2008 Annual Report

Workers' Compensation Appeal Tribunal

For the year January 1 to December 31, 2008

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

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

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http://www.wcat.bc.ca
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March 12, 2008

The Honourable Iain Black
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: The Workers' Compensation Appeal Tribunal's 2008 Annual Report

I am pleased to forward the 2008 Annual Report of the Workers' Compensation Appeal Tribunal for the year ended December 31, 2008. This report has been prepared for your review pursuant to section 234(8) of the *Workers Compensation Act*.

Yours truly,

Jill Callan
Chair

GLOSSARY

Act	*Workers Compensation Act*, R.S.B.C. 1996, c. 492
Administrative Tribunals Act	*Administrative Tribunals Act*, S.B.C. 2004, c. 45
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	*Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165
MRP	former Medical Review Panel
MRPP	*Manual of Rules of Practice and Procedure*
Prevention Manual	*Prevention Division Policy and Procedure Manual*
Review Board	former Workers' Compensation Review Board
Review Division	Review Division of the Workers' Compensation Board
RSCM I	*Rehabilitation Services and Claims Manual, Volume I*
RSCM II	*Rehabilitation Services and Claims Manual, Volume II*
WCAT	Workers' Compensation Appeal Tribunal
Workers Compensation Amendment Act, 2002	*Workers Compensation Amendment Act, 2002* S.B.C. 2002, c. 56 (Bill 49)
Workers Compensation Amendment Act (No. 2), 2002	*Workers Compensation Amendment Act (No. 2), 2002,* S.B.C. 2002, c. 66 (Bill 63)

1. CHAIR'S MESSAGE

March 3, 2008 was the fifth anniversary of the Workers' Compensation Appeal Tribunal (WCAT). WCAT came into existence through a restructuring of the British Columbia workers' compensation appeals system, which had previously been comprised of three levels of appeal – the Workers' Compensation Review Board, the Appeal Division and the Medical Review Panels.

The restructuring flowed from recommendations in the reports of the 1999 Royal Commission on Workers' Compensation in British Columbia (Chair: Gurmail S. Gill) and the 2002 Core Services Review (by A. Winter). Both reports had commented extensively on shortcomings of the previous appeals structure. In particular, they had noted that it could take several years for an appeal regarding a worker's claim for compensation to proceed through the three appeal bodies. The reports also noted that the delays caused emotional and financial hardship and it was unreasonable and unfair for the system to take so long to issue a final decision. Under the current appeals system, workers and employers have the benefit of timely decisions on their requests for reviews by the Review Division of WorkSafeBC and on their appeals to WCAT. It is apparent that the concerns of workers and employers about delays in the workers' compensation appeals system have been addressed.

The legislation that brought WCAT into existence was drafted at a time of significant administrative justice reform in British Columbia, which resulted in the addition of many new provisions to the *Workers Compensation Act* regarding WCAT's authority and accountability and the appointments and reappointments of our vice chairs. These provisions have assisted WCAT in efficiently handling procedural matters that arise under appeals through practices, procedures, and rules that are grounded in the legislation and publicly available. In addition, WCAT has been staffed with vice chairs who have been appointed through a merit-based process and whose performance is regularly evaluated for decision quality, appropriate conduct of oral hearings, and productivity.

In 2008, WCAT continued to be a high-volume tribunal. We made decisions on the merits of over 4,000 appeals and dealt with over 1,000 other appeals through summary decisions. Our administrative staff assisted workers and employers by providing information about the appeals process and ensuring that both parties understood our processes and were treated fairly. Our vice chairs continued to focus on issuing high-quality, timely decisions that are fair. I would like to take this opportunity to thank all vice chairs and administrative staff for their contributions to WCAT in 2008.

In 2009, among other things, we will focus on enhancing the accessibility of the appeals system through introducing plain language forms and appeal guides.

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 of the Workers' Compensation Board (Review Division). WCAT also receives direct appeals from Board decisions regarding applications for reopening of compensation claims and complaints regarding discriminatory actions. In addition, it receives applications for certificates to the court.

On some issues, the decision of the Review Division is final and not subject to appeal to WCAT. The following issues cannot be appealed to WCAT:

- vocational rehabilitation matters,
- permanent disability award commutations,
- permanent disability award decisions concerning the percentage of disability where the range in the Board's rating schedule is 5% or less,
- an employer's assessment rate group or industry group, or
- prevention orders

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), 2002* 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 currently provides that sections 1, 11, 13 to 15, 28 to 32, 35(1) to (3), 37, 38, 42, 44, 46(3), 48, 49, 52, 55 to 58, 60(a) and (b), and 61 of the *Administrative Tribunals Act* apply to WCAT.

(a) Changes in 2008

In 2008, the only changes made to the Act were amendments to section 94, which provides for workers' and employers' advisers. Section 94 was amended by section 29 of the *Labour and Citizens' Services Statutes Amendment Act*, 2008, S.B.C. 2008, c.12 (Bill 13 – 2008). The effects of the amendments were to change the status of workers' and employers' advisers from appointees of the Lieutenant Governor in Council to employees of the Ministry of Labour and Citizens' Services under the *Public Service Act*.

There were no amendments in 2008 to the *Administrative Tribunals Act* or to the federal *Government Employees Compensation Act*, R.S., 1985, c. G-5.

(b) 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).

(c) Consistency

WCAT must apply the policies of the board of directors of the Board 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 of directors of the Board 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 of directors of the Board relied upon by the precedent panel has been repealed, replaced, or revised. The authority to establish precedent panels

provides another means of promoting consistency in decision-making within the workers' compensation system.

(d) Finality

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

(e) 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.

In 2008 there were three amendments to the MRPP. All related to the process of reconsideration of WCAT decisions. The first amendment, effective February 13, 2008, at item #15.24, effectively provides that WCAT does not have jurisdiction to reconsider decisions of the former Appeal Division of the Workers' Compensation Board (Appeal Division) for jurisdictional defect. This amendment followed the chair's decision in *WCAT-2008-00457*. The second amendment, effective November 13, 2008, at item #15.23, provides that where a party appealed more than one decision, and WCAT administratively joined the appeals such that WCAT only issued one decision, the party may bring separate reconsideration applications pertaining to each appeal on the basis of new evidence on separate occasions. However, where the new evidence is relevant to more than one of the joined appeals, the party must bring the reconsideration applications at the same time. The third amendment, also effective November 13, 2008, at item #15.24, provides that WCAT will hear an application for reconsideration on the basis of common law grounds on one occasion only regardless of the number of appeals that were administratively joined.

(f) Public Access

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

4. COSTS OF OPERATION FOR 2008 CALENDAR YEAR

CATEGORY	COST
Salaries	$ 9,244,314
Employee Benefits and Supplementary Salary Costs	$ 2,162,856
Per Diem - Boards and Commissions	$ 440,014
Travel	$ 106,353
Centralized Management Support Services	$ 394,567
Professional Services	$ 427,226
Information Technology, Operations and Amortization	$ 1,130,943
Office and Business Expenses	$ 484,331
Building Occupancy and Amortization	$ 1,269,692
TOTAL EXPENDITURES	**$ 15,660,296**

5. WCAT MEMBERS

The members of WCAT are the chair and the vice chairs. Under section 232(2) of the Act, the chair is appointed by the Lieutenant Governor in Council and the vice chairs are appointed by the chair in consultation with the Minister of Labour and Citizens' Services.

In 2008, no new vice chairs were appointed to WCAT.

EXECUTIVE, AND VICE CHAIRS WITH SPECIAL DUTIES

AS OF DECEMBER 31, 2008

NAME	*POSITION*	*END OF TERM*
Jill Callan	Chair	March 2, 2009 (OIC#72/06)
Jane MacFadgen	Senior Vice Chair & Registrar	February 28, 2010
Susan Polsky Shamash	Senior Vice Chair & Tribunal Counsel	February 28, 2010
Heather McDonald	Vice Chair, Quality Assurance & Training	February 28, 2010
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
Susan Marten	Vice Chair & Team Leader	February 28, 2010
Guy Riecken	Vice Chair & Team Leader	February 28, 2011
James Sheppard	Vice Chair & Team Leader	February 28, 2011
Teresa White	Vice Chair & Team Leader	December 31, 2009

VICE CHAIRS AS OF DECEMBER 31, 2008	
NAME	***END OF TERM***
Cathy Agnew	February 28, 2010
Luningning Alcuitas-Imperial	February 28, 2010
Beatrice K. Anderson	February 28, 2010
W. J. (Bill) Baker	February 29, 2012
Hélène Beauchesne	March 31, 2011
Sarwan Boal	February 28, 2011
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
Daphne A. Dukelow	February 28, 2010
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 29, 2012
Brian King	August 31, 2009
Rob Kyle	February 28, 2011
Randy Lane	February 28, 2010
Janice A. Leroy	February 28, 2011
Iain M. Macdonald	February 28, 2010
Julie C. Mantini	February 28, 2011

VICE CHAIRS AS OF DECEMBER 31, 2008	
NAME	***END OF TERM***
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
Michael Redmond	February 29, 2012
Dale Reid	February 28, 2010
Deirdre Rice	February 28, 2011
Shelina Shivji	March 31, 2011
Debbie Sigurdson	February 28, 2011
Timothy B. Skagen	March 31, 2011
Anthony F. Stevens	February 28, 2010
Don Sturrock	February 28, 2010
Eric S. Sykes	August 31, 2009
David Van Blarcom	February 28, 2010
Andrew J. Waldichuk	February 28, 2011
Kathryn P. Wellington	February 28, 2010
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 2008		
NAME	***EFFECTIVE DATE***	***ORIGINAL APPOINTMENT DATE***
Norm Denney	March 1, 2008	March 3, 2003
Ian Puchlik	March 1, 2008	March 3, 2003
Gail Starr	September 25, 2008	March 3, 2003
Doug Strongitharm	April 1, 2008	March 3, 2003

6. EDUCATION

WCAT is committed to excellence in decision-making. Having adopted a competency-based recruitment process, WCAT also recognizes that professional 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.

In 2008, the WCAT education group organized 17 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 assessments issues, the sessions addressed medical issues, decision-making and decision writing, procedural issues, and information technology and systems.

WCAT is also represented on the Inter-organizational 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 committee's goal 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 inter-organizational training sessions.

In 2008, members of WCAT also played an active role in the British Columbia Council of Administrative Tribunals (BCCAT) and the Canadian Council of Administrative Tribunals. They sat on various committees, taught courses, and organized and presented educational workshops at the annual BCCAT conference.

The following is a list of sessions organized by WCAT for vice chairs and staff during 2008.

1. January 15 & 16
   - WCAT Oral Hearings – Fairness for All
2. January 22
   - Administrative Justice Principles
   - Standard of Review of WCAT Decisions
3. February 7
   - Sections 246(2)(d), 246(3) and 252 – WorkSafeBC Processes
   - WCAT's Suicide Risk Processes
4. February 14
   - Disability Determination – WorkSafeBC's Occupational Medicine Model

5.	March 6	• Common Chiropractic Terms and Tests; Back Pain Issues
6.	March 13 & 14	• Occupational Health and Safety Appeal Processes
7.	April 3	• InfoCAT (Intranet) – A Refresher/Update
8.	April 23	• "Better" Quality Adjudication
9.	May 8	• New Matters vs. Reopenings – A Refresher • Unrepresented and Underrepresented Litigants
10.	May 22	• WorkSafeBC's Health Care Services and Programs
11.	June 5	• Special Handling Appeals • Practice Directive #C6-2 – Permanent Disability Benefits
12.	June 12	• Inter-organizational Training: Pain – The Four Letter Word That Really Hurts
13.	June 19	• WorkSafeBC Evidence-Based Practice Group – Chronic Regional Pain Syndrome Research
14.	October 2	• Balance of Probabilities vs. Balance of Possibilities – Section 250(4) • Reviewable/Appealable Decisions vs. Findings of Fact – A Refresher
15.	November 6	• Credibility and Reliability of Evidence in Written Submissions and Oral Hearings
16.	November 20	• Productivity Tips
17.	December 4	• Additional Factors Outline – How Do We Use It? • Reimbursement of Appeal Expenses • WorkSafeBC's/B.C. Medical Association's Tariff for Medical Evidence

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 2008. The performance of vice chairs will continue to be regularly evaluated on an ongoing basis.

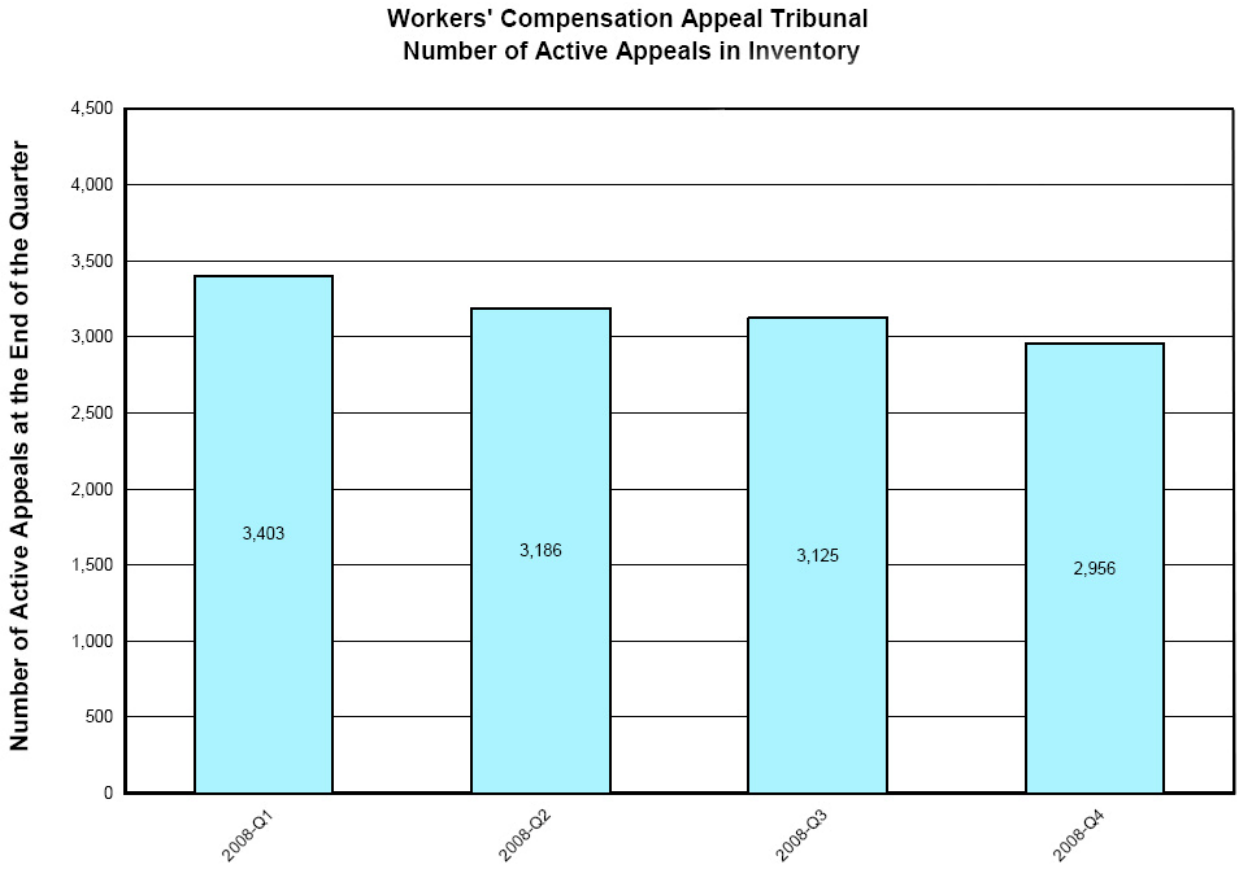
8. STATISTICS

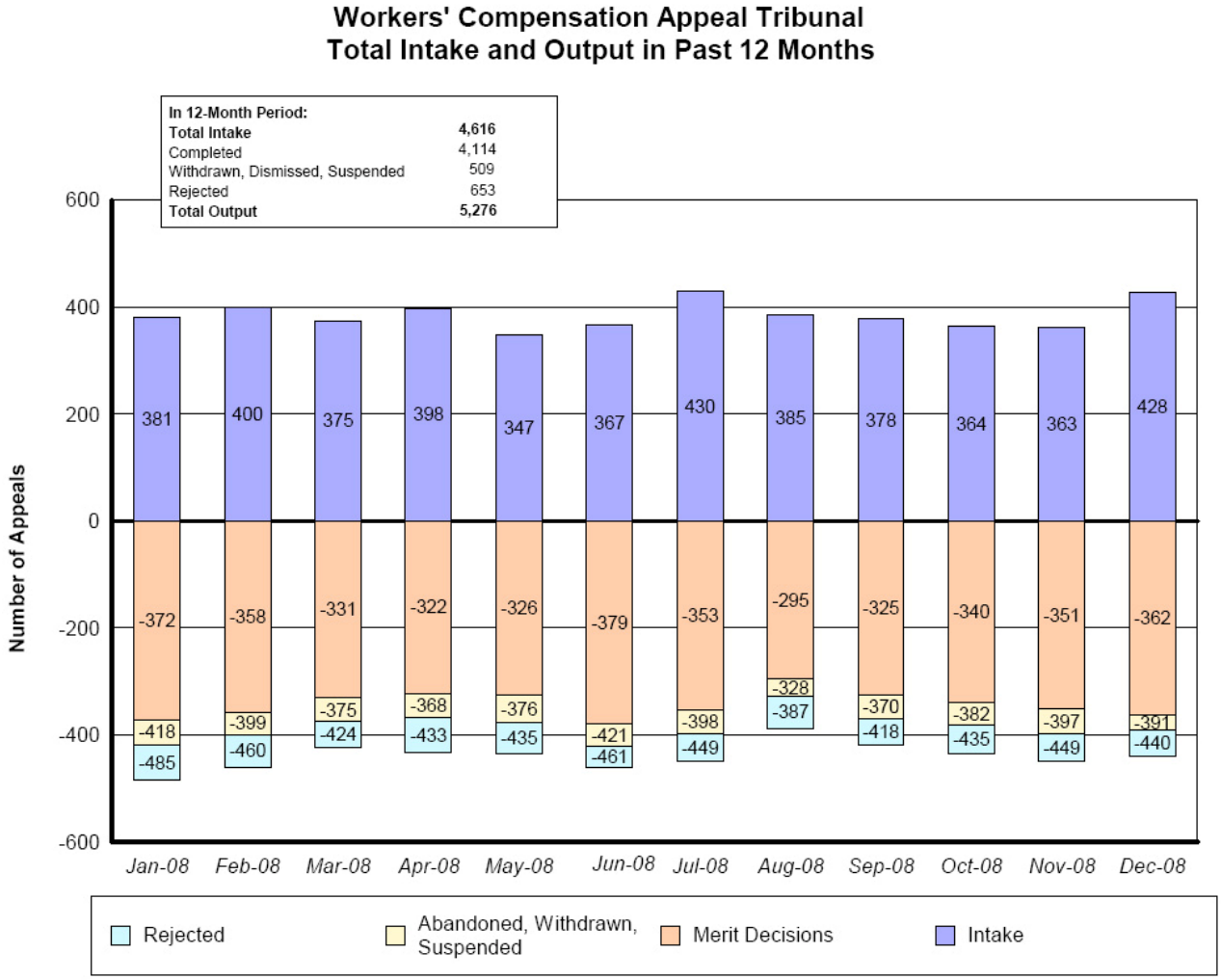
8.1 Overview of Appeals Inventory

This section contains two charts providing a high level overview of the status of our appeals inventory for 2008. WCAT records appeals by their date of initiation.

The first chart (Number of Active Appeals) provides the number of appeals in our inventory at the end of each quarter of 2008. WCAT's total active inventory at December 31, 2008 was 2,956 appeals compared to 3,613 at the end of 2007. This represented an 18% reduction in the appeals inventory during 2008.

The second chart (Total Intake and Output) provides monthly statistics regarding of our intake of appeals (including reactivated appeals) and our output, which includes completed appeals, rejected appeals, and appeals that were dismissed, withdrawn, or suspended. We received 4,616 new appeals in 2008, representing a reduction of 10.6% from the 5,166 new appeals we received in 2007.





8.2 Appeals and Applications

Appeals and applications are comprised of:

- appeals to WCAT from decisions made by review officers in the 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 Division review officers. 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 on application, discriminatory action

complaints, requests for reconsideration of decisions of WCAT and the Appeal Division, and applications for certificates for court actions.

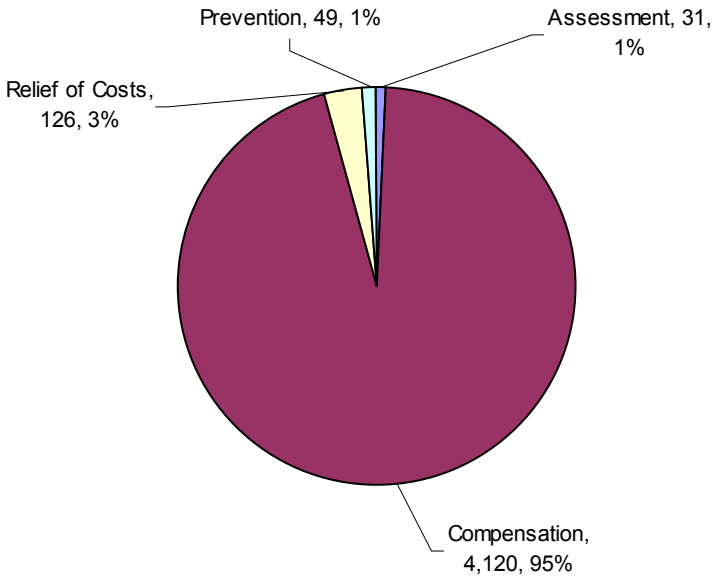
Intake

WCAT received 4,616 appeals and applications in 2008. Of these, 4,326 appeals (94%) arose from decisions of Board review officers and 290 were direct.

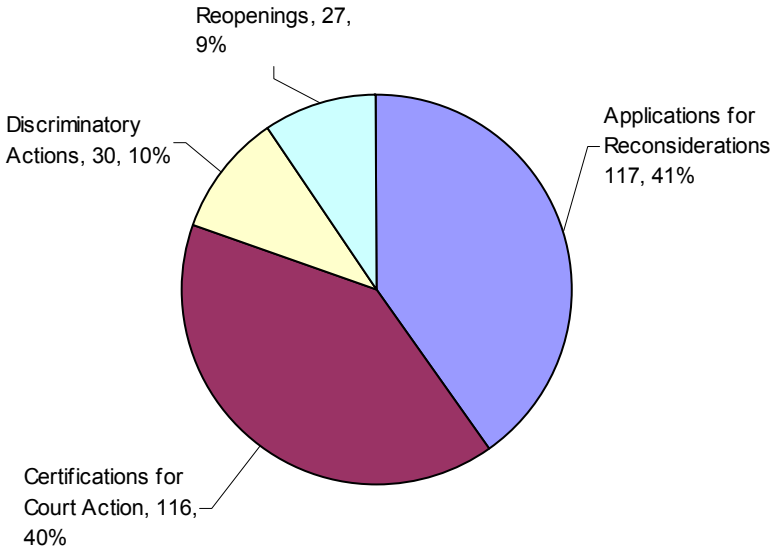
SOURCE	INTAKE
Review Division	4,326
Direct	290
TOTAL	**4,616**

The following two charts show the breakdown of the types of appeals and applications we received in 2008.

APPEALS FROM REVIEW DIVISION BY TYPE



DIRECT APPEALS AND APPLICATION BY TYPE



Merit Decisions

WCAT made 4,114 merit decisions on appeals and applications in 2008, 74 of which concerned applications for certificates for court actions. The remaining 4,040 merit decisions concerned appeals from decisions of the Review Division or Board officers, which may be varied, confirmed, or cancelled by WCAT.

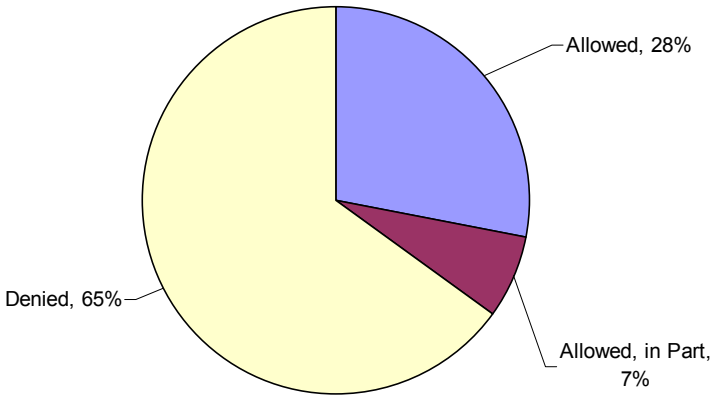
"Vary" means that WCAT varied the previous decision in whole or in part. Accordingly, whether WCAT has fully granted the remedies requested by the appellant on all issues arising under the appeal or merely changed a minor aspect of the previous decision, the decision is considered to have been "varied". "Confirm" means that WCAT agreed with all aspects of the previous decision. "Cancel" means that WCAT set aside the previous decision 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 2008. Appeals from Review Division decisions regarding reopenings are included as compensation appeals.

Appeals		Outcome	
Appeal Type	**Number of Decisions**	**Varied**	**Confirmed**
Compensation	3,878	41%	59%
Relief of Costs	96	28%	72%
Assessments	24	33%	67%
Prevention	16	50%	50%
Discriminatory Actions	23	22%	78%
Direct Reopenings	3	33%	67%

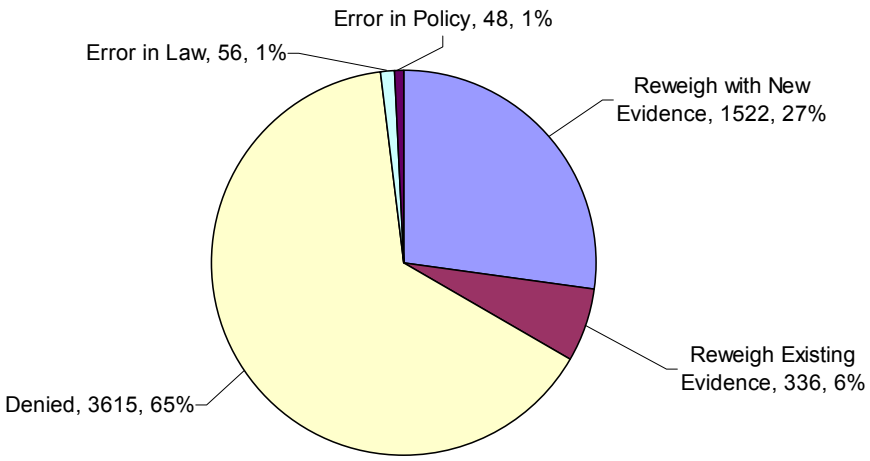
An appeal may raise numerous issues and WCAT may allow or deny the appeal on each issue. In 2008, WCAT decided 5,577 issues that arose out of the 4,040 appeals that led to merit decisions. The following chart shows the percentage of issues for which the appeals were allowed, allowed in part, or denied.

ISSUE OUTCOMES



The following chart shows the percentage of the issues where the appeals on those issues were denied and, if the appeals on those issues were allowed or allowed in part, the reasons for allowing the appeals on those issues.

REASONS FOR ISSUE OUTCOMES



Summary Decisions

WCAT made 1,162 summary decisions on appeals. In 500 (43%) of these decisions, WCAT dismissed the appeal or confirmed that the appellant had withdrawn it. WCAT rejected 502 appeals (43%) because there was no appealable issue or the decision under appeal was not appealable to WCAT. Nine summary decisions suspended appeals.

Of the remaining 151 summary decisions, 83 decided applications for reconsideration, 63 denied requests for extensions of time to appeal, and 5 referred a matter back to the Board for a further decision.

Requests for Extensions of Time

WCAT decided 182 requests for extensions of time to appeal, allowing 119 and denying 63.

(e) 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	1610	30%	33%	67%
Section 23 - Permanent Partial Disability	1152	21%	42%	58%
Section 6 - Occupational Disease	585	11%	34%	66%
Section 96(2) - Reopenings	364	7%	29%	71%
Section 29 - Temporary Total Disability	351	6%	38%	62%

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 2008, WCAT decided a total of 4,114 appeals and applications. WCAT decided 2,065 (50% of the total) after convening an oral hearing and decided 2,049 appeals and applications (50% of the total) using the read and review method.

(b) Oral Hearing Weeks

In 2008, WCAT held oral hearings in 13 locations around the province. The following table shows the number of hearing weeks that WCAT held in each location.

Location	Number of Hearing Weeks
Castlegar	4
Courtenay	11
Cranbrook	6
Fort St. John	3
Kamloops	17
Kelowna	21
Nanaimo	15
Powell River	1
Prince George	10
Terrace	4
Victoria	31
Williams Lake	3
Total outside Richmond	**126**
Richmond	255
GRAND TOTAL	**381**

(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 2008. The table does not include assessment or relief of costs appeals as the appellant is always the employer.

	APPELLANT/APPLICANT		
TYPE OF APPEAL OR APPLICATION	**Worker**	**Employer**	**Dependant**
Compensation	92%	7%	1%
Discriminatory Action	44%	56%	0%
Direct Reopening	94%	6%	0%
Prevention	9%	88%	3%
Reconsiderations	93%	6%	1%

(d) Representation

The following table shows the percentage of appeals and applications for which the appellant or applicant had a representative. Representatives may be workers' or employers' advisers, lawyers, consultants, family members, or friends. The percentages refer to appeals and applications that were active at some time during 2008.

	PERCENT REPRESENTED WHERE APPELLANT/APPLICANT IS:		
TYPE OF APPEAL	**Worker**	**Employer**	**Dependant**
Assessment	NA	91%	NA
Compensation	80%	93%	94%
Relief of Costs	NA	97%	NA
Discriminatory Action	29%	94%	NA
Direct Reopening	31%	100%	NA
Prevention	17%	100%	NA
Reconsiderations	76%	100%	50%

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 did not issue any precedent panel decisions in 2008. No precedent panel decisions were pending at the end of 2008.

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 2008, no new referrals were made to the chair and the chair did not issue any referral decisions. At the end of 2008 there were no outstanding referrals to the chair. At the end of 2007 there were three outstanding referrals to the chair. All three were resolved in 2008. Two were withdrawn by the referring vice chair after the board of directors amended the policy that was the subject of the referral. In relation to the third, the board of directors disagreed with the chair's decision that the impugned policy was patently unreasonable and found that the impugned policy was not patently unreasonable and directed WCAT to apply it.

(a) Section 251 Referrals Determined by the Board

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 *Rehabilitation Services and Claims Manual, Volume II* (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.

On April 15, 2008 the board of directors of the Board determined that item #40.00 was not patently unreasonable and directed WCAT to apply it. The board of directors found that the policy is within the range of policy options under the Act. It determined that the focus on the ability to perform the "essential skills" of an occupation is a rational way of defining exceptionality, as a worker who has lost essential skills has lost the benefit of his or her education, training and experience. It found that the focus on essential skills is consistent with the Legislature's objective in section 23(3.2) of the Act which requires the Board to consider the ability of a worker to continue in the worker's occupation or adapt to another suitable occupation. It was also of the view that the policy captures the physical requirements of an occupation in that some physical requirements are within the definition of skills which is "the learned application of knowledge and abilities" and that physical requirements are captured by the assessment as to whether the worker is "no longer able to perform the essential skills needed to continue in the occupation".

However, the board of directors noted that the chair had considered the Best Practices Information Sheet (BPIS #17) and a July 2007 discussion paper in determining the meaning of "skills" in the policy. The board of directors agreed that BPIS #17 needed revision. As a result, it directed the Board to amend the practice to improve the quality and consistency in decision-making and to ensure the intent of the policy was properly applied. On May 29, 2008 the Board issued BPIS #22 (subsequently renamed *Practice Directive* #C6-2). Among other things, the revised practice recognizes that physical requirements may be captured by the definition of "skills" where they are appropriately characterized as "learned abilities" and that this is generally true where a physical requirement represents a necessary element for the majority of jobs in the occupational grouping. For example, a labourer's "learned abilities" may be the ability to swing a hammer efficiently, operate a jackhammer, or climb a ladder.

(b) Section 251 Referrals Withdrawn

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.

On March 19, 2008 the board of directors of the Board signed *Resolution 2008/03/19-01*. The Resolution amended item #67.60 to provide, among other things, that it would be inequitable to reduce a worker's average earnings by including periods of compensable wage-loss in the average earnings calculation. The effective date of the change is May 1, 2008 and it applies to all decisions, including appellate decisions made on or after May 1, 2008. As a result of this amendment to the policy, the vice chair withdrew his referral of the policy to the chair of WCAT under section 251 of the Act.

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* (Prevention 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 cost 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 cost 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.

On May 28, 2008 the board of directors of the Board signed *Resolution 2008/05/28-04.* The Resolution amended item #D24-73-1 to provide that the Board has discretion as to the amount charged under section 73(1) of the Act, up to the maximum amount. The effective date of the change is July 1, 2008 and it applies to all decisions, including appellate decisions, to charge claim costs on or after July 1, 2008. As a result of this amendment to the policy, the vice chair withdrew her referral of the policy to the chair of WCAT under section 251 of the Act.

11. NOTEWORTHY WCAT DECISIONS

Noteworthy WCAT decisions are decisions that have been selected by WCAT staff because they may provide significant commentary or interpretative guidance regarding workers' compensation law or policy, or comment on important issues related to WCAT procedure. Decisions are also selected as noteworthy on the basis that they may serve as general examples of the application of provisions of the Act and regulations, the policies of the board of directors of the Board, or various adjudicative principles.

Noteworthy decisions are not binding on WCAT. Although they may be cited and followed by WCAT panels, they are not necessarily intended to become leading decisions. It is open to WCAT panels to consider any previous WCAT decision in the course of considering an appeal or application.

WCAT issued a large number of noteworthy decisions in 2008. 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 2008, 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 is a Worker

1.2. Whether Person is 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

11.1 Substantive Issues

(a) Mental Stress

Decision: *WCAT-2008-00516* **Panel:** I. MacDonald
Decision Date: February 18, 2008

In this appeal, the worker claimed compensation for a mental stress injury due to the circumstances that occurred at his work over the course of two days. During that time, as an emergency worker, he attended to an acutely ill infant who had to be transported to more than one location for a variety of reasons (including that the closest emergency department was full), the ambulance he was in was nearly in a number of accidents, the road was treacherous, the worker's shift was very long, and he had personal life stressors. The Board accepted the worker's mental stress claim. The employer requested a review by the Review Division which varied the decision, finding that the worker's acute stress reaction was not due to sudden and unexpected trauma arising out of and in the course of employment. The worker appealed to WCAT arguing that his shift had been replete with sudden unexpected events, potential physical threats to his person, and other stressors that had caused a mental stress injury.

WCAT denied the worker's appeal. Although the medical evidence in this case established a causal relationship between the workplace events and the diagnosed mental stress condition, causation in the context of section 5.1 of the Act requires more. The evidence must also show that the mental stress was caused by an event arising out of and in the course of the employment. The question remained whether, legally, the worker suffered an acute reaction and whether what occurred in the course of his employment was sudden, unexpected and sufficiently traumatic to be recognized as causative of the worker's mental stress condition, in the context of section 5.1 of the Act and item #13.30 of the RSCM II. The panel found that the worker's witnessing the respiratory arrest followed by cardiac arrest of a distressed infant would, by any reasonable standard, qualify as an objectively identifiable traumatic event. However, the panel also found that the worker's acute stress disorder was due to a series of events, and not to a sudden and unexpected traumatic event. While there may well have been cumulative stressors that manifested in the worker's diagnosed acute stress disorder, there was not in all the stressful events, whether they were sudden or prolonged, a "sudden event" of the kind and magnitude contemplated by item #13.30.

(b) Average Earnings

Decision: *WCAT-2008-01745* **Panel:** H. Morton
Decision Date: June 12, 2008

This decision is noteworthy as an example of the application of the Board's amended item #67.60 of the RSCM, and Practice Directive #C9-12, regarding the exceptional circumstances exception to the general rule regarding calculation of long-term average earnings. In this case, the worker was injured while employed as a housekeeper at a

care home. The Board accepted her claim for compensation and in time made a decision in respect of her long-term average earnings (wage rate). The Board relied on the worker's earnings in the 12 months prior to her injury. The worker objected to this calculation because her earnings for the first 4 months were lower as she was initially employed on a "casual on call" basis. The Review Division varied the decision in part but rejected the worker's argument that the long-term wage rate should be determined under section 33.4 of the Act. Section 33.4 confers a statutory discretion to determine the worker's wage rate on an amount that the Board considers best reflects the worker's loss of earnings, where exceptional circumstances exist such that the Board considers that it would be inequitable to base them on the worker's earnings from the 12 months prior to injury. WCAT allowed the worker's appeal. The panel found that the worker had experienced a change in employment status to that of a permanent full-time employee and this represented a fixed change in her earnings pattern. This constituted an exceptional circumstance which would make it inequitable to base her long-term wage rate on her earnings from the 12 months prior to her work injury. The panel concluded that the worker's average earnings should be determined using only the earnings in the period of time following the fixed change in her employment.

(c) Temporary Partial Disability Benefits (Wage Loss)

Decision: *WCAT-2008-00584* **Panel:** L. Alcuitas-Imperial
Decision Date: February 22, 2008

This decision is noteworthy for its analysis of the factors to be considered when determining whether it is unreasonable for a worker to refuse selective/light employment. The Board terminated the worker's temporary disability (wage-loss) benefits on the basis that it was unreasonable for the worker to refuse selective/light employment. The Review Division confirmed this decision. WCAT denied the appeal. The panel found that it was unreasonable for the worker to refuse the selective/light employment the employer offered him. The panel reviewed the four criteria outlined in item #34.11 of the RSCM II which must be met to ensure that an early return to work is appropriate.

The first criterion is whether the worker is capable of undertaking some form of suitable employment. This criterion involves examining the worker's potential capabilities. The panel found the worker was capable of undertaking the employment the employer offered him. She preferred the opinion of a nurse advisor over the worker's attending physician as the advisor specifically addressed the worker's potential capacity to perform the light duties offered. The second criterion is that the work must be safe. This criterion involves a specific examination of the worker's restrictions and limitations with reference to the specific light duties offered. Again, the panel placed greater weight on the nurse advisor's opinion because she demonstrated an understanding of the worker's sitting and standing tolerances and gave a clear opinion that the light duties position could safely accommodate those tolerances. There was no contrary medical opinion on this point, as the Board did not consult the worker's family physician about the proposed light duties. While it may be preferable for the Board to consult with the

attending physician before making a decision, the policy does not require this. The panel found no dispute that the third criterion had been met, that is, being that the work was productive.

The fourth criterion is that, within reasonable limits, the worker must agree to the arrangement. The panel found that it was unreasonable for the worker to have refused the light duties. She said that perhaps a more reasonable approach would have been for the worker to ask for more details about the proposed light duties, offer to consult with his family physician and ask for modifications to the light duties once they were undertaken. The worker also could have brought his concerns to the attention of the Board officer. The panel found that the policy effectively places an onus on the worker to investigate and consider the light duties offer and to bring his concerns to the attention of the employer, health professionals and the Board. This now appears to be the Board's approach after the January 2005 policy amendments. In the previous version of the policy, a light duties arrangement had to be approved by the worker's family physician. This is no longer the case. The Board is now the final arbiter, short of the appeal process, for deciding whether the worker's refusal to undertake light duties is reasonable.

Decision: *WCAT-2008-01545* **Panel:** S. Yeager, D. Dukelow, R. Lane
Decision Date: May 27, 2008

This three-person non-precedent panel determined that temporary wage loss benefits payable to a teacher in the vacation months of July and August should be paid to the employer instead. The worker's claim was reopened in July for surgery. The Board advised the worker that as a teacher whose employer had paid his vacation salary in advance, any wage-loss benefits to which he was entitled for periods in July and August would be directed to the employer. The Review Division upheld the decision.

WCAT denied the worker's appeal. Section 34(1) of the Act provides that, in fixing the amount of periodic payments of compensation, consideration must be had to payments, allowances or benefits which the worker may receive from his employer during the period of his disability, including a pension, gratuity or other allowance provided wholly at the expense of the employer. A sum deducted under this section may be paid to the employer. The panel found that the purpose of section 34 is to prevent double compensation to the worker and double liability to the employer. The objective of the Act is not to result in a situation where it is profitable to have an injury late in the school year. For this reason, a worker cannot be in receipt of paid vacation from the employer, and also receive wage-loss benefits for temporary disability from the Board. Receiving both wage loss and vacation pay for the same time period constitutes double compensation. The panel considered the prepayment of vacation time was an allowance or benefit, as discussed in section 34(1) of the Act, whether it was paid in advance, or arranged through a deferred payment scheme over 12 months. What was essential was whether the worker received a benefit paid for by the employer for the time the worker was disabled. There was no requirement in the statute that payments actually be made during the period of disability. If the worker was in receipt of a benefit

such as prepaid vacation, section 34(1) applies. In coming to this conclusion, the panel considered that the majority of teachers were not eligible for Employment Insurance benefits in the summer because they had already collected a salary for this period of time.

(d) Assessments (Employer Registration)

Decision: *WCAT-2008-00639* **Panel:** W. Hoole
Decision Date: February 27, 2008

This decision is noteworthy for its analysis of the responsibility of an employer to register with the Board. Where the Board promised not to levy penalties or interest on employers who voluntarily registered, and the Board subsequently levies a penalty or interest, it is doubtful that WCAT has the authority to provide relief in the nature of promissory estoppel or equitable estoppel.

In this appeal, the Board had advised the employer by letter that it may be required to register with the Board. The employer subsequently voluntarily registered. It had been in operation for approximately 15 years. The Board advised the employer that the effective date for its registration was approximately a year and a half before it actually registered. The employer disagreed, arguing that the effective date should be the date of voluntary registration and it relied on the wording in the Board's letter which the employer argued assured it that no penalties or interest would be levied if they came forward voluntarily. It argued that retroactive registration was indistinguishable from a penalty and the Board should be held to its promise.

WCAT denied the appeal. The panel doubted that WCAT has the authority to provide substantive relief on the basis of the equitable principles of promissory or equitable estoppel. Even if it did, the panel would not grant such relief because the Board's letter did not in fact contain any promise. The letter had indicated that employers would be responsible for retroactive premiums to ensure fairness between the delinquent employer and other employers that were properly registered. WCAT also rejected the employer's argument that it was the Board's responsibility to notify it of its obligation to register. The Board had placed an injured worker with the employer six years ago as part of a retraining initiative. At that time, the Board did not notify the employer of this requirement, nor did the Board inquire about the employer's registration status. Again, the panel questioned his authority to grant an equitable remedy. Even if WCAT had this authority, the panel would not grant it because the responsibility under the Act and policy for registration rests with the employer.

(e) Administrative Penalties

Decision: *WCAT-2008-02573* **Panel:** T. White, W. Hoole, G. Riecken
Decision Date: August 29, 2008

This decision is noteworthy as it provides an analysis of the administrative penalty and claims cost levy provisions of the Act and *Occupational Health and Safety Regulation* (Regulation) and, in particular, it reviews the criteria to be considered in determining quantum when imposing a penalty or levy. In this case, four workers died in a barge and two others were seriously injured. The Board issued two Inspection Reports. The second Inspection Report imposed an administrative penalty of $20,111 for violation of section 3.1(2) of the Regulation and section 115(1)(a)(i) of the Act. The Board also imposed a claims cost levy of $110,541.55 pursuant to section 73 of the Act (the statutory maximum), as the deaths of two of the workers and serious injury of one worker were due substantially to the failure of the employer to adopt reasonable means for the prevention of injuries or deaths, and their failure to comply with the Regulation. The Review Division varied the second order regarding the claims cost levy, but only in respect of which workers' claims costs should form the basis of the claims cost levy. The WCAT panel varied the Review Division decision in this respect (effectively restoring the original Board's decision on the issue), finding that the employer was properly subject to claims cost levies in relation to three of the workers.

With regard to the quantum of the claims cost levy, the panel noted that item #D24-73-1 of the Prevention Manual addresses the imposition of a claims cost levy. The board of directors of the Board amended the policy effective July 1, 2008 and the new policy applied to this appeal. The panel considered a number of factors including the nature of the violation, the nature of the potential hazard created, the employer's history, and the degree of actual risk created by the violation in determining the appropriate quantum of the levy. The panel concluded that the amount of each claims cost levy is to be calculated using 75% of the cost of compensation paid to each worker, or his dependant(s), up to the statutory maximum set out in section 73(1) of the Act at the time of the accident.

11.2 WCAT Procedural Issues

(a) WCAT Jurisdiction

Decision: *WCAT-2008-00457* **Panel:** J. Callan
Decision Date: February 13, 2008

The chair determined that WCAT does not have the authority to set aside and reconsider a previous Appeal Division decision on the basis of jurisdictional error (common law grounds). She directed that item #15.24 of WCAT's MRPP be amended accordingly. In this case, the worker requested reconsideration of an Appeal Division decision which had been rendered before the Appeal Division ceased to exist in March 2003. There was no reconsideration application on file relating to this Appeal Division

decision at that time which could have been be transferred to WCAT under the transitional provisions of Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*. The chair adopted the reasoning in *WCAT-2007-02083* in relation to this issue and found that her conclusion was supported by the judgment of the B.C. Supreme Court in *Solowan v. British Columbia (Attorney General)*, 2007 BCSC 752.

Decision: *WCAT-2008-01391* **Panel:** D. Sigurdson
Decision Date: May 9, 2008

This decision is noteworthy because it provides an analysis of the jurisdiction of the Review Division and WCAT to decrease a permanent partial disability award where such an award is appealed. In this case, the worker received a functional permanent disability award equal to 7.86% of total disability. Two years later the Board reassessed the worker's award to determine if the matter should be reopened on the basis of a significant change in the condition. The Board concluded that the worker's condition had not experienced a significant change and left the award unchanged. The worker requested a review of that decision but did so only on the grounds that she was entitled to an award for permanent chronic pain in respect of her neck. The employer argued, among other things, that the worker's neck condition had improved and that her award should have been reduced. The worker objected to the employer's argument on the basis that the employer was not entitled to make that argument as it had not brought its own appeal of the Board's decision. The Review Division reduced the worker's award to 4.5% of total disability. The worker appealed and challenged the jurisdiction of the Review Division to lower the award.

WCAT denied the worker's appeal. The panel referred to the *Review Division – Practices and Procedures* at item #B3.6.2 which notes that it may be reasonable to include a new issue within the scope of review. The panel found that it was clear that the employer in its submissions to the Review Division raised the issue of the appropriate amount of the worker's entitlement to an award for her neck. As the decision was already under review, the panel concluded that it was proper for the Review Division to continue with the request for review when the employer had identified a new issue within that decision.

Similarly, WCAT's MRPP at item #14.30 sets out the scope of a WCAT decision. This item notes that WCAT panels will normally restrict a decision to the issues raised by the appellant in the notice of appeal, but have the discretion to address issues raised by a respondent and to address issues not expressly raised by either party. Item #14.30 provides for an exception to this general rule where the subject of an appeal is entitlement to a permanent partial disability award. In those appeals, the panel may address any aspect of the permanent partial disability award decision without notice to the parties. This may on occasion adversely affect the appellant. Item #14.30 specifically notes that a panel may increase, decrease, or confirm a permanent partial disability award when a permanent partial disability award decision has been appealed. The panel concluded that this item confirmed her authority to review the worker's award.

(b) WCAT Extensions of Time

Decision: *WCAT-2008-00058* **Panel:** J. Callan
Decision Date: January 8, 2008

This decision was a reconsideration decision by the chair. Section 243(3) of the Act contains a residual discretion to deny an extension of time application (EOT) even when the requirements of sections 243(3)(a) and (b) of the Act had been met. Sections 243(3)(a) and (b) require that special circumstances existed which precluded the filing of the appeal on time and that an injustice would otherwise result if the EOT were not granted. The original panel's statutory interpretation of the word "may" in section 243(3) was not patently unreasonable. Given the presumption of consistent expression, it must be presumed that the legislature would have used "must" rather than "may" in section 243(3) if it had intended to establish a duty rather than a discretion to grant an EOT.

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 2008, WCAT received 126 applications for reconsideration and issued 80 stage one decisions. Of the stage one decisions issued, 20 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	15	2	13
Common Law Grounds	53	18	35
Both Grounds Alleged	12	0	12
TOTAL	**80**	**20**	**60**

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 2008, WCAT allowed 18 applications for reconsideration on common law grounds. Of those 18 allowed applications, 12 were allowed on the basis of a breach of procedural fairness, and 6 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 6 allowed on the basis of a patently unreasonable error, 2 were decisions involving WCAT decisions affected by the B.C. Supreme Court decision *Cowburn v. Workers' Compensation Board of British Columbia*.

13. JUDICIAL REVIEW OF WCAT DECISIONS

A party may apply to the B.C. 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 decreased in 2008 from 2007. In 2007, 62 judicial review applications were served on WCAT. In 2008, 40 judicial review applications were served on WCAT.

13.2 Judicial Review Decisions

The following court decisions were issued in relation to judicial review applications in respect of WCAT decisions.[1]

(a) *Gogol v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2008 BCSC 489

Decision under review: *WCAT-2007-01725*

The Petitioner was injured on what was to have been his last day of work before being laid off by his employer. The Board denied the Petitioner temporary disability (wage loss) benefits. It determined that because of the layoff, there was no work for the Petitioner to return to and therefore he had lost no time from work because of the injury. Upon being told this he advised the Board that he would have no choice but to apply for Employment Insurance benefits. The Review Division of the Board confirmed the Board's decision, stating that there was "insufficient evidence to conclude that the worker would, if not injured, have immediately sought new employment". WCAT denied the Petitioner's appeal. WCAT concluded that the Petitioner was not entitled to wage loss benefits because there was insufficient evidence that the Petitioner suffered a real or potential loss of income due to the accident. The panel considered the Petitioner's statements that he would have "to go on EI" as evidence that he did not intend to seek other employment. The panel also considered a letter from the Petitioner's union regarding job opportunities that the Petitioner could have pursued had the accident not occurred. However, because the Petitioner provided this letter to the Review Division five months post-injury and one month after the Review Division decision, WCAT viewed this time lapse as "very significant" and preferred the "employment information closer in time to the actual injury".

On judicial review, the Court set aside the WCAT decision and remitted it back to WCAT to reconsider. The Court found that the issue before WCAT was whether the Petitioner would have had the opportunity for other employment if he had not been injured. The Court noted that Board policy (item #34.32 of the RSCM II), which is binding upon WCAT, creates a rebuttable presumption in favour of the worker. The Court found that WCAT improperly reversed the presumption by placing the burden of proving a potential loss of income on the Petitioner, and thereby made a patently unreasonable error. Given the presumption, it was open to WCAT to reject the

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

Petitioner's claim only if there was some evidence that the Petitioner, if he had not been injured, would not have sought or obtained other work. The Court found that there was no such evidence before WCAT. WCAT had relied on the Petitioner's comments to the Board that he would seek Employment Insurance benefits. However, these comments were made in the context of the Petitioner having suffered an injury, being unable to work, and being denied workers' compensation benefits. The comments are not relevant to the issue that was before WCAT, namely whether the Petitioner would have sought employment if he had not been injured. There was therefore no evidence to rebut the presumption and therefore no rational basis for WCAT's conclusion. The decision was patently unreasonable.

On the question of the applicable standard of review, the Court found that it was not necessary to consider the impact of the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, on the patent unreasonable standard set out in section 58 of the *Administrative Tribunals Act* as the Petitioner was content to rely on the law as it stood before *Dunsmuir*. The Court did rely on *Dunsmuir* for the proposition that an exhaustive review is not necessary in every case to determine the standard of review and that the Court can rely on existing jurisprudence. Applying this rule, the Court concluded that patent unreasonableness was the appropriate standard of review as that was the applicable standard in two prior B.C. Supreme Court decisions which involved similar issues.

Lastly, the Petitioner was significantly late in filing his application for judicial review. He had originally attempted to appeal WCAT's decision to the Review Division. WCAT took no position on the application to extend the time to file and conceded that there was no prejudice to the tribunal. The Court granted an extension of time on the basis that the Petitioner had clearly demonstrated that he wished to challenge the WCAT decision immediately after the decision was rendered but appeared confused as to the appellate structure, which had been extensively changed in 2003.

(b) *Johnson v. British Columbia (Workers' Compensation Board)*

Decision under review: *WCAT-2005-03622-RB*

This proceeding has to date been the subject of five decisions by the courts, three of which were issued in 2008, and has not yet been resolved. The controversy relates to a policy of the Board (item #50.00 of the RSCM) that provides that interest on retroactive wage loss and pension lump sum payments will only be made where it is determined that "a blatant Board error…necessitated the retroactive payment".

In this case, the Review Board awarded the Petitioner retroactive wage loss benefits. That decision was issued before the effective date of the interest policy. When the Board implemented the decision, which occurred after the effective date of the policy, the Board denied the Petitioner's request for interest and applied the policy. The Board determined that it had not made a "blatant Board error". The WCAT chair appointed a precedent panel under section 238(6) of the Act to hear the Petitioner's appeal of the

Board's interest decision. The WCAT panel denied the appeal, finding that the policy applied to the Petitioner because it was retrospective, not retroactive, and because there was no "blatant Board error". The WCAT decision did not expressly consider the question of whether the interest policy was patently unreasonable.

The Petitioner's judicial review petition was certified as a class action (see 2007 BCSC 24) and the B.C. Supreme Court subsequently determined that the Board's interest policy was patently unreasonable (see 2007 BCSC 1410). The Court did not find it necessary to consider whether WCAT erred in respect of its conclusion that the policy was retrospective in application. WCAT's decision was set aside as patently unreasonable and the appeal was sent back to the WCAT precedent panel to rehear. WCAT subsequently reconsidered the appeal and determined that the Court's decision was determinative of the issue (see *WCAT-2007-04002*). Therefore, there was no purpose in referring the policy to the board of directors of the Board pursuant to the process set out in section 251 of the Act for challenging Board policies. As no new interest policy had yet been created, the panel referred the matter of interest back to the Board to adjudicate as the panel determined that it was not one that WCAT should adjudicate in a policy vacuum.

The Board appealed the B.C. Supreme Court decision which found the interest policy to be patently unreasonable. The B.C. Court of Appeal allowed the appeal on the basis that that the chambers judge purported to overturn a WCAT decision on an issue that was not before WCAT, namely whether the interest policy was patently unreasonable (see 2008 BCCA 232). The Court quashed the order of the B.C. Supreme Court and referred the matter back to the B.C. Supreme Court for consideration of the issues in the petition that remain to be determined. These were: (1) whether the court can (or should) consider the legality of the new interest policy directly and without reference to WCAT's decision, and (2) the retroactivity issue. The B.C. Court of Appeal noted that it is fundamental to judicial review of decisions or orders of tribunals that review be confined to those matters that were determined by the tribunal. Here, the chambers judge decided in the first instance the issue of the legality of the new interest policy on application of the patently unreasonable test as though that issue ought to have been decided by the tribunal. The Petitioner argued that his petition challenged the legality of the new interest policy on the basis of a direct review of the policy itself, without reference to WCAT. The Court noted that it seemed this argument was not made to the chambers judge and raised issues such as the scope of the relief sought in the petition and whether the Petitioner could make such an attack without first exhausting his internal remedies under the Act. As those were matters the chambers judge was not asked to consider, the Court determined that it should not consider them at first instance.

On referral back, the matter was assigned to the same judge who heard the petition in the first instance. The Board applied for an order that the judge disqualify herself from hearing the matter on the basis that there is a reasonable apprehension that she would be biased in deciding the procedural issues set out by the B.C. Court of Appeal as she had already decided the substantive question of whether the policy was patently

unreasonable and whether a class should be certified. The Court dismissed the Board's application (see 2008 BCSC 1386). The judge noted that her impartiality is presumed and that the Board must demonstrate serious grounds for the apprehension that she is biased. The fact that a judge previously ruled against a party is insufficient. She noted that until the substantive decisions she made in the previous decisions are overturned by the B.C. Court of Appeal, any other judge who would hear the matter would be bound by her conclusions. The underlying procedural issues have not yet been heard.

Meanwhile, the Board had also appealed the chambers judge's class certification decision to the B.C. Court of Appeal. The issue on appeal, in general terms, is whether the judicial review proceedings ought to have been certified as class proceedings. When the appeal came on for hearing, the B.C. Court of Appeal adjourned the proceeding on the basis that the matters referred back to the B.C. Supreme Court had yet to be heard (see 2008 BCCA 436). The Court determined that at least at this point the appeal has become academic and to proceed would not respect the policy that underpins the mootness doctrine.

(c) *Redae v. British Columbia (Workers' Compensation Board)*, 2008 BCSC 956

Decision under review: *WCAT Summary Decision dated October 18, 2007*

In this case, WCAT summarily dismissed the Petitioner's appeal pursuant to section 31(1)(f) of the *Administrative Tribunals Act* as having no reasonable prospect for success. In 1993, the Petitioner injured the right side of her body as a result of a fall at work. She received wage loss benefits for a period of time and then returned to work. Some time later her doctor advised the Board that she continued to complain of pain in her right shoulder and arm, among other things, and requested a reopening of her claim. The Appeal Division ultimately found that she had recovered from her injuries when she returned to work and that her ongoing symptoms were not related to the accident. A few years later, after the Petitioner again requested a reopening, the Appeal Division found that the first Appeal Division decision was binding upon it and that the Petitioner's complaints, including a diagnosed chronic pain disorder, were not compensable. The Board later denied the Petitioner's third reopening request after determining that her current complaints were the same as her earlier complaints, which had been found to be non-compensable. The Review Division agreed.

On appeal, WCAT's summary dismissal was based on the fact that both of the Appeal Division decisions were binding upon WCAT and that they had already concluded that the Petitioner had recovered from her compensable injuries. On judicial review, the Petitioner alleged only that WCAT had erred when it found that she did not have post traumatic stress disorder or a pain disorder related to her claim. The Court disagreed, determining that WCAT had made no such findings as it merely determined that the appeal could not succeed because those findings had been made by earlier appeal bodies. The Court determined that the standard of patent unreasonableness applied to the WCAT decision. It found that the decision was not patently unreasonable and was, in fact, correct. Although the Court found that the standard was patent

unreasonableness for the purposes of this case, it emphasized that it was not deciding the question of what effect the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, has on the legislated standard of review set out in the *Administrative Tribunals Act* as it did not have the benefit of full argument from a represented Petitioner.

The Court accepted WCAT's submission, based on the B.C. Court of Appeal's decision in *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, that WCAT performs a gate keeping function when it considers whether to summarily dismiss an appeal and that such discretionary decisions are subject to the section 58(3) patent unreasonableness standard set out in the *Administrative Tribunals Act* for discretionary decisions. Ultimately, the Court found that WCAT "exercised its discretion appropriately and there is not even a scintilla of a suggestion that it acted in bad faith or for an improper purpose". The decision was based on relevant factors and statutory requirements were taken into account.

The Petitioner's application to the B.C. Court of Appeal for indigent status and an extension of time to appeal the B.C. Supreme Court decision was denied on the basis that there was no plausible ground of appeal (*Redae v. Workers' Compensation Appeal Tribunal*, 2008 BCCA 383).

(d) *Lavigne v. British Columbia (Workers' Compensation Review Board)*, 2008 BCSC 1107

Decisions under review: *WCAT-2003-03236-RB* and *WCAT-2007-00480*

The Petitioner was injured in an accident and the Board accepted her claim for compensation. The Board based her initial average earnings (wage rate) on her three months' earnings immediately prior to the date of injury. At the eight-week review of her wage rate, the Board based her long-term wage rate on her one-year earnings prior to the date of injury. Doing so resulted in a lower wage rate. The long-term wage rate decision was made prior to the changes to the Act in 2002 and was therefore made under the former section 33(1), which provided, among other things, that a worker's wage rate could be calculated on the "probable yearly earning capacity of the worker at the time of the injury". Board policy (item #67.20 of the RSCM I) provided that the three-month figure can be used where there is "a relatively fixed change in the worker's earning pattern which is deemed likely to continue in the future". Some time after the decision was issued, the Petitioner argued that her long-term wage rate should have been determined using her time of accident earnings or at least the three-month figure as at the time of injury she was working both as a flag person and also a first aid attendant and first aid attendants are paid more. Furthermore, she argued that she had a job offer as a first aid attendant that was to have begun immediately after her accident employment ended. However, when the Board investigated with a view to possibly reconsidering its decision, her putative new employer denied offering her a first aid job.

By then the Petitioner had already appealed the Board's long-term wage rate decision to the former Review Board and received disclosure of the Board file. The Petitioner made submissions to the Review Board but did not know that the putative new employer had denied offering her a first aid job. The Petitioner did not request an oral hearing. When the Review Board was subsequently eliminated, her appeal was transferred to WCAT and heard on the basis of written submissions. The Petitioner relied on her submissions to the Review Board. The Petitioner received updated disclosure from the Board after her original submissions to the Review Board but before WCAT issued its final decision. This disclosure would have contained the employer's denial. WCAT did not seek submissions on the updated disclosure and the Petitioner did not request an opportunity to make submissions.

WCAT denied the appeal and concluded that there was insufficient evidence to establish that there was a fixed change in the Petitioner's pattern of employment that likely would have continued into the future. The vice chair relied on the employer's denial as well as the lack of other evidence confirming a future contract or job offer and general uncertainties in the road construction industry. The Petitioner applied to WCAT for reconsideration of the WCAT decision on grounds of procedural fairness, arguing that there should have been an oral hearing given the conflict in the evidence. She also submitted a new letter from the putative employer, clarifying his evidence. The Petitioner did not request a reconsideration on the basis of new evidence, pursuant to section 256 of the Act. Although the employer denied promising her a job, he said he felt certain she would have had very little trouble securing full-time employment as a first aid attendant. On reconsideration, WCAT found that it was fair not to hold an oral hearing and that the decision was not patently unreasonable. The panel noted that the Petitioner only requested one after her appeal was denied and that it was not clear what new evidence would have been generated in an oral hearing.

On judicial review, the B.C. Supreme Court determined that the standard of review of the original WCAT decision was patent unreasonableness and the standard of review of the reconsideration decision was correctness. For issues of fairness, the standard was whether the appeal was fair. The Court concluded that the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, which collapsed the common law patent unreasonableness and reasonableness standards into a single standard, does not affect the statutory patent unreasonableness standard set out in section 58 of the *Administrative Tribunals Act*.

In respect of the original WCAT decision, the Court concluded that it was not patently unreasonable on the evidence before the vice chair as there was some evidence on which the vice chair could conclude that, at the time of her injury, the Petitioner was more of a flag person than a first aid attendant. The Court did not directly address the issue of fairness arising from the original WCAT decision. Instead, the Court considered the reconsideration panel's analysis of that issue. In so doing, the Court expressed doubts as to whether the reconsideration panel had even seen the purported letter from the putative employer that the Petitioner submitted to WCAT in the course of the reconsideration process. The letter was not referenced in the reconsideration decision.

The Court found that if the panel had seen the letter he would not have dismissed it outright as not constituting new evidence. The Court noted that in a later WCAT decision relating to the Petitioner's entitlement to a permanent disability award, a decision not under review, a vice chair found the letter persuasive in relation to the issue of the nature of her employment at the time of the injury when setting her long-term wage rate for pension purposes (under the former provisions, the pension wage rate could be different than the long-term wage rate for wage loss purposes). The Court considered that this internal inconsistency might have been avoided if the reconsideration panel had had the contents of the letter before him.

Ultimately, the Court decided not to make a finding on the fairness issue but rather to refer the question back to the reconsideration panel to determine after considering the letter and the fact that an oral hearing would have required the putative employer to explain the discrepancy between the Board records and the letter. The Court also directed the panel to consider whether the letter constituted new evidence. In a subsequent amendment to the decision, the Court directed that the questions be referred back to the tribunal generally as opposed to the reconsideration panel specifically as the vice chair who decided the reconsideration was no longer a WCAT vice chair.

Lastly, the Petitioner also argued that the former Review Board, represented in this proceeding by the Attorney General of British Columbia, was required to decide her appeal instead of WCAT. She argued that she had appealed to the Review Board four months before it was eliminated and as a result of the transfer to WCAT lost one level of appeal (as she could have appealed the Review Board decision to the Appeal Division). The evidence from the Review Board indicated that it had been waiting for submissions from the Petitioner's employer at the time the Review Board was eliminated and no panel had been assigned. The Court dismissed the Petitioner's complaint as the transitional provisions of the statute that eliminated the Review Board specifically required Review Board proceedings like the Petitioner's be transferred to WCAT.

14. OTHER COURT DECISIONS

There were no other court decisions of significance to WCAT issued in 2008.