisions that varied or confirmed the decision under appeal. WCAT cancelled 8 decisions in 2007. Appeals from Review Division decisions regarding reopenings are included as compensation appeals.

Appeals		Outcome	
Appeal Type	Number of Decisions	Varied	Confirmed
Compensation	3,898	40%	60%
Relief of Costs	86	28%	72%
Assessments	30	33%	67%
Prevention	11	36%	64%
Discriminatory Actions	8	37%	63%
Direct Reopenings	3	67%	33%

(d) Reasons for Issue Outcomes

There were 5,476 disputed issues decided in the 4,036 appeal outcomes. The following chart shows the percentage of the issues that were denied and, if the issues were allowed or allowed in part, the reasons for allowing the issues.



(e) Summary Decisions

WCAT made 1,490 summary decisions on appeals. In 600 (40%) of these decisions, WCAT dismissed the appeal or confirmed that the appellant had withdrawn it. WCAT rejected 580 appeals (39%) because there was no appealable issue or the decision under appeal was not appealable to WCAT. Nine summary decisions suspended appeals and 94 denied requests for extensions of time to appeal. Of the remaining summary decisions, 205 related to reconsideration applications and two related to other issues.

(f) Requests for Extensions of Time

WCAT decided 283 requests for extensions of time to appeal, allowing 189 and denying 94.

(g) Top Five Issue Groups for WCAT Appeals

Act	Merit Decisions	Percentage of Total Decisions	Allowed / Allowed in Part	Denied
Section 5 - Compensation For Personal Injury	1484	28%	33%	67%
Section 23 - Permanent Partial Disability	1268	24%	43%	57%
Section 6 - Occupational Disease	528	10%	37%	63%
Section 96(2) - Reopenings	369	7%	22%	78%
Section 29 - Temporary Total Disability	360	7%	29%	71%

8.3 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 Board's records, any new evidence, and the submissions of the parties.

In 2007, WCAT decided a total of 4,078 appeals and applications. WCAT decided 2,024 (50% of the total) after convening an oral hearing and decided 2,054 appeals and applications (50% of the total) using the read and review method.

(b) Oral Hearing Weeks

In 2007, WCAT held oral hearings in 12 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	7
Courtenay	12
Cranbrook	8
Fort St. John	3
Kamloops	13
Kelowna	22
Nanaimo	20
Prince George	12
Terrace	6
Victoria	22
Williams Lake	5
Total outside Richmond	130
Richmond	258
Grand Total	388

(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 or application. The percentages refer to all appeals and applications that were active at some time during 2007. The table does not include assessment or relief of costs appeals as the appellant is always the employer.

Type of Appeal or Application	Appellant/Applicant		
	Worker	Employer	Dependant
Compensation	91%	8%	1%
Discriminatory Action	50%	50%	0%
Direct Reopening	95%	5%	0%
Prevention	3%	97%	0%
Reconsiderations	89%	10%	1%

(d) Representation

The following table shows the percentage of appeals and applications for which the appellant or applicant had a representative. Representatives include workers' or employers' advisers, lawyers, consultants, family members, or friends. The percentages refer to appeals and applications that were active at some time during 2007.

Type of Appeal or Application	Percent Represented Where Appellant/Applicant is:		
	Worker	Employer	Dependant
Assessment	NA	78%	NA
Compensation	81%	94%	90%
Relief of Costs	NA	93%	NA
Discriminatory Action	23%	73%	NA
Direct Reopening	35%	67%	NA
Prevention	0%	87%	NA
Reconsiderations	72%	97%	100%

9. 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 Board relied upon in the precedent panel's decision was repealed, replaced, or revised.

WCAT issued one precedent panel decision in 2007: *WCAT Decision #2007-04002*. No precedent panel decisions were pending at the end of 2007. A short summary of the precedent panel decision is provided below:

Decision: *WCAT-2007-04002* **Panel:** H. Morton, S. Polsky Shamash, W. Duncan
Decision Date: December 20, 2007

As ordered by the British Columbia Supreme Court on judicial review in *Johnson v. Workers' Compensation Board*, 2007 BCSC 1410 (a summary of which is in the Judicial Review Decisions section of this report), the WCAT precedent panel in *WCAT Decision #2007-04002* reconsidered their prior precedent panel decision, *WCAT Decision #2005-03622-RB*, concerning the payment of interest on retroactive compensation benefits.

The precedent panel declined to initiate a referral of the new interest policy (item #50.00 of the *Rehabilitation Services and Claims Manual*) to the WCAT chair under section 251 of the Act. The worker had originally appealed the Board's decision on the payment of interest to the former Workers' Compensation Review Board, and the appeal had been transferred to WCAT for completion following the March 3, 2003 changes to the Act. The precedent panel referred the Board decision back to the Board under section 38(2) of the transitional provisions of Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*. The precedent panel directed the Board to make a fresh decision concerning the worker's entitlement to interest in light of the court decision and any further policy direction which might be provided by the Board's board of directors.

10. 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 Board 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 Board 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 2007:

- the chair issued one decision in respect of a section 251 referral she received from a WCAT panel; and
- two section 251 referrals were withdrawn by the referring vice chair after the board of directors of the Board amended the policy that was the subject of the referral.

Of the three section 251 referrals that were made to the chair in 2007, two remained outstanding on December 31.

(a) Section 251 Referrals Determined

Referring Vice Chair: G. Riecken

Chair's Decision: WCAT-2007-03809

Decision Date: December 6, 2007

Policy Referred: #40.00 RSCM II

The chair found that elements of item #40.00 of the RSCM II are so patently unreasonable that the policy is not capable of being supported by the Act and its regulations. Specifically, the definition of "occupation" and its use in the three so exceptional criteria in item #40.00 are patently unreasonable because those elements of the policy only consider the essential skills of the worker's occupation at the time of the injury and whether the worker is able to perform the essential skills of the occupation. They fail to take into account the physical requirements of the occupation and the worker's ability to perform the physical requirements of the occupation. Also, the chair found that the element of item #40.00 that divides the process for adjudicating loss of earnings award entitlement into two stages is not patently unreasonable.

Status: The chair has sent notice of the chair's determination to the Board's board of directors, which will be issuing its determination as to whether WCAT must apply the policy.

(b) Section 251 Referrals Withdrawn

Referring Vice Chair: S. Yeager

Date Withdrawn: March 27, 2007

Policy Referred: #13.30 RSCM II

The panel considered item #13.30 of the RSCM II to be so patently unreasonable that it is not capable of being supported by the Act and its regulations. Item #13.30, entitled "Recurrence of Mental Stress" provided in part that "if a worker's claim for mental stress was allowed prior to June 30, 2002, for a recurrence to be compensable, the claim must meet the requirements of section 5.1 of the Act". Section 35.1(8) of the Act provides that "if a worker has, on or after the transition date, a recurrence of disability that results from an injury that occurred before the transition date, the Board must determine compensation for the recurrence based on this Act, as amended by the *Workers Compensation Amendment Act, 2002*".

The panel determined the policy to be patently unreasonable on the basis that: (a) the word "compensation" in section 35.1(8) properly interpreted refers to the rate of compensation not the right to compensation; (b) the purpose of sections 5.1 and 35.1(8) of the Act is not defeated by the failure to apply it to existing rights; (c) there is no evidence that the legislature intended to treat workers who experience a recurrence of mental stress differently depending on whether their recurrence is accompanied by disability; (d) to interpret section 35.1(8) to refer to right to as well as rate of compensation is not consistent with the intent of the legislature to increase certainty to the worker in matters relating to mental stress; (e) the policy interferes with a worker's vested rights and the provisions of the Act do not clearly evidence an intention do so; and (f) the policy is arbitrary in that it only applies to recurrence, which is only one portion of the reopening criteria contained in section 96(2) of the Act, does not apply to transitional pension claims, and similar requirements have not been established for other conditions which have been subject to legislative amendments.

On March 20, 2007 the board of directors of the Board signed *Resolution 2007/03/20-08*. This Resolution amends item #13.30 of the RSCM II by removing the impugned statement quoted above. The effective date of the change was April 1, 2007 and it applies to all decisions, including appellate decisions made on or after April 1, 2007. As a result of this amendment to the policy, the vice chair withdrew her referral of this issue to the chair of WCAT under section 251 of the Act.

Referring Vice Chair: H. McDonald

Date Withdrawn: April 2, 2007

Policy Referred: #AP1-37-3 and AP1-96-1 (*Assessment Policy Manual*)

The panel considered items #AP1-37-3 and AP1-96-1 of the *Assessment Policy Manual* to be so patently unreasonable that they are not capable of being supported by the Act and its regulations. Both policies provide that a Board decision to change a firm's classification does not constitute a reconsideration of a decision under section 96(4) of the Act and is therefore not subject to the time limitations in section 96(5) of the Act. The panel determined that insofar as these policies apply to circumstances where the Board changed the employers' classifications on the sole ground of Board error, they are patently unreasonable. The panel found that to apply the policies' interpretation of sections 96(4) and 96(5) would in effect negate the effect of those statutory provisions.

On October 4, 2007 the board of directors of the Board, signed *Resolution 2007/10/04-06*. This Resolution amends items #AP1-37-3 and AP1-96-1 of the *Assessment Manual* to include, in the list of reasons for change in classification, policy changes that might result in a change to an employer's classification. The effective date of the change is November 1, 2007 and it applies to all decisions, including appellate decisions on or after November 1, 2007. As a result of this amendment to the policy, the vice chair withdrew her referral of this issue to the chair of WCAT under section 251 of the Act.

(c) Section 251 Referrals Outstanding

Referring Vice Chair: H. McDonald

Policy Referred: #D24-73-1 (*Prevention Division Policy and Procedure Manual*)

The panel considered item #D24-73-1 of the *Prevention Division Policy and Procedure Manual* to be so patently unreasonable that it is not capable of being supported by the Act and its regulations. Item #D24-73-1 states that when the Board imposes a claim costs levy pursuant to section 73(1) of the Act, the Board "will charge the employer" the costs incurred up to the time of the decision, and any additional amounts that result from matters still under consideration by the Board or WCAT. The policy indicates that where appropriate in the claim costs levy context, the Board will apply policies and practices related to administrative penalties, with one exception. That exception is the policy in item #D12-196-6 involving calculation of basic amounts for administrative penalties, and the variation factors involved when considering lowering or raising the basic amount of administrative penalties.

The panel found that the clear intent of item #D24-73-1 is that the Board will not exercise any discretion to lower the quantum of a claim cost levy; it will charge the whole of the costs of

the claim up to the statutory maximum. The panel concluded that item #D24-73-1 constitutes an unlawful fettering of the Board's discretion in section 73(1) of the Act to levy "part" of the compensation payable "to a" maximum amount specified by the Act and regulation under section 25(4) of the Act.

Referring Vice Chair: H. Morton

Policy Referred: #67.60 RSCM II

The panel considered policy item #67.60 of the RSCM II, entitled "Exceptional Circumstances," to be so patently unreasonable that it is not capable of being supported by the Act and its regulations. Section 33.4(1) of the Act provides that if exceptional circumstances exist such that the Board considers that the application of section 33.1(2) would be inequitable, the Board's determination of the amount of average earnings of a worker may be based on an amount that the Board considers best reflects the worker's loss of earnings. Item #67.60 limits decision-makers, in exercising a discretion under section 33.4 of the Act, to only three criteria, one of which is whether a worker has experienced a "significant atypical and/or irregular disruption" in his or her pattern of employment during the 12-month period preceding the date of injury.

The panel noted that the policy does not distinguish between compensable and non-compensable causes of a disability, in terms of the consideration to be given to whether the worker suffered a "significant atypical and/or irregular disruption" in his or her pattern of employment. The panel concluded that it would be contrary to the purposes and intent of the Act to treat a history of periods of compensable disability as amounting to a regular feature of a worker's employment so as to warrant the setting of a lower long-term wage rate. It is patently unreasonable to treat the worker's receipt of workers' compensation benefits in the past as a basis for diminishing a worker's entitlement to such benefits on his or her current or future claims.

11. 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, illustrate how a provision of the Act, a policy, a compensation principle, or a legal principle operates, or are otherwise useful to the compensation community. Noteworthy decisions are not binding on WCAT.

WCAT issued a large number of noteworthy decisions in 2007. 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 2007, 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. BOARD 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

11.1 Substantive Issues

(a) Average Earnings

Decision: WCAT-2007-02166 **Panel:** G. Riecken

Decision Date: July 19, 2007

When calculating a worker's long-term average earnings under section 33.3 of the Act, the reference to "earning capacity" in section 33(1) of the Act does not allow for speculation about how much a particular worker could have earned in the future if the injury had not occurred. The Act and related policies create a rule-based system for determining average earnings and earning potential at the time of injury.

Section 33(2) of the Act requires the use of the rules in sections 33.1 through 33.7 of the Act to determine average earnings. The rules in sections 33.1 through 33.7 require the use either of evidence of actual earnings at the time of injury or evidence of some form of historical earnings prior to the date of injury. Section 33.3 is an exception to the general rule for calculating long-term average earnings and applies to workers employed, other than on a temporary or casual basis, for less than 12 months at the date of injury. For these workers, average earnings are based on a person of similar status employed in the same type and classification of employment either by the same employer or a different employer in the same region (a class average).

In this case, the Board calculated the worker's average earnings by using the statistical class average gross annual earnings for full-time child care workers. The worker was injured on his first day of work as a child care worker but stated that he intended to set up his own daycare business and for that reason had had the potential to earn more than the amount determined by applying the class average.

(b) Occupational Health and Safety (Administrative Penalties)

Decision: WCAT-2007-00316 **Panel:** T. White

Decision Date: January 29, 2007

This decision is noteworthy because it describes the occupational health and safety responsibilities of an employer in respect of its workers even when a work site injury involves a member of the public. In this case, a cyclist was struck and seriously injured by a dump truck while walking her bike. The employer was cited as being in violation of section 115(2)(e) of the Act and section 3.10 of the *Occupational Health and Safety Regulation* (Regulation) by the Board. The Board imposed an administrative penalty on the employer pursuant to section 196 of the Act.

The panel concluded that the Act and published policy was not restricted, in all situations, to "workers". There were provisions that referred much more broadly to "persons". Even if it were a correct interpretation of the Act and Regulation to limit their application only to "workers", the pedestrian accident could be taken to bring to light deficiencies in the occupational health and safety program at the work site that could put workers at risk. The fact that the accident involved

a member of the public did not mean that the Board did not have jurisdiction. The accident brought the hazardous situation, which involved everyone on the multi-employer site, to the attention of the employer. The accident illustrated the nature and extent of the hazard to which workers, as well as members of the public, were exposed.

11.2 Board Procedural Issues

(a) Board Practice

Decision: WCAT-2007-01737 **Panel:** H. Morton, T. White, W. Hoole

Decision Date: June 6, 2007

This decision is noteworthy as the three-person non-precedent panel considered the measure of deference to be given to a non-binding practice directive of the Board when determining the status of a person under the Act and policies of the board of directors of the Board.

In this case, the Board determined that a person was not a worker but an independent operator because the person owned a major piece of revenue-producing equipment (a chainsaw) and that his coverage was therefore limited to the amount of personal optional protection (POP) that he had purchased. This decision was consistent with a longstanding Board practice. The practice was later incorporated into a Board practice directive. The panel found that the application of the criteria in policy did not so strongly point to the person being a worker as to show that the Board's acceptance of his application for POP coverage was in error. The panel stated that it was evident from court decisions, and the policies of the board of directors, that there was no single test to be applied in determining the issue of status.

In this context, the desirability of having policies and practices to promote a consistent approach was obvious, and longstanding practices were deserving of some measure of deference. To conclude otherwise could lead to an unacceptable level of uncertainty regarding the status of such persons, with far-ranging consequences. Although there might be significant concerns respecting the application of the practice directive, the panel stated that consideration as to a possible change in the Board's approach was better addressed by the workers' compensation system and its stakeholders in some broader fashion than in the context of this particular appeal.

(b) What Constitutes a Decision (Findings of Fact)

Decision: WCAT-2007-00430 **Panel:** S. Polsky Shamash, M. Gelfand, L. Alcuitas-Imperial

Decision Date: February 5, 2007

This decision is noteworthy as the three-person non-precedent panel considered the fundamental question of whether a written statement by an officer of the Board is merely a finding of fact that cannot be the subject of a review or appeal, or whether that statement is a decision that can be the subject of a review or appeal. Among other things, the panel reviewed historical developments that led to the appeal, the underlying legislative scheme, Board policy and practice, competing policy interests, and the approach taken by previous WCAT panels.

In this appeal, some statements were found to be findings of fact that could not be appealed whereas other statements were found to be decisions that could be appealed.

The panel found that the “findings of fact” model articulated by the review officer in the decision before the panel, which had made its way into the Board’s Best Practices Information Sheet #14 “Findings of Fact”, had merit, subject to reservations regarding the applicability of section 96(1) of the Act to the analysis. It promotes consistency and predictability, avoids unnecessary appeals and hopefully, also, cyclical “treadmill” appeals. The panel also discouraged Board officers from issuing letters that may be perceived by the parties as containing reviewable decisions where that was not the Board’s intention. If such letters are issued, the panel advised that it is crucial that they be clear that they are interim, changeable, not reviewable, and may or may not form the basis of a later decision.

11.3 WCAT Procedural Issues

(a) WCAT Jurisdiction

Decision: WCAT-2007-01040 **Panel:** H. Morton

Decision Date: March 29, 2007

This decision was a reconsideration of a WCAT decision. The reconsideration panel considered the effect of a previous WCAT decision on a subsequent WCAT panel. The subsequent panel (which issued the decision that was before the reconsideration panel) determined that it was not bound by a previous WCAT decision on the basis that there was new medical evidence. That determination was patently unreasonable and the decision was set aside as void.

(b) Evidence

Decision: WCAT-2007-02032 **Panel:** A. Elliot

Decision Date: July 5, 2007

This decision is noteworthy because of its analysis of expert evidence in the context of determining whether a worker sustained a personal injury arising out of and in the course of employment. The fact that the only definite medical opinion supported the worker did not necessarily mean that the appeal would succeed. There is a common misconception that expert evidence is somehow evidence of great persuasiveness, which must prevail in the absence of expert evidence to the contrary. The expert opinion must not offend the “ultimate issue” rule. That is, it can never be a substitute for the decision-making function of the trier of fact. The final decision is that of the decision-maker, not the expert witness. The trier of fact reviews all of the evidence, while the expert witness does not.

(c) WCAT Extensions of Time

Decision: WCAT-2007-00880 **Panel:** J. Callan

Decision Date: March 15, 2007

This decision was a reconsideration of a WCAT decision. The reconsideration panel set aside as void a decision which denied an extension of time application on the basis that the original panel considered that there were different standards expected from legal counsel as opposed to lay representatives when filing a notice of appeal within time. It is the conduct of the applicant, not the representative, that is paramount and, thus, the factors the original panel took into account were predominantly irrelevant. The decision was therefore patently unreasonable.

12. 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 for reconsideration 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 2007, WCAT received 142 applications for reconsideration and issued 199 stage one decisions. Of the stage one decisions issued, 76 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	6	17
Common Law Grounds	147	69	78
Both Grounds Alleged	29	1	28
Total	199	76	123

12.1 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 and procedural fairness 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 significant 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 (section 58(3), *Administrative Tribunals Act*).

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 2007, WCAT allowed 69 applications for reconsideration on common law grounds. Of those 69 allowed applications, 35 were allowed on the basis of a breach of procedural fairness, and 34 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. Of the 34 reconsideration applications allowed on the basis of a patently unreasonable finding or exercise of discretion, 4 were decisions involving WCAT decisions affected by the British Columbia Supreme Court decision *Cowburn v. Workers' Compensation Board of British Columbia*.

12.2 Reconsideration Decisions on Common Law Grounds

The following 2007 noteworthy WCAT reconsideration decisions determined that the WCAT panel responsible for the underlying decision committed a jurisdictional error. Summaries of *WCAT Decision #2007-00880* and *WCAT Decision #2007-01040*, noteworthy reconsideration decisions where the reconsideration panel determined that the original decision was patently unreasonable, are in the Noteworthy Decisions section of this report. All 2007 WCAT reconsideration decisions can be found on the WCAT website at <http://www.wcat.bc.ca/research/appeal-search.htm>.

(a) Breach of a Rule of Natural Justice or Procedural Fairness

Decision: WCAT-2007-00293 **Reconsideration Panel:** J. Steeves

Decision Date: January 26, 2007

The reconsideration panel concluded that a decision was required by the original panel about whether the request for an oral hearing would be allowed or not, with reasons related to the particular facts of the case. That did not happen and, therefore, the original panel did not consider the important issue of the worker's right to be heard adequately, or at all. For this procedural reason the decision was set aside.

Decision: WCAT-2007-00900 **Reconsideration Panel:** H. Morton

Decision Date: March 16, 2007

In setting aside the original panel's decision as void in part, the reconsideration panel found there was a lack of clarity in the original panel's decision regarding the worker's appeal for health care benefits. One possibility was that this was a missed issue, which remained to be addressed. The other possibility was that the worker's appeal on this issue was considered and denied. In respect of this possibility, the reconsideration panel found that there was a lack of adequate reasons to explain the basis for the original panel's decision, given the medical

evidence received after health care benefits were terminated which appeared to be inconsistent with the decision to terminate health care benefits. The reconsideration panel stated that a lack of adequate reasons to explain the basis of the original panel's decision involved a breach of procedural fairness.

13. Judicial Review of WCAT Decisions

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

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.

13.1 Judicial Review Applications

The number of judicial review applications brought in respect of WCAT decisions remained approximately the same in 2007 as compared to 2006. A total of 62 judicial review applications were filed and served on WCAT in 2007, as opposed to 68 in 2006.

13.2 Judicial Review Decisions

Ten judicial review applications were decided in 2007¹.

(a) *Daniel v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2007 BCSC 1005

Decisions under review: *WCAT-2004-05439-RB* and *WCAT-2006-02602*.

The Petitioner injured her shoulder at work and received temporary wage loss benefits from the Board. The Board subsequently determined that her condition plateaued and terminated her temporary wage loss benefits. Pending the Board's assessment of her entitlement to a permanent partial disability award (PPD award), the Board paid her income continuity benefits at the same rate as the wage loss benefits she had been receiving. A later Board employability assessment determined that the Petitioner would be capable of sedentary work after receiving Board-sponsored vocational rehabilitation. The Petitioner did not participate in the vocational rehabilitation that was offered to her.

The Board reduced her income continuity benefits to account for the amount that it thought she could have earned in a sedentary position (the Board Income Continuity Decision). The Board also decided that the Petitioner's short and long-term average earnings (wage rate) were

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

incorrectly calculated and, when determining her entitlement to a PPD award, determined that they ought to have been based on her earnings in the 12 months prior to the injury, as opposed to a three-month period (the Board Average Earnings Decision). The Board based its calculations on the Petitioner's 1999 income tax submission. This decision resulted in a further reduction in the Petitioner's income continuity benefits as well as a determination that she was entitled to a PPD award on a functional impairment basis as opposed to a loss of earnings basis. Both decisions were appealed and ultimately came before WCAT, the latter by way of the Review Division of the Board.

WCAT confirmed both Board decisions. In relation to the Board Income Continuity Decision, WCAT found that the Petitioner had voluntarily removed herself from the workforce because she refused the Board's offer of vocational rehabilitation. WCAT determined that the Petitioner was not competitively unemployable. The WCAT decision was upheld by a WCAT reconsideration panel, which also considered new evidence provided by the Petitioner following a subsequent surgery.

On judicial review, the court granted the Petitioner's application to set aside both WCAT decisions and remitted the matters back to WCAT for rehearing. The court found that the original WCAT decision was patently unreasonable in finding that the Petitioner's income continuity benefits should be reduced. The court found that there was no evidence the Petitioner had voluntarily withdrawn from the workforce as the Petitioner had not refused the Board's offer of vocational rehabilitation but had rather appealed it. The court also found the original WCAT decision patently unreasonable on the basis that it failed to apply applicable statutory provisions or policies of the board of directors of the Board which required WCAT to calculate the Petitioner's wage rate on the basis of her earnings in either the three months or the 12 months pre-injury, not on the basis of an income tax year. The court found that the WCAT reconsideration decision was patently unreasonable on the basis that it failed to consider the impact of the new evidence on the Petitioner's employability and therefore the issue of the reduction of income continuity benefits and the later pension assessment. The court rejected the Petitioner's argument that WCAT had acted unfairly by not subpoenaing a witness as the Petitioner had not directly requested that the witness be ordered to attend the hearing. Lastly, the court determined that in relation to findings of fact, the appropriate standard of review by a WCAT reconsideration panel of an original WCAT decision is patent unreasonableness.

(b) Hill v. British Columbia (Workers' Compensation Board), 2007 BCSC 1187

Decision under review: *WCAT-2006-02587*

The Petitioner is a bus driver who, over his career, was the object of a number of violent and threatening acts. In the last such act, he was threatened at work by a man who had assaulted him earlier. As a result of that incident the Petitioner was diagnosed with post-traumatic stress disorder and was unable to work for eight months. He applied for compensation from the Board, which denied his claim. This decision was confirmed by the Review Division of the Board and by WCAT. WCAT determined that the incident was not the kind of event that would generally cause stress in any person, and therefore it failed the objective test mandated by Board policy. WCAT did not take into account the Petitioner's particular sensitivities resulting from his long history, or his accumulated trauma, when assessing his reaction to what, on an objective basis, was a fairly innocuous event.

On judicial review, the court dismissed the Petitioner's application to set aside WCAT's decision. The court determined that the appropriate standard of review of WCAT's decision was patent unreasonableness. The court found that it was not patently unreasonable for WCAT to apply an objective test to the Petitioner's mental stress claim based on the language of item #13.30 of the RSCM II, a policy which was capable of bearing that meaning. Further, when WCAT said the event had to be capable of causing such an injury in "any person", WCAT was doing nothing more than applying the reasonable person test. The decision must be read as a whole. The court also found that item #13.30 itself was not patently unreasonable as section 5.1 of the Act was ambiguous and capable of several interpretations. Such an entitlement decision involves a careful balancing of worker and employer interests which falls at the heart of the Board's expertise. In relation to the application of the policy itself to the Petitioner's case, the court determined that WCAT did not make a patently unreasonable decision as there was a rational basis for WCAT's conclusion that the event was not, objectively, "traumatic".

(c) *Johnson v. British Columbia (Workers' Compensation Board) et. al., 2007 BCSC 1410*

Decision under review: WCAT-2005-03622-RB

This decision is currently under appeal to the B.C. Court of Appeal.

The former panel of administrators of the Board created a policy regarding the payment of interest (item #50.00 of the *Rehabilitation Services and Claims Manual*) which provides that the Board's discretion to pay interest on retroactive wage loss and pension lump sum payments will only be exercised where it is determined that "a blatant Board error ... necessitated the retroactive payment" (New Interest Policy). In this case, the Petitioner was awarded retroactive wage loss benefits on an appeal decided prior to the new policy's effective date but not implemented until after that date, and the Board applied the New Interest Policy when implementing the decision. The Board determined that the Board had not made a "blatant Board error" and so denied the Petitioner's claim for interest. The WCAT chair appointed a precedent panel under section 238(6) of the Act to hear the appeal. The WCAT panel denied the Petitioner's appeal, finding that the New Interest Policy applied to the Petitioner's case and that there was no "blatant Board error". The WCAT decision did not expressly consider the question of whether the New Interest Policy was patently unreasonable.

On judicial review, the Petitioner's application was certified as a class action (see 2007 BCSC 24 – currently under appeal at the B.C. Court of Appeal). The certified class is described as "all workers whose claims for interest on retroactive wage loss and pension awards were decided on or after November 1, 2001, a sub-class of which is those who were injured prior to November 1, 2001". There were two common issues certified: (a) whether the New Interest Policy is patently unreasonable in the face of section 5 of the Act; and (b) whether the New Interest Policy is retroactive and therefore *ultra vires* the statutory authority of the Board.

The court concluded that "compensation" provided for by section 5 includes interest, and that nothing in the Act supports an interest policy in which the payment of interest depends upon Board conduct (error). Therefore, the court found the New Interest Policy to be patently unreasonable. The court found further that it was patently unreasonable for the precedent panel to fail to conclude that the New Interest Policy was patently unreasonable and remitted the case to the WCAT precedent panel to reconsider. Having found that the New Interest

Policy was patently unreasonable in the face of section 5, the court found it was not necessary to determine the retroactivity issue.

In accordance with the court's direction in this decision, the WCAT precedent panel reconsidered their prior precedent panel decision and declined to initiate a referral of the new interest policy to the WCAT chair under section 251 of the Act. The precedent panel referred the Board decision back to the Board under section 38(2) of the transitional provisions of Part 2 of the *Workers Compensation Amendment Act (No. 2)*, 2002. For a complete summary of the precedent panel reconsideration decision (*WCAT Decision #2007-04002*) refer to the Precedent Panel Decisions section of this report.

(d) *Cianelli v. British Columbia (Workers' Compensation Board) et. al.*, 2007 BCSC 862

Decisions under review: *WCAT-2003-01003-RB* and *WCAT-2006-01496*

The Petitioner was crushed by a ten-ton amusement park ride while working under it and suffered a number of injuries. The Board accepted his claim for these injuries. While attempting a return to work a month after the accident, the Petitioner developed symptoms in his lower right leg and later his right sacroiliac joint. The Board denied compensation for these symptoms on the basis that there was no clear evidence connecting the new symptoms to the accident. WCAT confirmed the Board's decision not to accept the new symptoms as part of the Petitioner's claim. A WCAT reconsideration panel upheld the original WCAT decision.

On judicial review, the court granted the Petitioner's application to set aside the WCAT decision and remitted the matter back to WCAT for a rehearing. The court found the WCAT decision patently unreasonable on the basis that the panel asked itself the wrong question and therefore applied the wrong test for determining causation. The WCAT panel attempted to identify the source of the symptoms on an objective medical basis rather than asking itself whether the accident caused the symptoms or whether the symptoms were a compensable consequence of the accepted injuries. The WCAT panel equated an inability to prove a specific source of the Petitioner's pain symptoms with an inability to prove causation. The court stated that a finding that the evidence failed to establish a specific source for the pain symptoms may be of assistance in arriving at a conclusion that causation has not been made out, but to convert such a finding into a dispositive conclusion without regard for all the surrounding evidence, the sequence of events, and several other potential available conclusions, has the hallmarks of jurisdictional error. Among other things, the court found that the test adopted by WCAT prevented weighing in the balance, for example, the evidence that there was no other potentially causative event.

(e) *Baldwin v. Workers' Compensation Appeal Tribunal*, 2007 BCSC 942

Decision under review: *WCAT-2007-00065*

This decision is currently under appeal at the B.C. Court of Appeal.

After receiving a decision from the Review Division of the Board the Petitioner immediately telephoned WCAT to advise that he intended to appeal the decision. WCAT told him during that conversation that it would send to him the necessary forms and that he must return

them to WCAT by a certain date. WCAT also told him that WCAT would initiate an appeal. The Petitioner did not receive the forms which were purportedly sent to the Petitioner together with a letter which advised that the forms had to be completed and returned by a certain date or the appeal could be dismissed. The Petitioner made no further inquiries of WCAT. Subsequently, WCAT advised the Petitioner that his appeal was not proceeding as he had failed to submit the necessary forms within time and that he would need an extension of time to appeal if he still wanted to proceed. WCAT later denied the Petitioner's application for an extension of time, concluding that WCAT's failure to provide the appeal forms did not constitute special circumstances precluding the Petitioner from appealing within time. Among other things, the Petitioner argued that WCAT failed to consider whether there were other relevant considerations beyond those specifically enumerated in WCAT's MRPP, as required by item #5.31 of the MRPP.

On judicial review, the court dismissed the Petitioner's application on the basis that the WCAT decision was not patently unreasonable. The court found that WCAT considered the appropriate factors and that it was not necessary for WCAT to set out in its decision in detail all of the possible considerations as such an expectation would be unreasonable. To require endlessly detailed reasons in all situations would ask too much. WCAT provided sufficient reasons for the losing party to understand why the decision was reached.

(f) *Canadian Broadcasting Corporation v. Luo et. al.*, 2007 BCSC 971

Decision under review: *WCAT-2005-01542*

This decision is currently under appeal at the B.C. Court of Appeal.

A man died as a result of a motor vehicle accident. At the time of the accident the man was performing paid work for a federal crown corporation. The federal employer notified the federal government (Human Resources Development Canada) of the accident and argued that the man was not an employee but an independent contractor under the *Government Employees Compensation Act* (GECA), and therefore not entitled to compensation. The federal government agreed. The man's widow advised the provincial Board of the accident and the Board requested information from the federal employer in order to determine whether the man was an employee. The federal employer refused to provide any additional information to the Board on the basis that the federal government had already made a determination. The Board proceeded to adjudicate the claim in the absence of information from the employer and accepted the widow's claim for compensation under the GECA.

The employer requested a review of the Board's decision and the Review Division of the Board found that the Board had no jurisdiction under the GECA to determine whether an individual is an employee under the GECA. The Review Division concluded that the determination of employee status under the GECA is a matter that must be determined by the federal government rather than the Board and, as a result, found that the federal government's determination was binding on the Board. The widow appealed to WCAT. On appeal, the WCAT panel concluded that the Board had jurisdiction to determine whether a person is an employee pursuant to the GECA.

On judicial review, the court dismissed the Petitioner's application for judicial review. The court found that the appropriate standard of review of the original WCAT decision was correctness. The court agreed with the WCAT conclusion, although not necessarily with all the ingredients of the WCAT panel's analysis. Section 4(2) of the GECA provides that federal employees or dependants are to receive compensation "at the same rate and under the same conditions" as are provided to workers provincially. Section 4(3) of the GECA essentially provides that compensation for employees and dependants shall be determined by the Board (in B.C.). The court agreed with WCAT that the determination of employee status is reasonably incidental to a condition governing compensation under the laws of the province, and is not otherwise in conflict with the GECA, and so is within the exclusive jurisdiction of the Board. The court also found strong support for WCAT's conclusion in an agreement between the Board and the federal government which, among other things, provides that the federal government will provide to the Board "information" on employee status, as opposed to a "determination" of employee status, and speaks broadly about the Board adjudicating claims.

(g) *Baker v. British Columbia (Workers' Compensation Board)*, 2007 BCSC 1517

Decision under review: *WCAT-2005-03737-RB*

The Petitioner experienced pain in his left knee at work and applied to the Board, for compensation. The medical evidence showed that the Petitioner had pre-existing but asymptomatic osteoarthritis in his left knee. The Board initially denied his claim but later, upon appeal (a considerable period of time later), the claim was allowed for an injury and an aggravation of his osteoarthritis. In the meantime, the Petitioner's position with his employer had been terminated. The Petitioner subsequently applied to the Board for compensation for emotional stress, anxiety, and depression. The Petitioner asserted that his knee injury led to poisoned labour relations which in turn caused psychological injury. Evidence from his physician indicated that the Petitioner suffered from a long-term psychiatric disorder. The Board denied the Petitioner's claim on the basis that there was no evidence that the psychological condition was causally related to the compensable knee injury. This decision, which was confirmed by the Review Division of the Board, was upheld by WCAT. WCAT also confirmed the Review Division's decision not to reimburse the Petitioner's legal expenses before the Review Division.

On judicial review, the court partially granted the Petitioner's application and set aside portions of the WCAT decision with instructions for WCAT to rehear them. On the question of whether the Petitioner was entitled to legal costs before WCAT pursuant to section 6 of the Appeal Regulation, the court found that WCAT failed to consider the issue. On the question of alleged procedural unfairness, the court found that WCAT acted unfairly when it declined to issue certain subpoenas and denied production of the Petitioner's personnel file in the possession of his employer. It was patently unreasonable and unfair for WCAT to have considered the possible relevance of this evidence only in relation to the question of accommodation by the employer, and not in relation to all issues and particularly in relation to the claim for psychological injury. It was unfair that the Petitioner was disadvantaged by lack of his own personnel file to attempt to rebut the employer's position that the interaction between the employer and the Petitioner was not unusual, especially when certain information in the file was used by the employer and

referenced in WCAT's findings of fact. In so acting, WCAT took the unacceptable risk that not all information that could have affected its decision was placed before it.

The court rejected a number of other arguments made by the Petitioner, including his argument that item #100.40 of the *Rehabilitation Services and Claims Manual* is patently unreasonable because it prohibits the Board from reimbursing a party's legal expenses. The court also rejected the Petitioner's argument that the delay in processing his claim was an abuse of process, finding that the Petitioner had not established sufficient details of delay and who was responsible for it such that it was inordinate or that the proceedings were rendered unfair.

**(h) *Schulmeister v. British Columbia (Workers' Compensation Appeal Tribunal)*,
2007 BCSC 1580**

Decision under review: *WCAT-2005-01084*

The Petitioner is the widow of a worker who drowned in a boating accident. Eight years earlier the worker was seriously injured while at work and received a permanent total disability award. The Board determined that the worker's death was not a compensable consequence of his work injuries and denied the Petitioner's claim for dependent survivor's benefits. WCAT denied the Petitioner's appeal. On judicial review, the court set aside the WCAT decision on the basis that the WCAT panel failed to take statutory requirements into account, and thereby exercised its discretion in a patently unreasonable manner, as set out in section 58(3)(d) of the *Administrative Tribunals Act*. The panel failed to take statutory requirements into account when it inserted a "relative element" into the term "significant cause" in item #22.00 of the RSCM I and II when such an element was not found in Board policy. The court concluded that, by embarking upon an analysis of the "more significant" factors and on the "most significant cause" of the accident that led to the worker's death, the panel did not properly apply policy item #22.00 or failed to properly take item #22.00 into account. The court rejected a number of other arguments raised by the Petitioner, most relating to questions of alleged unfair WCAT procedure.

**(i) *Herbaut v. British Columbia (Workers' Compensation Appeal Tribunal)*,
2007 BCSC 1656**

Decision under review: *WCAT-2005-00757*

Pursuant to section 243(3) of the Act, the Petitioner applied to WCAT for an extension of time to appeal a decision of the Review Division of the Board, on the basis that there were "special circumstances" that precluded him from appealing within time. He filed his appeal 385 days late. He argued that that he missed the time limit because he received bad advice from his representative (a Workers' Adviser) during the Review Division proceeding. The representative had advised the Petitioner to withdraw his review of the Board decision because his chances of success were limited. The representative gave this advice because the Board decision under review determined that the Petitioner's previous loss of earnings permanent disability award should remain unchanged and the Review Division had just issued a final decision confirming a different Board decision denying the Petitioner any further vocational rehabilitation benefits because of the Petitioner's failure to adequately participate in vocational rehabilitation.

In light of this advice the representative ceased representing the Petitioner and, despite this advice, the Petitioner continued with the review. The Review Division subsequently dismissed his application. On application to WCAT for an extension of time, the Petitioner relied on an earlier WCAT decision which had granted an extension of time to a worker on the basis that the worker's representative as well as the Review Division had incorrectly advised the worker that a decision was not appealable to WCAT, when in fact portions of the decision were appealable. WCAT found that there were no special circumstances which precluded the Petitioner from filing his appeal on time.

On judicial review, the court dismissed the Petitioner's application for judicial review on the basis that the WCAT decision was not patently unreasonable. The court was satisfied that WCAT took the necessary statutory requirements into account and that there was some evidence in the record before WCAT (in fact ample evidence) which supported WCAT's conclusion that there were no special circumstances that had precluded the Petitioner from appealing in time. The facts as found by WCAT formed a rational basis for the outcome and that there was no indication on the face of the record that the panel based its decision entirely or predominantly on irrelevant factors. The court agreed that the earlier WCAT case relied on by the Petitioner was properly distinguished and that the Petitioner's decision to proceed with the Review Division decision and not to appeal to WCAT was entirely and independently the Petitioner's decision. The Petitioner was not misled by either his former representative or the Review Division regarding the amount of time he had to appeal to WCAT.

(j) Manz v. Workers' Compensation Appeal Tribunal et. al., 2007 BSCS 1945

Decisions under review: *WCAT-2005-03693* and *WCAT-2006-01402*

This decision is currently under appeal at the B.C. Court of Appeal.

The Petitioner and the Respondent Sundher were involved in a motor vehicle accident in or around a ferry terminal (Accident). At the time of the Accident the Petitioner, an employee of the B.C. Ferry Corporation, was leaving the terminal on his motorcycle after finishing his shift. Shortly thereafter he collided with a dump truck driven by the Respondent Sundher. The Accident occurred on the property of the employer and on a road regularly travelled by the public. The dump truck was making a wide left turn, across the lane in which the Petitioner was riding, in order to enter a gap in a concrete barrier by the left side of the road. The Petitioner was injured in the Accident and brought a legal action against the Respondent Sundher for damages arising from the alleged negligence of the Respondent Sundher.

Pursuant to section 257 of the Act the Respondent Sundher requested that WCAT determine the status of the Petitioner and the Respondent Sundher, and certify that status to the court. The contested issue was the status of the Petitioner. WCAT certified that the Petitioner was a worker at all material times and that his injuries arose out of and in the course of his employment. That determination was based on, among other things, the fact that the gap in the concrete barrier was on the employer's premises and a finding that large vehicles had to turn across multiple lanes of traffic in order to enter the gap. A WCAT reconsideration panel denied the Petitioner's application to have the original WCAT decision set aside.

On judicial review, both the original WCAT decision and the WCAT reconsideration decision were set aside on the basis that the original panel's finding that the gap in the concrete barrier constituted a hazard of the employer's premises was based on no evidence and was therefore patently unreasonable.

14. Other Court Decisions

The following court decisions are of significance to WCAT and the workers' compensation system generally².

(a) *Rathor v. British Columbia (Workers' Compensation Board)*, 2007 BCSC 503

This was an application by the Petitioner to the B.C. Supreme Court for judicial review of a decision of the former Medical Review Panel (MRP) that found that she was not disabled after June 12, 1995 by reason of her work-related injuries. She had been examined prior to that date by a medical advisor to the Board who found that she had recovered from the work-related injury. On that basis her wage loss and health care benefits were concluded. The Petitioner sought review by a MRP claiming that she continued to have pain as a result of her injury. The request specifically asked the panel that if it should appear that there were alternative possibilities, that the panel indicate if one possibility is more likely than the other or if the possibilities are evenly balanced. A MRP examined the Petitioner and issued an eight-page decision concluding that the Petitioner was not disabled after June 12, 1995 as a result of her work injury. The Petitioner sought judicial review of that decision on the basis that the panel erred in failing to consider chronic pain as another explanation for her inability to work and also on the basis that the panel erred in failing to obtain further medical evidence regarding her pain.

The court dismissed the application. The panel found no objective evidence of any disability. Having been asked to report on any "alternative possibilities", the fact that none were mentioned could only mean that none were found. The decision was not patently unreasonable. On the second issue, the court found that requiring a panel to obtain further medical evidence whenever it cannot find any evidence supporting a pain complaint would be antithetical to its intended function under the legislative scheme.

(b) *Glover v. British Columbia (Workers' Compensation Board)*, 2007 BCSC 1878

This was an application to the B.C. Supreme Court for judicial review of two decisions of the former Appeal Division regarding permanent disability awards (pensions) that were assessed by the Board under the *Criminal Injury Compensation Act*. The petitioners, Mr. Glover and Ms. Molnar, were victims of crime who alleged that the Board and the Appeal Division did not properly adjudicate their claims in accordance with the policies contained in the RSCM I and II used by the Board in adjudicating claims by injured workers.

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

In relation to Ms. Molnar, the Appeal Division had declined to set aside the Board's original decision regarding the calculation of her pension but did set aside a decision of the Board's Criminal Injury Appeal Committee (Committee) that had determined that her claim would not be reopened as her permanent functional impairment rating for pension calculation purposes had not changed sufficiently to justify a higher pension. The Appeal Division determined that it was not appropriate for it to determine if Ms. Molnar was entitled to a reopening of her claim and an adjustment to her pension and requested that the Board gather further evidence. The Board ultimately increased her pension.

Ms. Molnar argued that the Appeal Division decision was patently unreasonable in that it was contrary to the provisions of the *Criminal Injury Compensation Act* and also that it was inconsistent with a finding of fact made by an earlier decision of the Committee (a different decision from the one appealed from) that but for her injury she would have gone back to work in the auto body business (and thus the average earnings upon which her pension was calculated should have been increased). The court rejected Ms. Molnar's application for judicial review, finding that there was evidence before the Appeal Division upon which it could have rationally concluded that at the time of the Board's original pension decision Ms. Molnar was not totally physically disabled and that she was not, therefore, eligible to receive a pension based on the minimum monthly rate prescribed by section 22 of the Act. The court also determined that the comments of the Committee regarding Ms. Molnar's prospective auto body career were clearly *obiter dicta* and could not bind any subsequent panel.

In relation to Mr. Glover, he alleged that on the face of the evidence, it was patently unreasonable for the Board and Appeal Division to have determined that he was not entitled to a pension and for the Board and Appeal Division to not have made further investigation into his alleged disability. The court dismissed his application, finding that far from being patently unreasonable, the Appeal Division's decision was manifestly correct. The court determined that the record was so lacking in evidence relating to Mr. Glover's alleged disability and its impact on his capacity to work, that to require the Appeal Division to embark on further investigation of it would itself have been unreasonable.