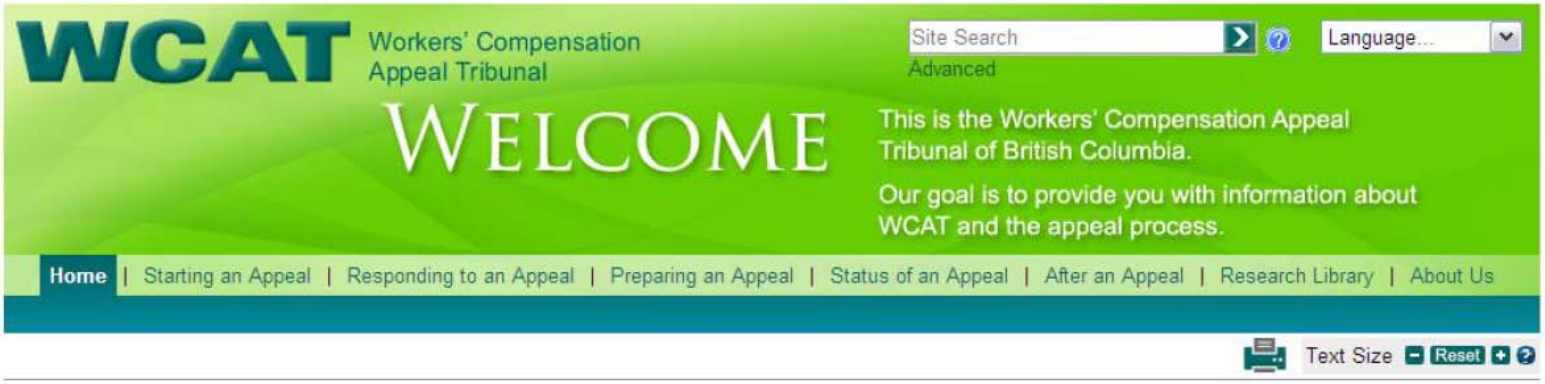
Workers' Compensation Appeal Tribunal

2009 Annual Report

For the year January 1 to December 31, 2009



- Manual of Rules of Practice and Procedure (MRPP)
- Information Guides
- Forms
- Search Our Decisions
- Workers Compensation Act and Regulations
- WorkSafeBC Policy
- Workers' Advisers
- Employers' Advisers
- FAQs
- Alerts
- News
- Contact Us
- Virtual Tour


STARTING AN APPEAL


RESPONDING TO AN APPEAL


PREPARING AN APPEAL


STATUS OF AN APPEAL


AFTER AN APPEAL

WCAT is an appeal Tribunal located in Richmond, British Columbia. WCAT is the final level of appeal in the workers' compensation system of British Columbia and is independent of WorkSafeBC.

WCAT hears appeals from most Review Division decisions. The Review Division provides the first level review for most WorkSafeBC decisions concerning compensation, vocational rehabilitation, assessments and occupational health and safety (prevention). Some Review Division decisions are not appealable to WCAT.

WCAT also hears appeals directly from WorkSafeBC decisions concerning discriminatory action complaints and applications to reopen claims. WCAT also provides certificates to the court concerning the status of parties to legal actions.

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

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150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
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Toll Free: 1-800-663-2782
Fax: (604) 664-7899
Website: www.wcat.bc.ca

March 15, 2010

The Honourable Murray Coell
Minister of Labour
Room 247
Parliament Buildings
Victoria, BC V8V 1X4

Dear Minister,

RE: The Workers' Compensation Appeal Tribunal's 2009 Annual Report

I am pleased to forward the 2009 Annual Report of the Workers' Compensation Appeal Tribunal for the year ended December 31, 2009. 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, operating as WorkSafeBC
BCCAT	British Columbia Council of Administrative Tribunals
FIPPA	*Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165
GECA	*Government Employees Compensation Act*, R.S., 1985, c. G-5
MRP	former Medical Review Panel
MRPP	*Manual of Rules of Practice and Procedure*
Prevention Manual	*Prevention Division Policy and Procedure Manual*
Occupational Health and Safety Regulation	*Occupational Health and Safety Regulation*, B.C. Reg 296/97
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, 2009	*Workers Compensation Amendment Act, 2002* S.B.C. 2009, c. 7 (Bill 8, 2009)
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

In 2009, the Workers' Compensation Appeal Tribunal (WCAT) was engaged in:

- improving access to the workers' compensation appeal system for parties to appeals and their representatives;
- updating practices, procedures, rules, and forms; and
- managing the transition to WorkSafeBC's new Claims Management Solutions (CMS) system.

In order to improve access, we introduced a new website at www.wcat.bc.ca, which describes each stage of the appeal process and is designed to assist appellants, respondents, and their representatives during the appeal process. The cover of this annual report has been copied from the "home" and "about us" pages of the website. In conjunction with the new website, we also introduced 11 plain language information guides, most of which are available on our website in Punjabi and Chinese.

We undertook an extensive revision of our *Manual of Rules of Practice and Procedure* (MRPP). The revised MRPP includes amendments that flowed from our experience in our first few years of operation and is organized to follow the order of the appeal process. We also introduced new or revised forms, which are designed to ensure that we receive all of the information we require to initiate and process an appeal.

In May, WorkSafeBC converted its case management system to CMS. All vice chairs and administrative staff received training to prepare them for the transition to the new system and to enable them to use it as efficiently and effectively as possible.

In 2009, WCAT continued to be a high-volume tribunal, with intake of over 4,700 appeals. We made decisions on the merits of 3,400 appeals and dealt with over 1,100 other appeals through summary decisions. Our administrative staff assisted workers and employers by providing information about the appeal 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 2009.

Jill Callan, Chair

2. WCAT'S ROLE WITHIN THE WORKERS' COMPENSATION SYSTEM

Workers' Compensation Appeal Tribunal (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 B.C. Supreme 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 provided 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 2009

In 2009, the only changes made to the Act were amendments to sections 1(d) and 6.1 by the *Workers Compensation Amendment Act, 2009*, S.B.C. 2009, c. 7 (Bill 8, 2009). It added to the rebuttable presumption in section 6.1 of the Act in favour of firefighters by including "primary site lung cancer" as a disease that must be presumed to be due to the nature of the worker's employment as a firefighter, unless the contrary is proven. This is the ninth cancer added to the list of occupational diseases for firefighters and applies only to non-smoking firefighters. More specifically, the Act provides that the

presumption applies only if (a) the worker has, in his or her lifetime, smoked a combined total of fewer than 365 cigarettes, cigars and pipes, or (b) the worker has been a non-smoker of tobacco products immediately before the date on which the worker is first disabled from that disease for the minimum period that may be prescribed, which minimum period may be different for different types or amounts of previous tobacco product usage. The *Firefighters' Occupational Disease Regulation* was repealed and a new one substituted on March 18, 2009.

The *Workers Compensation Amendment Act, 2009* received royal assent on March 12, 2009 and came into force by regulation on March 18, 2009. The statute included transition provisions.

There were no amendments in 2009 to the *Administrative Tribunals Act* or to the federal *Government Employees Compensation Act*, R.S., 1985, c. G-5 (GECA).

(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.

In 2009 WCAT undertook an extensive revision of the MRPP. The purpose of this revision was twofold: to reorganize the MRPP into a more "user friendly" document, and to make necessary changes that reflect WCAT's experience to date. In the course of the revision process WCAT requested, and received, comments from stakeholder groups within the workers' compensation system. The revised MRPP came into effect on November 3, 2009 and is available on WCAT's website (www.wcat.bc.ca).

The revision resulted in many additions, deletions and modifications as well as a renumbering of all chapters and items. It reorganized the MRPP so that it generally follows the progress of an appeal through WCAT. The revision affected every chapter and every item in some measure. The following are only some of the changes made in the revised MRPP:

- renames “read and review appeals” to “appeals proceeding by written submission”;
- sets out what happens to an appeal when a single member is unable to complete his or her duties (item 2.7.4);
- clarifies and expands when an employer has standing to appeal or participate in an appeal (item 4.7);
- amends a “rule” to say that telephone notification is not sufficient to initiate an appeal as an appeal must be in writing (item 5.1.2);
- sets out that pre-hearing conferences will be recorded (item 7.4);
- elevates to a “rule” the item relating to applications for a stay of the decision under appeal and amends one of the factors a panel will consider to replace “serious irreparable harm” to “serious harm” (item 8.3);
- clarifies what is a related or pending matter that would allow WCAT to suspend an appeal pursuant to section 252 of the Act (item 8.4.4);
- clarifies what “legal precedent is not binding” in section 250(1) means (item 9.4.3);
- amends a “practice directive” in relation to lawfulness of policy referrals made to the WCAT chair pursuant to section 251 of the Act to direct, among other things, that referrals to the chair be made in a numbered decision (item 10.1);
- clarifies the “Rules for Expert Evidence” to require, among other things, a party to provide WCAT with a written report in advance of attendance by an expert at an oral hearing (item 11.6);
- clarifies a “practice directive” in relation to orders for the production of existing evidence by requiring parties to request an order from WCAT at least 14 days before the date of the oral hearing or the deadline for written submissions (item 11.7);
- states that WCAT will not accept or consider documents submitted in a language other than English unless the document is accompanied by a version translated

into English and a signed translator's declaration (item 11.9). The expense a party incurs associated with translating documents may be claimed as an appeal expense (item 16.1.3);

- creates a "rule" that a written notice of examination given by WCAT pursuant to section 249 of the Act (independent health professionals) is an order to the worker to appear at the time and place stipulated (item 12.5.2);

- creates a "rule" that a written notice of oral hearing is an order for the appellant to appear at the time and place stipulated (item 14.2.3);

- creates a "rule" that no party, representative, or observer may record a WCAT hearing by any audio, video, or other electronic means (item 14.5);

- sets out that in relation to the reimbursement of expenses, if a WCAT panel determines that appeal expenses will be reimbursed at a different rate or on a different basis than set out in Board policy, the panel will provide reasons in its decision (item 16.1.1);

- clarifies that WCAT will not order reimbursement of expenses associated with a party duplicating or transmitting written evidence obtained or produced for an appeal (item 16.1.3);

- clarifies when WCAT will order reimbursement of the expense a party incurs having an expert witness attend an oral hearing, and the amount of any such reimbursement (item 16.1.3.1.1);

- amends the "Hallmarks of Quality Decision Making" to remove the hallmark of consistency with WCAT decisions published in the *Workers' Compensation Reporter* (WCR) as the WCR is no longer being published (item 17.2.1);

- clarifies the exceptions to the WCAT chair's responsibility to provide public access to WCAT decisions (item 19.2.11);

- creates a new "practice directive" in relation to reconsiderations of WCAT decisions which, among other things, renames the previous "reconsideration on common law grounds" to "reconsideration to cure a jurisdictional defect" and requires applicants to fill out a new Application for Reconsideration form (item 20.3); and

- creates a new code of conduct for parties (item 20.1) and clarifies that the code of conduct for representative applies to written submissions as well as oral hearings (item 21.2.2).

4. PUBLIC ACCESS TO WCAT

In 2009 WCAT launched a new enhanced website (www.wcat.bc.ca). Both the design and content of the website was significantly changed. It now includes a number of electronic assisted fill-and-print forms that make it easier for parties to prepare forms to be submitted to WCAT, an enhanced site and decision search, and electronic versions of new WCAT information guides. Plain language information guides have been prepared for bringing an appeal, preparing evidence, attending an oral hearing, making written submissions, post-decision processes, legal actions, and judicial review. The guides are also available in print. A portion of the website and some of the information guides have been translated into Punjabi, Chinese (traditional), and Chinese (simplified).

As has been the case since the inception of WCAT, WCAT decisions are publicly accessible on WCAT's website, in a manner which protects the privacy of the parties (see http://www.wcat.bc.ca/search/decision_search.aspx).

5. COSTS OF OPERATION FOR 2009 CALENDAR YEAR

Category	Cost
Salaries	$ 8,719,808
Employee Benefits and Supplementary Salary Costs	$ 2,151,979
Per Diem - Boards and Commissions	$ 223,859
Travel	$ 107,082
Centralized Management Support Services	$ 367,805
Professional Services	$ 429,853
Information Technology, Operations and Amortization	$ 1,380,587
Office and Business Expenses	$ 434,996
Building Occupancy and Amortization	$ 1,307,031
TOTAL EXPENDITURES	**$15,123,000**

6. 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.

In 2009, one new vice chair was appointed to WCAT.

Executive, and Vice Chairs with Special Duties as of December 31, 2009		
NAME	***POSITION***	***END OF TERM***
Jill Callan	Chair	March 3, 2014 (OIC# 50/09)
Jane MacFadgen	Senior Vice Chair & Registrar	February 28, 2015
Susan Polsky Shamash	Senior Vice Chair & Tribunal Counsel	February 28, 2010
Teresa White	Vice Chair, Quality Assurance & Training	December 31, 2014
Steven Adamson	Vice Chair & Deputy Registrar	February 28, 2011
Kevin Johnson	Vice Chair & Deputy Registrar	February 28, 2011
Lesley A. Christensen	Vice Chair & Team Leader	February 28, 2013
Susan Marten	Vice Chair & Team Leader	February 28, 2013
Guy Riecken	Vice Chair & Team Leader	February 28, 2011
James Sheppard	Vice Chair & Team Leader	February 28, 2011

Vice Chairs as of December 31, 2009	
NAME	***END OF TERM***
Cathy Agnew	August 31, 2012
Luningning Alcuitas-Imperial	February 28, 2013
Beatrice K. Anderson	February 28, 2013
W. J. (Bill) Baker	February 29, 2012
Hélène Beauchesne	March 31, 2011

Vice Chairs as of December 31, 2009	
NAME	**END OF TERM**
Sarwan Boal	February 28, 2011
Dana G. Brinley	February 28, 2012
Michael Carleton	February 28, 2010
Melissa Clarke	September 30, 2012
David A. Cox	August 31, 2012
Daphne A. Dukelow	February 28, 2014
William J. Duncan	February 28, 2013
Andrew J. M. Elliot	August 31, 2012
Lisa Hirose-Cameron	September 30, 2010
Warren Hoole	September 30, 2010
Nora Jackson	February 28, 2011
Cynthia J. Katramadakis	March 31, 2013
Joanne Kembel	February 29, 2012
Brian King	August 31, 2012
Rob Kyle	February 28, 2011
Randy Lane	February 28, 2015
Janice A. Leroy	February 28, 2011
Iain M. Macdonald	February 28, 2013
Julie C. Mantini	February 28, 2011
Heather McDonald	February 28, 2013
Herb Morton	February 28, 2015
Marguerite Mousseau	February 28, 2013
Lorne Newton	February 28, 2011
David Newell	January 31, 2012
P. Michael O'Brien	February 28, 2011
Paul Petrie	February 28, 2011
Michael Redmond	February 29, 2012
Dale Reid	February 28, 2013
Deirdre Rice	February 28, 2011
Shelina Shivji	March 31, 2011

Vice Chairs as of December 31, 2009	
NAME	**END OF TERM**
Debbie Sigurdson	February 28, 2011
Timothy B. Skagen	March 31, 2011
Anthony F. Stevens	February 28, 2014
Don Sturrock	February 28, 2013
Eric S. Sykes	August 31, 2011
Andrew J. Waldichuk	February 28, 2011
Kathryn P. Wellington	February 28, 2013
Lynn M. Wilfert	February 28, 2012
Lois Williams	February 28, 2013
Judith Williamson	March 31, 2011
Sherryl Yeager	February 28, 2013

Vice Chair Departures in 2009		
NAME	**EFFECTIVE DATE**	**ORIGINAL APPOINTMENT DATE**
Baljinder Chahal	November 12, 2009	March 3, 2003
Larry Campbell	May 22, 2009	March 3, 2003
David Van Blarcom	May 22, 2009	March 3, 2003
Michelle Gelfand	March 17, 2009	March 3, 2003
Margaret Hamer	June 18, 2009	March 3, 2003

7. EDUCATION

WCAT is committed to excellence in decision-making. 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 2009, the WCAT education group organized a wide variety of educational and training sessions. Members of WCAT attended these sessions both as participants and

as educators/facilitators. WCAT is registered as a continuing professional development provider with the Law Society of British Columbia.

On May 4, 2009, the Board introduced its new Claims Management Solutions (CMS) system. WCAT training in 2009 included a significant component relating to information technology and systems because of the introduction of CMS and the need for vice chairs and staff to become proficient in read-only use. Several WCAT vice chairs and staff participated in extensive "train the trainer" sessions in order to prepare them to be an on-site WCAT resource for others once CMS was implemented, and to train other WCAT members and staff on the use of CMS. All WCAT members and staff who required read-only access to CMS to do their work were provided with targeted E-learning on-line modules with a facilitator, followed by two days of classroom training. This training took place between February 24, 2009 and April 30, 2009, with multiple sessions scheduled to accommodate vice chair and staff schedules.

WCAT is also represented on the Inter-Organizational Training Committee, which is composed of representatives from 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 2009, the Inter-Organizational Training Committee organized and presented a half-day session focused on CMS.

In 2009, members of WCAT also played an active role in the administrative tribunal community, including the British Columbia Council of Administrative Tribunals (BCCAT). 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, in addition to those focused on CMS, organized by WCAT for vice chairs during 2009:

1.	January 6	• Technical training on using disclosure obtained on CD
2.	January 15	• Legal Reasoning – Critical Thinking and Logic in Formulating Arguments and Reasons for Decision
3.	February 19	• Sufficiency and Adequacy of Reasons
		• Causation: Section 5(4) of the *Workers Compensation Act* and causative significance in tort and workers' compensation law
4.	June 11	• Review of Judicial Review decisions
5.	July 15	• CMS Refresher

6.	September 17	• Self-Represented Litigants • Difficult Oral Hearings
7.	September 9	• CMS – Preparing a File
8.	December 3	• Ethics for Decision-Makers

In addition, many WCAT vice chairs participated in Continuing Legal Education (CLE) sessions, including a webcast of the Administrative Law CLE on October 29, 2009.

8. PERFORMANCE EVALUATION

Section 234(2)(b) of the Act provides the WCAT "chair is responsible for establishing quality adjudication, performance and productivity standards for members of [WCAT] 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 2009. The performance of vice chairs will continue to be regularly evaluated on an ongoing basis.

9. STATISTICS

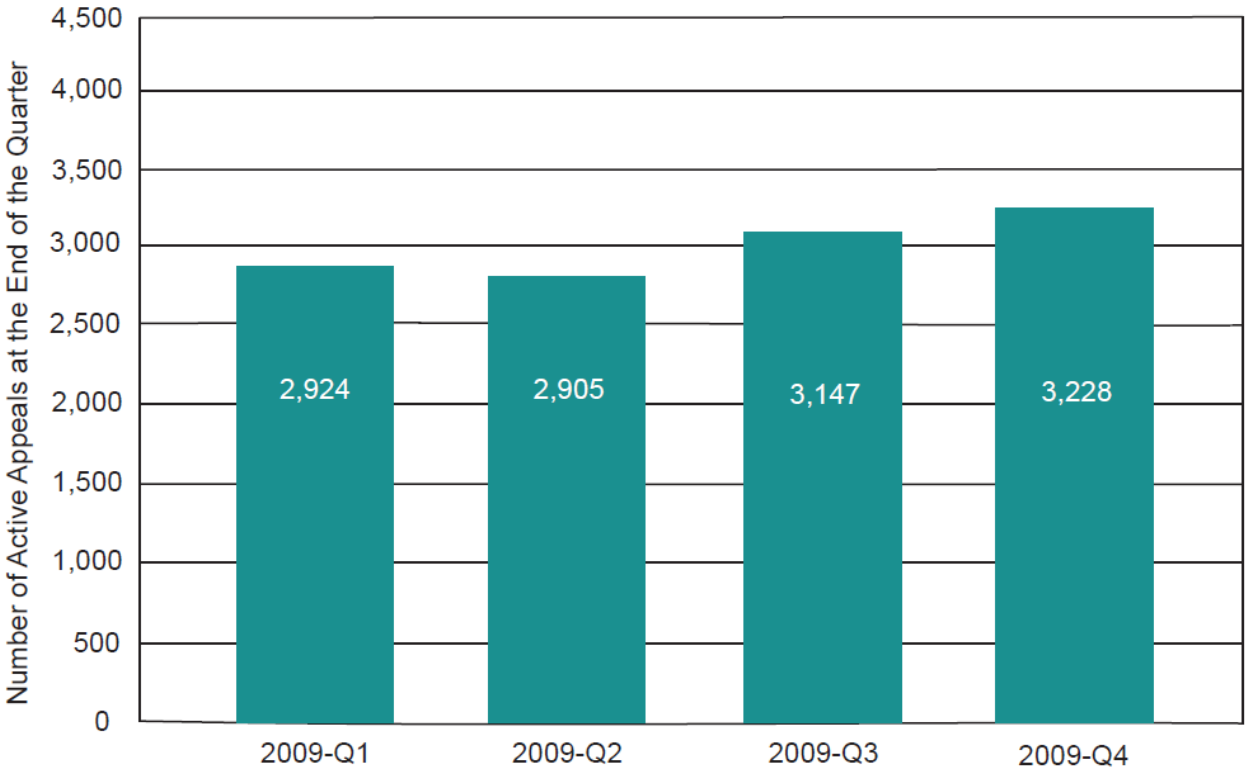
9.1 Overview of Appeals Inventory

This section contains two charts providing a high level overview of the status of our appeals inventory for 2009. WCAT records appeals by their date of initiation.

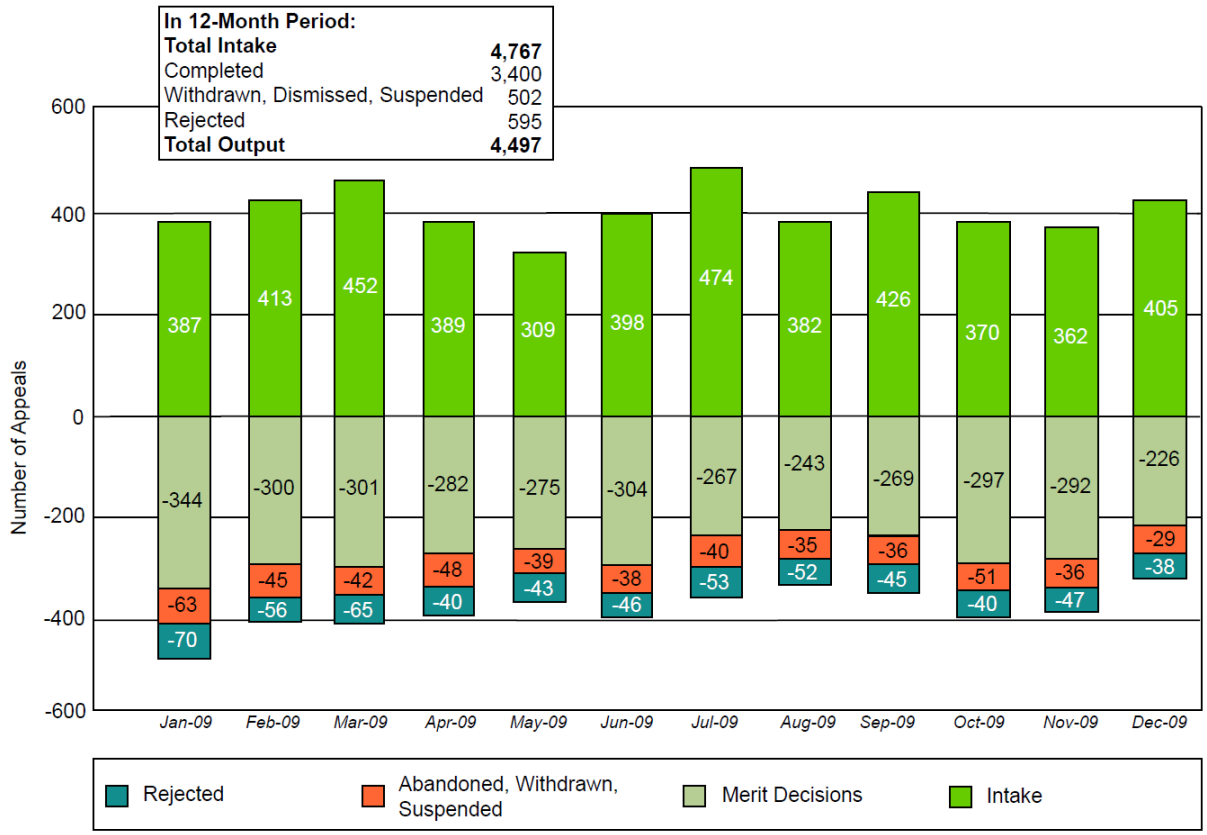
The first chart (Number of Active Appeals) provides the number of appeals in our inventory at the end of each quarter of 2009. WCAT's total active inventory at December 31, 2009 was 3,228 appeals compared to 2,956 at the end of 2008. This represented a 9% increase in the appeals inventory during 2009.

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. We received 4,767 new appeals in 2009, representing an increase of 3% from the 4,616 new appeals we received in 2008.

WORKERS' COMPENSATION APPEAL TRIBUNAL
NUMBER OF ACTIVE APPEALS IN INVENTORY



WORKERS' COMPENSATION APPEAL TRIBUNAL
TOTAL INTAKE AND OUTPUT IN PAST 12 MONTHS



9.2 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 the former Appeal Division of the Board (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.

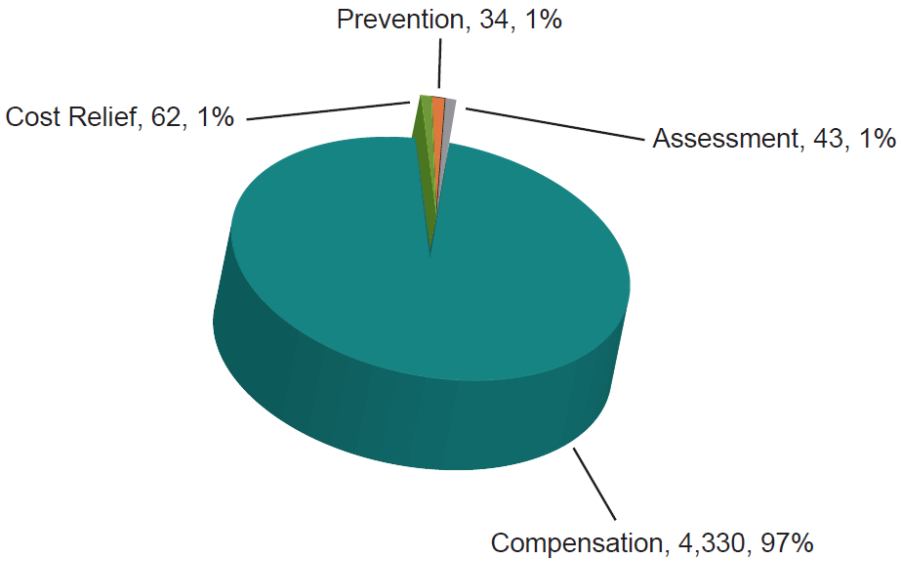
Intake

WCAT received 4,767 appeals and applications in 2009. Of these, 4,469 appeals (94%) arose from decisions of Board review officers and 298 were direct.

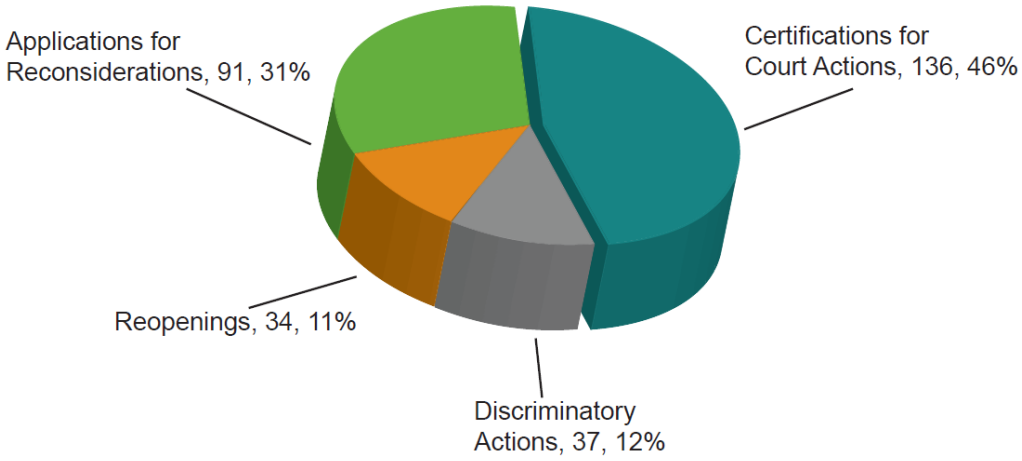
Source	Intake
Review Division	4,469
Direct	298
TOTAL	**4,767**

The following two charts show the breakdown of the types of appeals and applications we received in 2009.

APPEALS FROM REVIEW DIVISION BY TYPE



DIRECT APPEALS AND APPLICATIONS BY TYPE



Merit Decisions

WCAT made 3,400 merit decisions on appeals and applications in 2009, 58 of which concerned applications for certificates for court actions. The remaining 3,342 merit decisions concerned appeals from decisions of the Review Division or Board officers, which may be varied, confirmed, or cancelled by WCAT.

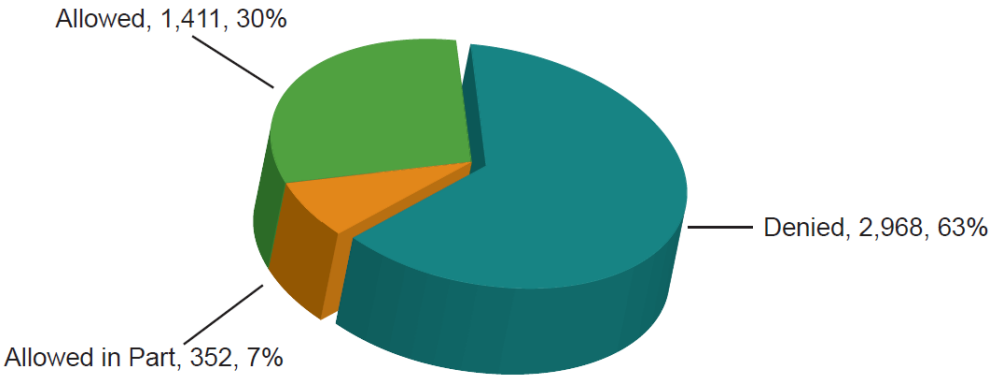
"Vary" means that WCAT varied the previous decision in whole or in part. Accordingly, whether WCAT has fully granted the remedies requested by the appellant on all issues arising under the appeal or merely changed a minor aspect of the previous decision, the decision is considered to have been "varied".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

Appeals		Outcome	
Appeal Type	**Number of Decisions**	**Varied**	**Confirmed**
Compensation	3,188	42%	58%
Relief of Costs	78	42%	58%
Assessments	30	37%	63%
Prevention	25	72%	28%
Discriminatory Actions	16	37%	63%
Direct Reopenings	5	100%	0%

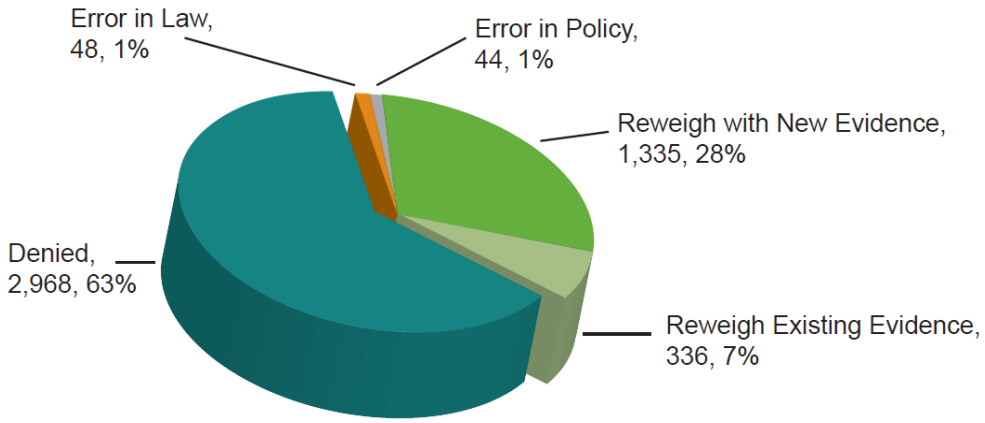
An appeal may raise numerous issues and WCAT may allow or deny the appeal on each issue. In 2009, WCAT decided 4,731 issues that arose out of the 3,342 appeals that led to merit decisions. The following chart shows the percentage of issues for which the appeals were allowed, allowed in part, or denied.

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 1,097 summary decisions on appeals. In 488 (44%) of these decisions, WCAT dismissed the appeal or confirmed that the appellant had withdrawn it. WCAT rejected 442 appeals (40%) because there was no appealable issue or the decision under appeal was not appealable to WCAT. Fourteen summary decisions suspended appeals.

Of the remaining 153 summary decisions, 94 decided applications for reconsideration, 58 denied requests for extensions of time to appeal, and one referred a matter back to the Board for a further decision.

Requests for Extensions of Time

WCAT decided 199 requests for extensions of time to appeal, allowing 141 and denying 58.

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	1,524	33%	34%	66%
Section 23 - Permanent Partial Disability	781	17%	48%	52%
Section 6 - Occupational Disease	499	11%	35%	65%
Section 29 - Temporary Total Disability	341	7%	33%	67%
Section 96(2) - Reopenings	281	6%	33%	67%

9.3 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 2009, WCAT decided a total of 3,400 appeals and applications. WCAT decided 1,750 (51% of the total) after convening an oral hearing and decided 1,650 appeals and applications (49% of the total) by written submission.

(b) Oral Hearing Weeks

In 2009, 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	6
Courtenay	9
Cranbrook	5
Fort St. John	2
Kamloops	14
Kelowna	19
Nanaimo	16
Prince George	12
Terrace	6
Victoria	25
Williams Lake	4
Total outside Richmond	**118**
Richmond	252
GRAND TOTAL	**370**

(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 2009. 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	30%	70%	0%
Direct Reopening	100%	0%	0%
Prevention	12%	85%	3%
Reconsiderations	95%	5%	0%

(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 2009.

	Percent Represented where Appellant/Applicant is:		
Type of Appeal	**Worker**	**Employer**	**Dependant**
Assessment	NA	94%	NA
Compensation	78%	92%	91%
Relief of Costs	NA	98%	NA
Discriminatory Action	41%	100%	NA
Direct Reopening	54%	NA	NA
Prevention	25%	90%	NA
Reconsiderations	75%	100%	0%

10. PRECEDENT PANEL DECISIONS

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

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

WCAT did not issue any precedent panel decisions in 2009. No precedent panel decisions were pending at the end of 2009.

11. REFERRALS TO THE CHAIR (SECTION 251)

Pursuant to section 251(1) of the Act, WCAT may refuse to apply a policy of the board of directors of the 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.

At the end of 2008 there were no outstanding policy referrals to the chair. In 2009, one policy was referred to the chair. A vice chair had considered an aspect of item D12-196-6 of the *Prevention Division Policy and Procedure Manual* (Prevention Manual) to be so patently unreasonable that it was not capable of being supported by the Act and its regulations. The impugned aspect was that portion of the policy which contained tables for determining the "basic amount" of a penalty with reference to an employer's assessable payroll. The policy provided that the basic amount of the administrative penalty will be determined on the basis of the employer's assessable payroll for the most recent calendar year for which figures are available at the time the penalty is imposed. The vice chair found that aspect of the policy patently

unreasonable on the basis that it was arbitrary and unfair for a delay by the Board in imposing an administrative penalty to influence the determination of the amount of the penalty to the employer's detriment.

In 2009 the vice chair withdrew the policy referral to the chair after the board of directors of the Board amended the policy. By resolution 2009/03/05-02 the board of directors amended item D12-196-6 to provide that the "basic amount" of the administrative penalty will be determined on the basis of the employer's assessable payroll for the full calendar year immediately preceding the year in which the incident giving rise to the penalty occurred. The new policy was effective on March 25, 2009.

12. 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 number of noteworthy decisions in 2009. This section provides summaries of some of those decisions.

All WCAT decisions from 2009, including noteworthy decisions and their summaries, are publicly accessible and searchable on the WCAT website at http://www.wcat.bc.ca/search/decision_search.aspx). 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))

1.4. Whether Injury In the Course of Employment (section 5(1))

1.5. Section 5(4) Presumption

1.6. Whether Occupational Disease Due to Nature of Employment (section 6(1)(b))

1.7. Specific Injuries

1.8. Compensable Consequences (item #22.00)

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

1.10. Compensation in Fatal Cases (section 17)

1.11. Temporary Disability Benefits (sections 29 and 30)

1.12. Average Earnings

1.13. Vocational Rehabilitation (section 16)

1.14. Deductions from Compensation (section 34)

1.15. Health Care Benefits (section 21)

1.16. Permanent Disability Awards (section 23)

1.17. Period of Payment (section 23.1)

1.18. Retirement Benefits

1.19. Protection of Benefits

1.20. Recurrence of Injury (section 96(2)(b))

1.21. Assessments

1.22. Relief of Costs

1.23. 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 (Reduction or Suspension of Compensation) (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. Suspension of WCAT Appeal (Pending Board Decision) (section 252(1))

3.12. Certifications to Court (sections 10 and 257)

3.13. WCAT Reconsiderations

3.14. Procedural Fairness

3.15. WCAT Extensions of Time (section 243(3))

3.16. Abandoning a WCAT Appeal

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

3.18. Withdrawing a WCAT Appeal

3.19. Costs and Expenses

3.20. Transitional Appeals

12.1 Substantive Issues

(a) Section 55 Limitation Period

Decision: *WCAT-2009-01094* **Panel:** B. Anderson
Decision Date: April 22, 2009

This decision determined that the limitation period set out in section 55 of the Act, which requires a worker to apply for compensation within one year of the date of injury or disablement from occupational disease, does not apply to an application by a worker for compensation related to a consequence of an original injury where the Board has already accepted the original injury.

In this case, the worker lacerated her thumb. She reported the injury to her employer but did not make a claim for compensation. Several years after the original injury the worker applied for compensation related to a hepatitis C condition which she said resulted from the thumb laceration. She had been diagnosed with the condition 18 months after the original injury and had started to reduce the hours that she worked

about two years before her application for compensation. The Board accepted the worker's claim for compensation related to the laceration. The Board's decision did not address the limitation period problem, and that decision was not appealed. The following day the Board issued a second decision and found that the worker's hepatitis C condition was not related to the laceration. The worker appealed the second decision and in the course of the appeal before WCAT the employer argued that the worker's application was out of time. The WCAT panel found that section 55 does not apply to compensable consequences of work injuries. Once the Board has accepted the original condition the section 55 threshold has been met. The panel stated that had the employer appealed the first decision accepting the laceration the section 55 matter would have arisen.

(b) Assessments (Change of Classification)

Decision: *WCAT-2009-01313* **Panel:** W. Hoole
Decision Date: May 13, 2009

This decision determined that "distinct change" for the purpose of item AP1-37-3(4) of the *Assessment Manual* which relates to the transfer of an employer's experience rating upon a change in the employer's industry classification, should be interpreted as allowing for the potential transfer of experience rating unless an employer's new operations represent a clear and marked difference from their former operations.

In this case the employer was engaged in the construction industry. For the purposes of levying assessments on the employer the Board initially assigned the worker to "House or Other Wood Frame General Contracting, Construction or Renovation Work" classification unit. The employer later advised the Board it was commencing a seven-storey concrete building project. The Board determined that the employer's operations had changed and therefore assigned the employer to "Industrial, Commercial, Institutional or Highrise Residential General Contracting or Construction." In the same decision letter, the Board declined to transfer the employer's positive experience rating from its former classification unit to its new classification unit. The Review Division confirmed the Board's decision. The WCAT panel denied the employer's appeal, finding that the employer's experience rating should not be transferred. The panel concluded that a comparison between a seven-storey concrete building and a wood-frame building demonstrates a clear and marked difference between the methods of construction and the attendant safety concerns. The panel thus found that the employer's transition from wood-frame housing construction to the construction of a seven-storey concrete building does not reflect a mere evolution over time and instead demonstrates a distinct change in the employer's operations.

(c) Discriminatory Actions (Remedies)

Decision: *WCAT-2009-02609* **Panel:** H. McDonald
Decision Date: October 7, 2009

A WCAT panel found that in determining an appropriate monetary remedy for a worker in circumstances where an employer terminates the worker's employment in violation of section 151 of the Act (which prohibits discriminatory actions) the fact that a worker had only worked for the employer for a short period of time is irrelevant. The panel also determined that item D6-153-2 of the Prevention Manual is not patently unreasonable to the extent that it provides that employment insurance benefits received by a worker are not to be considered in measuring a worker's actual loss.

In this case, the worker was employed for less than two months before his employment was terminated by his employer. The Board determined that the employer had terminated the worker's employment in violation of section 151 of the Act. In a subsequent decision, the Board determined that the appropriate remedy for the worker was for the employer to reimburse the worker wage loss equivalent to 18 weeks' wages, plus holiday pay, plus interest. This amount was subject to statutory deductions (Employment Insurance, Canada Pension Plan and income tax). The worker began receiving employment insurance benefits 6 weeks after termination and found alternative employment at a lower wage seven months after termination. Pursuant to section 240 of the Act, the employer appealed the Board's remedy decision directly to WCAT.

WCAT rejected the employer's argument that the remedy was unreasonable given the short length of time that the worker had been employed by the employer, noting that the wage loss remedies under section 153(2) of the Act are based on the same principle guiding the award of wage loss remedies in human rights complaints, namely, to restore a complainant, so far as practicable, to the position he or she would have been in were it not for the employer's discriminatory action. Thus, the *Employment Standards Act*, under which the worker would not be entitled to any pay on termination, does not apply. The panel also found that common law notice period/damages principles are not a proper measure of wage loss in discriminatory action remedies awarded under section 153 of the Act. The panel also rejected the employer's argument that the employment insurance benefits the worker received should be deducted from the amount owing as it results in double recovery for the worker. The panel found that the Board policy setting out that such benefits are not to be deducted is not patently unreasonable and does not result in double recovery as section 46 of the *Employment Insurance Act* independently requires an employer to deduct employment insurance benefits from any award made to the worker and remit it to the Receiver General.

12.2 Board Procedural Issues

(a) Communication of Decisions

Decision: *WCAT-2009-00149* **Panel:** L. Alcuitas-Imperial
Decision Date: January 16, 2009

This decision is noteworthy as the WCAT panel found that disclosure of a worker's claim file to a worker is not effective communication to the worker of any Board decision that may be contained within the disclosure. The WCAT panel accepted the findings of previous WCAT panels that for appeal and reconsideration purposes a decision is not "made" by the Board until it is communicated to the worker.

In this case a worker had a number of injuries accepted by the Board as compensable. The Board further accepted that the worker developed depression as a result of his compensable injury. This decision may have been first recorded in an internal Board memorandum. The Board subsequently issued a written decision to the worker advising the worker that the depression was accepted. The employer requested a review of the written decision and argued that the depression should not have been accepted. The Review Division found that it did not have jurisdiction over the issue because the decision was made in the memorandum, which the employer did not appeal. The WCAT panel varied the Review Division decision and found that the decision for appeal purposes was contained in the Board decision that the employer had appealed and therefore it was properly before WCAT.

12.3 WCAT Procedural Issues

(a) WCAT Jurisdiction (Income Continuity Benefits)

Decision: *WCAT-2009-00113* **Panel:** J. Callan
Decision Date: January 14, 2009

The panel found that WCAT does not have jurisdiction to consider an appeal regarding income continuity benefits in light of section 239(2)(b) of the Act which prohibits WCAT from hearing appeals from "decisions respecting matters referred to in section 16" (i.e. vocational rehabilitation). The worker attempted to appeal to WCAT a Review Division decision which confirmed a Board decision refusing to grant the worker further income continuity benefits under item #89.11 of *Rehabilitation Services and Claims Manual, Volume I* (RSCM I). The WCAT registrar concluded that WCAT lacked the jurisdiction to hear such an appeal. The worker sought reconsideration of that decision on common law grounds, which was denied.

The WCAT reconsideration panel determined that the policies of the board of directors of the Board regarding continuity of income benefits (items #89.11 and #89.12) are in chapter 11 of RSCM I, which contains the policies regarding vocational rehabilitation benefits paid under section 16 of the Act. Item #89.11 characterizes continuity of

income benefits as a rehabilitation allowance which is provided to workers who are not actively engaged in the vocational rehabilitation process but are awaiting the assessment of their permanent disability pension. The reconsideration panel found that the policies of the board of directors establish that continuity of income benefits are vocational rehabilitation benefits under section 16 of the Act. They cannot be characterized as short-term disability or wage loss benefits, which are paid under sections 29 and 30 of the Act, because a worker is only eligible to receive continuity of income benefits if his or her condition has stabilized. Since continuity of income benefits are paid before a worker is assessed for entitlement to a permanent partial disability pension payable under section 22 or 23 of the Act, they do not constitute permanent disability benefits. The reconsideration panel concluded that the registrar's decision was reasonable, and correct.

13. WCAT RECONSIDERATIONS

WCAT decisions are "final and conclusive" pursuant to section 255(1) of the Act, but are subject to reconsideration based on two limited grounds:

- new evidence not previously available (Act, section 256(2));
- jurisdictional error (common law and Act, section 253.1(5)).

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 2009, WCAT received 91 applications for reconsideration and issued 90 stage one decisions. Of the stage one decisions issued, 28 determined that reconsideration grounds existed. The outcomes of the stage one reconsideration decisions were as follows:

Type of Reconsideration	Number of Reconsideration Decisions	Summary Dismissal	Allowed	Denied
Statutory Grounds	9	0	3	6
Common Law Grounds	68	0	21	47
Both Grounds Alleged	13	1	4	8
TOTAL	**90**	**1**	**28**	**61**

13.1 Reconsideration on the Basis of Jurisdictional Error

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 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 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 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 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 2009, WCAT allowed 21 applications for reconsideration on common law grounds. Of those 21 allowed applications, 9 were allowed on the basis of a breach of procedural fairness, 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, and 4 were allowed on both grounds. In addition, one reconsideration application was allowed on the basis that WCAT lacked the jurisdiction to make the decision and one was allowed on the basis that WCAT had jurisdiction to make the decision but found that it did not.

14. 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.

14.1 Judicial Review Applications

The number of judicial review applications brought in respect of WCAT decisions increased slightly in 2009 from 2008. In 2008, 40 judicial review applications were served on WCAT. In 2009, 44 judicial review applications were served on WCAT.

14.2 Judicial Review Decisions

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

(a) *Manz v. Sundher*, 2009 BCCA 92

Decisions under review: *WCAT-2005-03693* dated July 13, 2005 and *WCAT-2006-01402* dated March 27, 2006

The B.C. Court of Appeal considered whether the B.C. Supreme Court had erred in improperly re-weighing evidence on a judicial review of a WCAT decision. The Court of Appeal also addressed the issue of how to define "patent unreasonableness" in section 58 of the *Administrative Tribunals Act* in light of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick,* 2008 SCC 9 which collapsed the former common law patent unreasonableness and reasonableness *simpliciter* standards of review into a single standard of reasonableness. Lastly, the Court considered whether it was beyond the constitutional powers of the provincial legislature to enact the statutory standard of review set out in section 58.

This case arose from an application to WCAT by a party to a legal action for a determination pursuant to section 257 of the Act. Section 257 grants to WCAT the authority to determine, among other things, whether an injury, disability, or death of a worker arose out of and in the course of worker's employment. Here, the Petitioner was injured in a motor vehicle accident shortly after leaving work. He worked at a ferry terminal and the road on which the accident occurred (a road exiting the ferry terminal) was a public road but was still on the employer's property. It was a multiple lane one way road with a concrete barrier on the left side. There was a gap in the barrier that connected the one way road to another one-way road used for traffic entering the ferry terminal. After driving on his motorcycle a short distance in the left lane of the road exiting the terminal the Petitioner was struck by a dump truck pulling a trailer that turned left over multiple lanes, including the Petitioner's. The dump truck was turning into the gap in order to pick up tools that had been left behind by a work crew doing work at the terminal.

WCAT found that the Petitioner's injuries arose out of and in the course of his employment principally on the basis that the gap was on the employer's premises and posed a hazard of those premises as it was so configured to require long vehicles to make wide turns across multiple lanes. The panel had before it the discovery evidence of the truck driver who stated that the gap required him to make a wide turn. The B.C. Supreme Court allowed the judicial review after finding that the gap in the barrier did not pose a hazard and that there was no evidence to support WCAT's finding that the gap required wide turns.

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

The Court of Appeal allowed the appeal. It found that the chamber's judge, while correctly stating that the patent unreasonableness test on judicial review is whether there is any evidence to support the decision, impermissibly weighed the evidence. The Court noted that by the judge's own statement some of the evidence before WCAT was capable of more than one interpretation and yet he opted for an interpretation that dispelled the notion the gap created a hazard as that term was used in Board policy. The Court also noted that the judge entirely discounted the truck driver's evidence to the effect that, as a truck, he was required to turn wide. The judge also incorrectly compared the gap to a turn from a one-way street and failed to address the "U" turn purpose of the gap, and incorrectly referred to the Petitioner as being on the public side of a highway.

In the course of the appeal the Petitioner raised a constitutional challenge to section 58 of the *Administrative Tribunals Act*. He argued that the provincial legislature has impermissibly sought to control the supervisory function of a superior court by legislating on the standard of review. He argued that by doing so the legislature trenched upon section 96 of the *Constitution Act, 1867*. He argued that the constitutional guarantee of judicial review requires that the standard applied by a court must be determined by the courts. The Court of Appeal disagreed, finding that the legislature did not step outside of its legislative competence. The constitutionally protected role of the superior courts is supervision of the administrative tribunal's conformity with the jurisdiction assigned to it by the enabling legislation. Nothing in sections 58 or 59 detract from that constitutional role held by the superior court. The Court distinguished between "what is done" and "how that what is done": the "what" is supervision of tribunals to ensure they do not overstep their legislated mandate. The standard of review analysis is a question of "how". The common law of standard of review has been developed as an interpretive guide for use in determining the Legislature's intent as to the jurisdiction accorded by it to the Tribunal. There is no constitutional imperative to the method employed by the courts in the supervision of administrative tribunals so long as the core requirement of ensuring the tribunal keeps to its mandate is preserved.

Lastly, the Court found that *Dunsmuir* did not change the meaning of the phrase "patently unreasonable". The Court found that the standard mandated by the *Administrative Tribunals Act* is that which existed at common law prior to the issuance of the decision in *Dunsmuir*. *Dunsmuir* had the effect of abolishing patent unreasonableness, and therefore the definition of patent unreasonableness must be that immediately prior to its abolition.

(b) *Plesner v. British Columbia Hydro and Power Authority*, 2009 BCCA 188

Decision under review: *WCAT-2005-03861* dated July 21, 2005

At issue before the B.C. Court of Appeal was whether the mental stress provisions in section 5.1 of the Act and item #13.30 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) violated section 15(1) of the *Charter of Rights and*

Freedoms (Charter). Section 5.1 of the Act provides that, for a worker to be entitled to compensation for mental stress, the mental stress must be "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment". The majority of the Court of Appeal found that portions of the Board policy violated the Charter and set them aside. The Petitioner did not pursue the administrative law arguments raised on judicial review, namely that WCAT's interpretation and/or application of the Act and policy was patently unreasonable.

In this case there was an accident at the Petitioner's workplace, a generating plant, in which a natural gas pipe burst, causing a stream of natural gas to vent into the atmosphere. The employer evacuated the Petitioner along with other employees away from the gas line location and emergency response teams closed off the line about an hour after the venting began. The Petitioner worked voluntary overtime on the same day of the accident. The Petitioner applied for compensation to the Board for stress and depression resulting from the accident, among other work incidents. The Board denied the Petitioner's claim for mental stress. He appealed to WCAT. WCAT upheld the Board's decision, finding that the Petitioner's mental stress claim did not meet the requirements set out under section 5.1 of the Act and item #13.30 because the event was not one that would be "generally accepted as traumatic" as required by policy. The B.C. Supreme Court allowed the Petitioner's judicial review of WCAT's decision and remitted the matter back to WCAT for rehearing on the basis that the reasons were "internally inconsistent". Although the Petitioner succeeded on judicial review, he appealed to the Court of Appeal on the basis that the lower court failed to decide the Charter issues he had raised.

The majority of the Court of Appeal allowed the appeal and remitted the matter back to WCAT for rehearing. The Court declared that some of the provisions of item #13.30 contravene section 15(1) of the Charter and cannot be saved under section 1. Section 15(1) of the Charter provides that every individual has the right to equal protection and benefit of the law without discrimination, including discrimination based on mental or physical disability. In particular, the majority found that the provisions of item #13.30 which set out examples of "an acute reaction" and "traumatic event" as well as the requirement that the event be "generally accepted as being traumatic" contravened the Charter. The majority severed those provisions of item #13.30 and declared them to be of no force and effect.

The majority concluded that the "traumatic event" requirement in section 5.1(1)(a), as qualified by item #13.30, gives rise to substantive discrimination on the basis of mental disability as the ability of persons suffering from mental stress to access compensation and other benefits is significantly restricted in comparison with workers suffering physical injuries. The Court found that those with mental stress have to show that they suffer a work related injury, and in addition, that the work related injury was caused by a traumatic event, which item #13.30 further qualifies by requiring that the event be akin to "horrifying". In contrast, those who suffer physical injuries merely have to show that they suffered a work related injury to receive compensation. The Court did not strike

down section 5.1 of the Act, finding that section 5.1(1)(a), in itself, does not give rise to substantive discrimination.

The dissenting justice dismissed the challenge to section 5.1 of the Act and item #13.30 on the basis that they did not violate section 15(1) of the Charter. She found that the distinction being drawn for the purposes of section 15(1) is not being done on the basis of an enumerated ground protected by the Charter, but on the basis of the manner in which the injury was acquired.

After the Court of Appeal decision, on July 14, 2009, the board of directors of the Board approved further changes to item #13.30 (see the board of directors Resolution 2009/07/14-06).

(c) *Canadian Broadcasting Corporation v. Luo*, 2009 BCCA 318

Decision under review: *WCAT-2005-01542* dated March 29, 2005

In this case, the B.C. Court of Appeal upheld a decision of the B.C. Supreme Court finding that the Board and WCAT have jurisdiction to determine whether a person is an "employee" for purposes of the federal *Government Employees Compensation Act* (GECA). Canadian Broadcasting Corporation (CBC) the appellant employer, had argued that the federal government has exclusive jurisdiction to determine whether someone was an employee. CBC argued that the Board (and WCAT) therefore cannot adjudicate an application for compensation unless the federal government has already determined that the person applying is an employee.

A man died as a result of a motor vehicle accident. At the time of the accident the man was performing paid work for the CBC, a federal crown corporation. CBC notified the federal government of the accident and argued that the man was not an employee but an independent contractor. Without obtaining submissions from the man's dependants, the federal government determined that the man was not an employee under GECA. The man's widow advised the Board of the accident and the Board requested information from the CBC in order to determine whether the man was an employee under GECA. CBC refused to provide any additional information to the Board on the basis that the federal government had already made a determination regarding employee status. The Board proceeded to adjudicate the claim in the absence of information from the employer, determined that the man was an employee, and accepted the widow's claim for compensation. On review, the Review Division found that the Board had no jurisdiction under GECA to determine whether an individual is an employee under GECA. WCAT allowed the appeal and determined that the Board has jurisdiction to determine employee status under GECA. CBC applied for judicial review of WCAT's decision and the B.C. Supreme Court determined on review that WCAT's decision was correct (see 2007 BCSC 971). CBC appealed to the B.C. Court of Appeal.

The Court of Appeal denied CBC's appeal, finding that both the B.C. Supreme Court and WCAT were correct in concluding that the Board has jurisdiction to determine whether a person is an "employee" for purposes of GECA. The Court of Appeal concluded that the language of section 4 of GECA, read as it must be by applying the modern rule of statutory interpretation, contemplates determination by a provincial body of a claimant's entire claim for compensation. The Court noted that in the context of a claim by a dependent, section 4(1) of GECA required a number of questions to be determined: whether a claimant was a dependent, whether the person upon whom the claimant depended was an employee, whether that person suffered a personal injury, whether that personal injury was caused an accident, whether the accident arose out of employment, and whether the accident arose in the course of employment. The CBC's position was that the Board had jurisdiction to determine all of these issues except for the issue of employee status. Section 2 of GECA contains definitions not only of "employee", but also of "dependent", and "accident". The Court found that "carving out the singular question under s. 4(1) of employee status, strains the language of s. 4, which, on my reading, assigns issues of the section's application to the provincial body".

The Court was bolstered in this conclusion by the absence of language in GECA which would reserve to the federal Minister or a federal agency authority to determine this issue when presented with a claim and the absence of any legislated process by which a claimant could make submissions prior to determination of the issue by the federal government. The Court agreed with the CBC that a claimant is not without a remedy as the claimant could seek judicial review of an employee status decision by the federal government from the Federal Court but found that "an interpretation which accords a claimant an opportunity to address all but one of the issues under s. 4 before the determination is made strains the structure of the section, is unnatural and is to be eschewed".

(d) *Tallarico v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 49

Decision under review: *WCAT-2007-02706* dated September 6, 2007

This was a petition for judicial review of a WCAT decision which considered the Petitioner's claim for a loss of earnings award. The B.C. Supreme Court also addressed how patent unreasonableness in section 58 of the *Administrative Tribunals Act* is to be defined in light of *Dunsmuir v. New Brunswick,* 2008 SCC 9.

The Petitioner was injured in a workplace accident which left him unable to work as a truck driver. The Board determined that the Petitioner was permanently partially disabled as a result of the accident. He was awarded a 14.54% permanent functional impairment award. The Petitioner also sought a loss of earnings award under section 23(3) of the Act. The claim for the loss of earnings award was denied on the basis that he could perform light assembly work, and that such positions could restore him to his pre-injury earnings and were readily available. The Petitioner's appeal to WCAT was denied as the panel found that suitable employment was reasonably available to the Petitioner over the long term and that this employment would restore

the Petitioner's earnings to a pre-injury level, such that he would suffer no loss of earnings.

The Court dismissed the judicial review application. The Court found that *Dunsmuir v. New Brunswick* had not affected the standard of review set out in the *Administrative Tribunals Act,* and the applicable standard was that of patent unreasonableness. The Court concluded that the decision of WCAT was not patently unreasonable as there was a rational basis for the conclusion reached on the evidence before the tribunal. The record indicated that there was evidence of suitable jobs that were likely reasonably available over the long term.

(e) *Asquini v. British Columbia* (Workers' Compensation Appeal Tribunal), 2009 BCSC 62

Decision under review: *WCAT-2004-05802* dated November 1, 2004 and *WCAT-2007-00555* dated February 16, 2007

This was a petition for judicial review of a WCAT decision which considered the Petitioner's claim for a loss of earnings award. The B.C. Supreme Court also addressed a constitutional challenge to section 58 in the *Administrative Tribunals Act.*

The Petitioner suffered a neck injury after slipping on a pipe while employed as a crane operator. The worker's neck injury caused his hands to go numb if he looked upwards. Consequently, he could not operate a crane. The Board found that the Petitioner could operate other heavy equipment which did not require looking up and that such work would effectively replace his lost income. Therefore, the Board found that he was not entitled to a loss of earnings award. WCAT upheld this finding both at the original hearing and on reconsideration.

The Court dismissed the Petitioner's constitutional challenge to the legislated standards of review in sections 58 and 59 of the *Administrative Tribunals Act*. The Court also found that *Dunsmuir v. New Brunswick,* 2008 SCC 9, did not redefine patent unreasonableness for British Columbia. The Court further found that the WCAT decision was not patently unreasonable and consequently, that the reconsideration was correct. The Court concluded that it was open to the panel to prefer the opinion of the Board's consultant over another consultant and that there was a basis in fact for the decision.

(f) *Bagri v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 300

Decisions under review: *WCAT-2005-03229* dated March 7, 2005 and *WCAT-2006-01515* dated March 30, 2006

This was a petition for judicial review of a WCAT decision which considered the Petitioner's entitlement to a permanent functional impairment award.

The Petitioner, a sawmill worker, was injured in 1991 and had not worked since his injury. The Board accepted the Petitioner's claim for an L5-S1 vertebral disc herniation and awarded the Petitioner a permanent disability award of 11.11% of a totally disabled person. In 1998 the Board accepted on a temporary basis the Petitioner's diagnosed Adjustment Disorder with Depressed Mood as having been related to the work injury. In 2000, the former Workers' Compensation Review Board (Review Board) confirmed the functional impairment calculation but determined that he was entitled to a permanent disability award based on a loss of earnings basis, and found that he was able to earn $10.00 per hour. The Appeal Division largely upheld the Review Board's decision but referred the claim back to the Board to determine whether the Adjustment Disorder was a permanent psychological condition.

As a result of the Appeal Division decision the Petitioner was referred to a psychologist (Dr. Shergill) who diagnosed him with chronic pain syndrome with depressive symptoms. In a later report Dr. Shergill advised that the Petitioner's pain disorder and psychological symptoms were permanent. In 2003 the Board, based on the conclusions of the Board's Psychological Disability Awards Committee (PDAC), decided that the Petitioner was not entitled to a permanent disability award for his psychological condition. The Board did award him an additional 2.5% for functional impairment arising from his chronic pain. That decision was ultimately appealed to WCAT and upheld in *WCAT-2005-03229*.

The Petitioner sought judicial review of *WCAT-2005-03229* which denied the Petitioner's appeal relating to his permanent functional impairment award and found, among other things, that the Petitioner's permanent functional impairment for chronic pain was correctly assessed at 2.5% and that the Petitioner did not suffer a measurable permanent functional impairment as a result of his psychological conditions. The Petitioner also sought judicial review of *WCAT-2006-01515* which denied the Petitioner's appeal relating to his subsequent loss of earnings permanent disability award and found that the Petitioner was capable of earning $10.00 per hour (in 2003 dollars) in full-time employment, resulting in a partial loss of earnings pension of $1,233.17 per month.

The Court set aside both WCAT decisions. The Court found that the appropriate standard of review for both WCAT decisions was patent unreasonableness and fairness pursuant to section 58 of the *Administrative Tribunals Act*. The 2005 decision was set aside because the Court found that the panel did not weigh the PDAC's opinion against the other opinions on file. The 2006 decision was set aside on the basis that either the decision was patently unreasonable because it depended on the findings of the first decision or because it would be unfair to allow it to stand once the first decision was set aside. The Court awarded costs against WCAT in relation to the review of the 2005 decision as it found that there was misconduct on the part of the PDAC in that they did not follow Board policy with respect to the evidence of Dr. Shergill and that misconduct was duplicated by the WCAT decision when it upheld the decision.

(g) *Page v. British Columbia* (Workers' Compensation Appeal Tribunal), 2009 BCSC 493

Decision under review: *WCAT-2008-00774* dated March 10, 2008

This was a petition for judicial review of a WCAT decision which considered the Petitioner's claim for compensation which was requested on the basis that she was unable to work due to psychological disability.

In 1991 the Board accepted the worker's claim for a left jaw injury that resulted from an assault by a patient in the course of her employment as a registered nurse. The Board paid temporary disability benefits for a few weeks after which the worker returned to work. In 1995 the Board accepted an adjustment disorder with anxiety under the 1991 claim on the basis that it resulted from the 1991 assault. The Board paid wage loss benefits for several months and paid for counselling, after which the worker returned to full-time work at her pre-injury job. In 2000 the worker stopped work again because of mental stress. She requested the Board reopen her 1991 claim for mental stress or to accept a new mental stress claim. The Board found that the worker's then current symptoms were not related to the 1991 assault, and that her 1991 claim would not be reopened. The Board also disallowed a new claim for mental stress. WCAT confirmed the Board's decision. Among other things, WCAT found that the Petitioner did not suffer from post-traumatic stress disorder (PTSD). The Petitioner sought judicial review of the WCAT decision.

The Court allowed the judicial review, finding that WCAT's rejection of an uncontradicted PTSD diagnosis was patently unreasonable. The Court also found the requirement that a psychological injury result from a traumatic event was not patently unreasonable, and that WCAT's application of a test requiring an unusual stimulus was supported on a rational basis. Therefore, the Court rejected these grounds for judicial review. The Court set aside the WCAT decision and returned it back to WCAT for rehearing.

The Court subsequently decided the Petitioner's application for costs (*Page v. British Columbia (Workers' Compensation Appeal Tribunal*), 2009 BCSC 1602). The Court applied the principle in *Lang v. British Columbia (Superintendent of Motor Vehicles)* 2005 BCCA 244 that generally an administrative tribunal will neither be entitled to costs nor be ordered to pay costs and dismissed the petitioner's claim for costs. The Court found that there was no misconduct or perversity in the proceedings before WCAT. The Court rejected the Petitioner's argument that misconduct or perversity exists when a tribunal acts arbitrarily or fails to follow its own stated policies.

(h) *Johnson v. British Columbia* (Workers' Compensation Board), 2009 BCSC 877

Decision under review: *WCAT-2005-03622-RB* dated July 8, 2005

This proceeding has to date been the subject of six decisions by the courts, two of which were issued in 2007, three in 2008, and one in 2009, and it has not yet been resolved. The controversy relates to a policy of the Board (item #50.00 of the RSCM I and RSCM II) 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 "new" interest policy. When the Board implemented the decision, which occurred after the effective date of the new policy, the Board applied the new policy and denied the Petitioner's request for interest. 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 new 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 new 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 new interest policy was patently unreasonable on the basis that "compensation" in section 5 of the Act includes interest (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 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 new interest policy was patently unreasonable (see 2008 BCCA 232). The Court of Appeal 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 (i.e. whether Mr. Johnson was required to exhaust all internal remedies); and, (2) the retroactivity issue. On referral back, the matter was assigned to the same judge who heard the petition in first instance. The Board's application that the judge disqualify herself from hearing the matter was dismissed (see 2008 BCSC 1386).

By this time the Petitioner had amended his petition to directly challenge the decision of the board of directors of the Board (BOD) that created the new interest policy (prior to this the petition had only sought that the WCAT decision be set aside). The amended petition sought an order that the BOD decision (i.e. the policy) be set aside as being both patently unreasonable (inconsistent with section 5 of the Act) and *ultra vires* the statutory authority of the Board (because of the alleged retroactive application of the policy). The Board brought an application asking the B.C. Supreme Court to dismiss the order as sought. It did so on the basis that Mr. Johnson failed to exhaust his internal remedies at WCAT in relation to the section 5 argument (the same issue raised by the referral back to the Court) and on the basis that Mr. Johnson could not challenge the policy on the basis of the retroactivity argument because the issue was argued before WCAT and could be resolved through the judicial review of the WCAT decision (an issue not raised by the referral back to the Court).

In 2009 the B.C. Supreme Court issued its decision on the Board's application (see 2009 BCSC 877). The Court found that in the circumstances it was in the interest of justice that Mr. Johnson be entitled to proceed with a direct judicial review of the BOD decision to issue the new policy on the basis that it was patently unreasonable. The Court therefore found that Mr. Johnson could proceed with this argument on judicial review even though he did not raise it as an issue before WCAT. Having so found, the Court then confirmed its earlier decision that the policy was patently unreasonable. In response to the second argument raised by the Board, the Court determined that Mr. Johnson could not seek a direct judicial review of the BOD policy on the basis of the retroactivity argument because a judicial review of the WCAT decision was an adequate remedy. The Court did not address the merits of the retroactivity issue (i.e. whether WCAT's decision on the question was patently unreasonable) as it determined that that issue (which the B.C. Court of Appeal had referred back to the Court) would be considered at a later time.

After the B.C. Supreme Court issued its decision Mr. Johnson advised the Supreme Court that he would not be pursuing the retroactivity issue. The Court's decision (2009 BCSC 877) is currently under appeal to the Court of Appeal.

(i) *Buttar v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 1228

Decision under review: *WCAT-2008-00792* dated March 12, 2008

The Respondent Galleto was struck and seriously injured by a taxi cab driven by the Petitioner Buttar and owned by the Petitioner Black Top Cabs Ltd. Mr. Galleto was

employed by the Marriott Hotel. The accident occurred when he was leaving the hotel area for an unpaid lunch break. Mr. Galleto was crossing the breezeway area adjacent to the hotel, when the Petitioner Buttar reversed his taxi cab from the hotel lobby entrance, hitting Mr. Galleto with the open door of the taxi.

Mr. Galleto commenced a tort action against the Petitioners, and in response the Petitioners pleaded the defence of section 10 of the Act. Pursuant to section 257 of the Act, the Mr. Galleto requested that WCAT determine the status of the parties and certify that status to the B.C. Supreme Court. WCAT found that Mr. Galleto was a worker, and that his injuries arose out of his employment but did not arise in the course of his employment. WCAT found that the section 5(4) presumption was rebutted. WCAT determined that the breezeway did not form part of the employer's premises and that the employer's control over the portion of the breezeway where the accident occurred was very limited, "if any".

The Petitioners sought judicial review of the WCAT decision. On judicial review, the Court denied the Petitioner's application. The Court found that the WCAT decision was not patently unreasonable. The Court found that this was a case where there was competing evidence before WCAT that could have supported both the view that the breezeway area was part of the employer's premises and that it was not. The Court concluded that there was nothing openly, clearly, evidently unreasonable in reaching the conclusion that the breezeway area in question was not a part of the hotel's premises. There was therefore a rational basis for WCAT's decision.

Prior to considering the merits of the judicial review the Court had considered a preliminary objection by the Petitioners with respect to the standing of WCAT in a judicial review proceeding of a WCAT decision.

The Court dismissed the preliminary objection (*Buttar v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 129). The Court concluded that WCAT had standing to address the statutory and policy framework of the workers' compensation scheme, the standard of review applicable in this case, and to review the record to demonstrate that WCAT did not lose jurisdiction by rendering a patently unreasonable decision. The Court noted that WCAT has standing to make all these arguments, and in doing so does not exceed the role an administrative tribunal is permitted to take in a judicial review of its own decision.

(j) *Woods v. British Columbia* (Workers' Compensation Board), 2009 BCSC 1402

In this judicial review at issue was primarily a WCAT decision which considered whether the Petitioner was still temporarily disabled as a result of his compensable injury after a certain date, and whether item #35.30 of the RSCM II was patently unreasonable.

Item #35.30 provides in part that the Board will terminate temporary total or partial wage loss benefits under section 29(1) or 30(1) of the Act once the worker's temporary

disability ceases. It sets out that a temporary disability ceases when it either resolves entirely or stabilizes as a permanent impairment. Section 31.1 of the Act provides, in part, that the Board may not make a periodic payment to a worker under section 22(1), 23(1) or (3), 29(1) or 30(1) of the Act if the worker ceases to have the disability for which the periodic payment is to be made.

The Board terminated the Petitioner's temporary wage loss benefits on the basis that his condition had reached a medical plateau and was no longer temporary. The Board subsequently provided him with a permanent partial disability award calculated on a functional impairment basis which resulted in a decrease in the amount of money he received from the Board. The Board later determined that he was not entitled to a loss of earnings permanent disability award. The Petitioner appealed the termination of wage loss decision to WCAT which found that the worker was not temporarily disabled after the date of termination as a result of his compensable injury and that item #35.30 was not patently unreasonable. WCAT subsequently denied the Petitioner's application for reconsideration. The Petitioner never appealed the Board's loss of earnings decision.

The B.C. Supreme Court dismissed the Petitioner's application for judicial review. The Petitioner sought an order quashing items #35.30 and #40.00 of the RSCM II (item #40.00 relates to loss of earnings permanent disability awards) on the grounds that each was unreasonable and *ultra vires* the Board. The Petitioner also sought an order quashing the two WCAT decisions as well as the Board's loss of earnings decision. The Court first considered whether the Petitioner could challenge the policy items and the Board's loss of earnings decision directly. It found that the Petitioner could not and was required to exhaust all internal remedies first before seeking review. Therefore, the primary question left for the Court to answer was whether WCAT's original decision was patently unreasonable (the Court agreed with previous Court decisions that the standard of review of the WCAT reconsideration decision was correctness). As the Petitioner's challenge to item #35.30 was addressed in WCAT's decision the issue relating to item #35.30 was properly before the Court.

On this issue the Court found that WCAT's decision was not patently unreasonable. The Petitioner argued that the interpretation of section 31.1 of the Act contained in item #35.30 was patently unreasonable because by using the phrase "temporary disability" the Board applied a temporal qualifier to the word "disability" found in section 31.1. The consequence of this interpretation is that the Board terminates wage loss benefits once the worker's temporary disability ceases. The Petitioner argued that "disability" is not defined in the Act and should be interpreted to mean "the inability to work due to the effects of occupational injury or disease".

The Court noted that section 31.1 of the Act specifically refers to sections 29(1), 30(1), 22(1) and 23(1) and (3) and that each of these sections specifies a particular form of disability in both temporal and degree terms such as "permanent partial", "permanent total", "temporary partial" and "temporary total". They all refer to "periodic payment". The Court found that it was apparent that the temporal nature of the disability is a factor

included in the Act and is not a creature of policy. Item #35.30 interprets section 31.1 as delineating all of the circumstances in which periodic payments are to cease, including when a worker's condition has plateaued and the nature of the benefits to be paid changes. The Court found that this is certainly an option available on a rational interpretation of the Act. To determine the meaning of "disability" in section 31.1 apart from the referenced sections would not give full meaning to the entire context of the relevant sections.

(k) *Srochenski v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 1488

Decisions under review: *WCAT-2004-05166-RB* dated September 30, 2004, *WCAT-2005-05864* dated November 2, 2005, and *WCAT-2007-00502* dated February 12, 2007

In this judicial review the B.C. Supreme Court considered three WCAT decisions. The Court dismissed the petition against one of the WCAT decisions, and with respect to the remaining two decisions remitted the matter back to WCAT to rehear the appeals and in doing so consider the evidence that the Petitioner's current symptoms were not entirely the result of natural degeneration. The third WCAT decision was central to the judicial review proceeding.

The first WCAT decision determined that wage loss benefits were properly terminated by the Board. The panel also found that it did not have the jurisdiction to address a disc protrusion issue and so remitted it to the Board for initial adjudication. The petition with respect to the first decision was allowed in part. The Court quashed the portion of the decision addressing any aspect of the Petitioner's "current" or "ongoing" symptoms or disability that had also been addressed in the third WCAT decision.

The second WCAT decision determined that the Petitioner's right-sided disc protrusion was not a compensable consequence of the work injury. The panel found that it did not have the jurisdiction to address the question of whether the work incident caused the disc protrusion. The petition with respect to this decision was dismissed as moot as the third WCAT decision overtook the question of the cause of the disc protrusion.

With regard to the third decision, the Court considered whether or not the worker's current and ongoing symptoms were entirely the result of natural degeneration. The Petitioner suffered a minor, compensable, left-sided low back strain at work. About three months after the injury, it was discovered that the Petitioner had a right-sided disc protrusion. The Petitioner continued to complain of left-sided symptoms for many years after the injury. The medical experts could not correlate the Petitioner's right-sided discogenic problems to his left-sided pain complaints. At least two doctors, a neurologist and an orthopaedic surgeon suggested that the Petitioner may be suffering from myofascial pain syndrome, or problems in his sacroiliac joints or facet joints. There was evidence of pre-existing degenerative disc disease.

The petition with respect to the third decision was allowed in part. The Court found that WCAT decided two issues within the third decision. First, WCAT found that the work injury did not include the disc prolapse and second, that the ongoing or current symptoms were a product of natural degeneration of his back. The Court found that the decision on the first issue was unassailable, but with regard to the second, found that the evidence was incapable of supporting the conclusions that the current or ongoing symptoms were at a critical point of degeneration at the time of the work injury and that the current symptoms were entirely the result of natural degeneration. The Court remitted to WCAT the following questions: (a) whether the work injury caused more than a strain injury; (b) if not, when did the strain injury resolve or plateau?; and (c) if more than a strain injury occurred in the work incident, is it compensable on the application of item #15.10, and has it resolved or plateaued?

(l) *Chima v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 1574

Decision under review: *WCAT-2006-01428-RB* dated March 27, 2006

In this judicial review, the B.C. Supreme Court considered whether a WCAT decision which found that the worker's psychological disorder was not related to his compensable right-sided low back strain injury, but rather was related to a non-compensable disc protrusion, was patently unreasonable.

The worker suffered a compensable right-sided low back strain injury at work in 1998. He began developing psychological symptoms throughout 1999 but those did not rise to the level of a psychological disorder under the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition.* In 1999, the worker was diagnosed with a non-compensable left-sided L5-S1 disc protrusion accompanied by a left-sided S1 nerve compression and left leg pain. His psychological symptoms worsened and by December of 2000 he was diagnosed with severe major depressive disorder (MDD) with anxious features.

The Board found that the worker's soft tissue injury had resolved by October 1999. That finding was upheld by the Review Board and the Appeal Division. The Appeal Division remitted the issue of the psychological injury as a compensable consequence of the compensable injury to the Board for consideration. The Board referred the worker for a psychological assessment.

The referral doctor confirmed the MDD diagnosis and found it was precipitated by the physical injury. The Board decided that the psychological injury was caused by the non-compensable physical injury and not the compensable injury, which had resolved long before the worker was diagnosed with MDD, and thus the MDD was non-compensable. The worker appealed.

The worker also appealed the decision of the Appeal Division to a Medical Review Panel (MRP). The MRP certified that the worker's compensable injury resolved and the

Petitioner was not disabled by it after October of 1999. The MRP also certified that the Petitioner suffers from degenerative disc disease.

WCAT found that when the compensable back strain had resolved the worker had no psychological disorder and that the worker developed the psychological disorder subsequently in reaction to the non-compensable disc protrusion. That decision was upheld on reconsideration. The worker sought judicial review.

The B.C. Supreme Court found that WCAT had asked itself the wrong question when it focused on the temporal relationship between the physical injuries and the psychological injury without considering whether the compensable injury was causally significant in the development of the MDD despite the fact that the full onset of the MDD occurred after the compensable injury had resolved. Whether the non-compensable injury was a significant cause was not determinative of the question of whether the compensable injury was also a significant cause. The policy does not require that the compensable injury be the most significant cause or the sole significant cause. The Court remitted the matter to WCAT for reconsideration.

15. OTHER COURT DECISIONS

The following court decisions are of significance to WCAT or the workers' compensation system generally.

(a) *Petro-Canada v. British Columbia* (Workers' Compensation Board), 2009 BCCA 396

At issue in this appeal from a judicial review decision was the scope of a franchisor's responsibilities as a possible "employer" for the purposes of the occupational health and safety provisions of the Act.

Workers at two Petro-Canada service stations were violently attacked in separate incidents. The Board investigated and following inspections of each service station issued Inspection Reports, both of which contained orders. The orders were made against Petro-Canada as "employer".

In relation to the first Inspection Report the Board issued an order that Petro-Canada had violated section 115(1)(a)(ii) of the Act (which requires every "employer" to ensure the health and safety of workers present at a workplace at which the employer's work is being carried out) as it had not conducted a site-specific assessment to determine the risks to workers from possible violence in the workplace.

In relation to the second Inspection Report the Board issued four orders, three of which related to violations (the fourth directed Petro-Canada to provide the Board with certain investigation reports). The first violation order declared the Petro-Canada had violated section 115(1)(a)(ii) of the Act for failing to conduct a site-specific risk assessment and,

as the incident at this station occurred some time before the inspection, for failing to take steps since the attack to minimize the risk. The second violation order declared that Petro-Canada failed to meet the requirements of sections 4.28 and 4.29 of the *Occupational Health and Safety Regulation* (which relates to risk assessments and elimination or minimization of risks) and thereby contravened section 115(1)(b) of the Act (which requires employers to comply with Part 3 of the Act and the Regulation). The third violation order declared that Petro-Canada failed to meet the requirements of section 3.10 of the Regulation (which requires employers to investigate and take corrective action) and thereby contravened section 115(1)(b).

Petro-Canada sought review of all four orders, arguing that the service stations were operated by franchisees, and that it was not an "employer" in respect of those stations for the purposes of the Act and the Regulation. In responding to the review application, the Compliance Section of the Board conceded that three of the orders were invalid (the order in relation to the first Inspection Report and two of the orders in relation to the second Inspection Report on the basis that the direct employer (franchisee) has the obligation to conduct a risk assessment), and accepted that those orders should be rescinded or cancelled. Notwithstanding the concession, the review officer confirmed all four orders.

The Review Division found that Petro-Canada was an "employer" for the purposes of the occupational health and safety provisions of the Act in relation to the service stations even though Petro-Canada did not directly operate them and did not employ the workers. Petro-Canada applied for judicial review of the decision on the basis that it had no duty as an "employer" to ensure the health and safety of the workers employed by the operators of the service stations and that it had no duty as an "employer" to comply with the Regulation in relation to those service stations. It also argued that the Review Division acted in a procedurally unfair manner by considering, without notice to Petro-Canada, the validity of three of the violation orders which the Board officer had recommended be cancelled during the course of the Review Division proceeding.

On judicial review, the B.C. Supreme Court set aside the Review Division decision as having been unreasonable and remitted the matter back to the Review Division. The Court found that the review officer erred by overemphasizing the inclusive nature of the definition of employer in section 1 of the Act and by considering the expanded definition in section 106 to amount to an invitation to further expand the scope of the term. Given its finding that the Review Division was unreasonable the Court did not find it necessary to consider the procedural fairness issue.

The B.C. Court of Appeal allowed the Board's appeal of the judicial review decision. The Court found that while the Review Division's discussion of the definition of the word "employer" was unsound the error was harmless because it is obvious that Petro-Canada is, indeed, an employer for the purposes of section 115 of the Act. While Petro-Canada argued that the concentration on the appropriate definition of "employer" permeated the balance of the decision, the Court did not agree. The Court found that the Review Division proceeded through his reasons methodically, and its misstep with

respect to the definition of "employer" cannot fairly be said to have affected the balance of his reasons.

The Court said that the real issues for the Review Division were whether Petro-Canada's work was being carried out at the service station, and whether, in the context of the case, Petro-Canada's degree of control over the workplace permitted a finding that it had failed to ensure the safety of workers. In relation to these two questions the Court found that the Review Division decision was not unreasonable.

Having determined that the Review Division decision was not unreasonable, it was necessary for the Court to consider Petro-Canada's procedural fairness argument. On this issue, the Court found that the Review Division breached the rules of procedural fairness in relation to two of the three violation orders which the Board officer had recommended be cancelled during the course of the Review Division proceeding. The Court did so on the basis that Petro-Canada was denied the opportunity to present its case. It was inappropriate for the Review Division to decide on the validity of those orders without correcting Petro-Canada's understandable impression that there was no need for it to make submissions in respect of those orders. The Court noted that it was not clear that submissions would have been futile. The Court also found that in the context of the legislative scheme and the case, Petro-Canada's failure to seek a reconsideration of the Review Division decision from the chief review officer did not amount to a waiver of the fairness breach. The Court remitted the review of the two violation orders back to the Review Division for rehearing.

(b) *Jim Pattison Enterprises v. Workers' Compensation Board*, 2009 BCSC 88

This judicial review and action were brought by commercial fishing companies and considered the constitutional validity of British Columbia's occupational health and safety legislation relating to commercial fishing vessels. The B.C. Supreme Court upheld the Act and the *Occupational Health and Safety Regulation* as within the jurisdiction of the Province, determined that they were operative, and that they apply to the petitioners and the plaintiff.

Although the facts upon which the challenge to the Act and Regulation were different for the different parties participating in the proceeding, in each case the party had been subject to an order issued by the Board under the Regulation. The Review Division subsequently determined that it lacked the jurisdiction to address constitutional matters arising in any request for review of such orders.

The petitioners' position in these proceedings was that the provincial legislature lacks constitutional jurisdiction to regulate safety on board fishing vessels operating from British Columbia. They argued that Part 24 of the Regulation is *ultra vires* because its pith and substance is "ship safety", which they say is a matter within the exclusive legislative competence of Parliament under the *Constitution Act, 1867*, s. 91(10) or 91(12), or as a federal work or undertaking within the meaning of s. 92(10). They also

say in the alternative that Part 24 should be found inapplicable or inoperative either through the doctrine of interjurisdictional immunity or the doctrine of paramountcy.

The Court found that the pith and substance of the provincial legislation is occupational health and safety, a matter within provincial jurisdiction, and that federal paramountcy does not require all or part of the provincial legislation to be deemed inoperative given that there is no operational incompatibility between the federal and provincial schemes and the provincial scheme does not undermine the purpose of the federal legislation. The doctrine of interjurisdictional immunity does not preclude the application of the Act or Regulation to the plaintiff's or the petitioners' undertakings as they are provincial undertakings, not federal ones, and the legislation does not have adverse impacts that place in jeopardy the core competence of the federal government over navigation and shipping.

In finding the Act and Regulation constitutionally valid the Court noted that the federal government had not taken a position in the litigation, and that its agencies have signed Memoranda of Understanding acknowledging the jurisdiction of the Province over occupational health and safety on British Columbia commercial fishing vessels. Although the Court noted that jurisdiction cannot be granted by consent it referred to recent comments from the Supreme Court of Canada that the courts should not be astute to find ways to frustrate rather than facilitate federal-provincial cooperation if this can be done within the rules laid down by the constitution.