



March 17, 2011

The Honourable Stephanie Cadieux
Minister of Labour, Citizens' Services and Open Government
Room 236
Parliament Buildings
Victoria, BC V8V 1X4

Dear Minister,

RE: The Workers' Compensation Appeal Tribunal's 2010 Annual Report

I am pleased to forward the 2010 Annual Report of the Workers' Compensation Appeal Tribunal for the year ended December 31, 2010. This report has been prepared for your review pursuant to section 234(8) of the *Workers Compensation Act*.

Yours truly,



Jill Callan
Chair

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GLOSSARY

Act	<i>Workers Compensation Act</i> , R.S.B.C. 1996, c. 492
<i>Administrative Tribunals Act</i>	<i>Administrative Tribunals Act</i> , S.B.C. 2004, c. 45
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	<i>Freedom of Information and Protection of Privacy Act</i> , R.S.B.C. 1996, c.165
GECA	<i>Government Employees Compensation Act</i> , R.S., 1985, c. G-5
MRP	former Medical Review Panel
MRPP	<i>Manual of Rules of Practice and Procedure</i>
Prevention Manual	<i>Prevention Division Policy and Procedure Manual</i>
<i>Occupational Health and Safety Regulation</i>	<i>Occupational Health and Safety Regulation</i> , B.C. Reg 296/97
Review Board	former Workers' Compensation Review Board
Review Division	Review Division of the Workers' Compensation Board
RSCM I	<i>Rehabilitation Services and Claims Manual, Volume I</i>
RSCM II	<i>Rehabilitation Services and Claims Manual, Volume II</i>
WCAT	Workers' Compensation Appeal Tribunal
<i>Workers Compensation Amendment Act, 2009</i>	<i>Workers Compensation Amendment Act, 2009</i> S.B.C. 2009, c. 7 (Bill 8, 2009)
<i>Workers Compensation Amendment Act (No. 2), 2002</i>	<i>Workers Compensation Amendment Act (No. 2), 2002</i> , S.B.C. 2002, c. 66 (Bill 63, 2002)

1. CHAIR'S MESSAGE

This annual report sets out some general information regarding the statutory mandate of the Workers' Compensation Appeal Tribunal (WCAT). It also provides information regarding our activities in 2010, including appeal statistics, financial information, and summaries of judicial review judgments released by the courts during the year.

Under the *Workers Compensation Act* (Act), WCAT has jurisdiction over a variety of workers' compensation matters, including employer assessments, prevention penalties, discriminatory actions, and certificates for the courts regarding the status under the Act of parties to litigation. However, over 90% of the appeals and applications we received in 2010 were workers' and employers' appeals regarding benefits under workers' compensation claims.

WCAT is a high volume administrative tribunal. In 2010, workers and employers filed 3,946 appeals and applications. Our vice chairs decided 3,498 appeals and applications and we disposed of 975 through various summary decisions. Our intake of appeals was down 17% from the previous year. We attribute this decrease to the reduction in claims filed with WorkSafeBC, and the delays in initial adjudication that flowed from their transition to the Claims Management Solutions (CMS) system for compensation claims.

We are very fortunate to have outstanding administrative staff, most of whom hold positions in which they facilitate the smooth operation of the appeal process. They ensure that workers and employers have access to information about the process and are treated fairly. Our vice chairs are focussed on issuing timely and well-reasoned decisions that are fair. I would like to take this opportunity to thank all administrative staff and vice chairs for their contributions to WCAT and to the workers and employers we serve.

A handwritten signature in black ink, reading "Jill Callan". The signature is written in a cursive, flowing style.

Jill Callan, Chair

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

The 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 impairment 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 2010

In 2010, the only change made to the Act was an amendment to section 247(2) by the *Miscellaneous Statutes Amendment Act (No. 2), 2010*, S.B.C. 2010, c. 6 (Bill 11, 2010). The phrase "Rules of Court" was replaced with "Supreme Court Civil Rules". The *Miscellaneous Statutes Amendment Act (No. 2), 2010* received royal assent on June 3, 2010 and came into force on July 1, 2010.

There were no amendments in 2010 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 that are applicable in an appeal 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. They are found in WCAT's *Manual of Rules of Practice and Procedure* (MRPP). The MRPP is available on WCAT's website (www.wcat.bc.ca).

The original 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 to reorganize the MRPP into a more "user friendly" document, and to make necessary changes that reflect WCAT's experience to date. The revised MRPP came into effect on November 3, 2009.

In 2010, the MRPP was revised twice. The first revision corrected a small number of typographical errors and slips arising from the 2009 revision. The second revision related to an interim amendment to the extension of time to appeal process resulting from the B.C. Supreme Court's decision in *Kerton v. Workers' Compensation Appeal Tribunal et al.* (2010 BCSC 644). The interim amendment applied to all WCAT decisions respecting an extension of time to appeal made on or after May 5, 2010. The amendment was interim as both WCAT and the Board appealed the B.C. Supreme Court decision to the B.C. Court of Appeal. In early 2011, the B.C. Court of Appeal allowed the appeals. For a summary of these decisions see the judicial review of WCAT decisions section in this report.

4. COSTS OF OPERATION FOR 2010 CALENDAR YEAR

Category	Cost
Salaries	\$ 8,483,933
Employee Benefits and Supplementary Salary Costs	\$ 2,094,798
Per Diem – Boards and Commissions	\$ 266,707
Travel	\$ 78,963
Centralized Management Support Services	\$ 529,709
Professional Services	\$ 422,063
Information Technology, Operations, and Amortization	\$ 1,130,057
Office and Business Expenses	\$ 389,907
Building Occupancy and Amortization	\$ 1,124,421
TOTAL EXPENDITURES	\$ 14,520,558

5. WCAT MEMBERS

The members of WCAT are the chair and 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 2010, five new vice chairs were appointed to WCAT.

<i>Executive and Vice Chairs with Special Duties as of December 31, 2010</i>		
<i>Name</i>	<i>Position</i>	<i>End of Term</i>
Jill Callan	Chair	March 3, 2014 (OIC# 50/09)
Jane MacFadgen	Senior Vice Chair & Registrar	February 28, 2015
Teresa White	Senior Vice Chair & Tribunal Counsel	December 31, 2014
James Sheppard	Vice Chair, Quality Assurance & Training	February 28, 2014
Steven Adamson	Vice Chair & Deputy Registrar	February 28, 2014
Kevin Johnson	Vice Chair & Deputy Registrar	February 28, 2014
Paul Petrie	Vice Chair & Deputy Registrar	February 28, 2013
Hélène Beauchesne	Vice Chair & Team Leader	March 31, 2014

<i>Executive and Vice Chairs with Special Duties (continued)</i>		
Lesley 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, 2014

<i>Vice Chairs as of December 31, 2010</i>	
<i>Name</i>	<i>End of Term</i>
Cathy Agnew	August 31, 2012
Luningning Alcuitas-Imperial	February 28, 2013
Beatrice K. Anderson	February 28, 2013
W. J. (Bill) Baker	February 29, 2012
Sarwan Boal	February 28, 2014
Dana G. Brinley	February 28, 2012
Melissa Clarke	September 30, 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, 2013
Warren Hoole	September 30, 2014
Nora Jackson	February 28, 2014
Cynthia J. Katramadakis	March 31, 2013
Joanne Kembel	February 29, 2012
Brian King	August 31, 2012
Rob Kyle	February 28, 2014
Randy Lane	February 28, 2015
Janice A. Leroy	February 28, 2014
Julie C. Mantini	February 28, 2014
Heather McDonald	February 28, 2013
Herb Morton	February 28, 2015

<i>Vice Chairs as of December 31, 2010 (continued)</i>	
David Newell	January 31, 2012
P. Michael O'Brien	February 28, 2013
Michael Redmond	February 29, 2012
Dale Reid	February 28, 2013
Deirdre Rice	February 28, 2014
Shelina Shivji	March 31, 2014
Debbie Sigurdson	February 28, 2014
Timothy B. Skagen	March 31, 2014
Anthony F. Stevens	February 28, 2014
Eric S. Sykes	August 31, 2011
Andrew J. Waldichuk	February 28, 2014
Kathryn P. Wellington	February 28, 2013
Lynn M. Wilfert	February 28, 2012
Lois J. Williams	February 28, 2013
Judith Williamson	March 31, 2011
Sherryl Yeager	February 28, 2013

<i>New Vice Chairs in 2010</i>	
<i>Name</i>	<i>Effective Date</i>
Patricia Broad	May 3, 2010
Darrell LeHouillier	May 3, 2010
Renee Miller	May 3, 2010
Andrew Pendray	May 3, 2010
Allan Tuokko	May 3, 2010

<i>Vice Chair Departures in 2010</i>		
<i>Name</i>	<i>Original Appointment Date</i>	<i>Departure Effective Date</i>
Mike Carleton	March 3, 2003	February 25, 2010
David Cox	March 3, 2003	January 29, 2010
Iain Macdonald	March 3, 2003	December 17, 2010
Marguerite Mousseau	March 3, 2003	February 26, 2010
Andrew Pendray	May 3, 2010	July 30, 2010
Susan Polsky Shamash	March 3, 2003	February 26, 2010
Don Sturrock	March 3, 2003	September 24, 2010

6. EDUCATION

WCAT is committed to excellence in decision-making. WCAT's MRPP sets out our guiding principles in item #1.4. WCAT strives to provide decision-making that is predictable, consistent, efficient, independent and impartial. We also strive to provide decisions that are succinct, understandable, and consistent with the Act, policy, and WCAT precedent decisions.

WCAT 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 2010, 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.

Commencing in May 2010, the WCAT education group provided an extensive orientation and training program for five new WCAT vice chairs, involving several weeks of classroom sessions and extensive mentoring.

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 2010, the Inter-Organizational Training Committee organized and presented two-half day sessions. The first, held on April 20, 2010, focused on the

adjudication of mental stress claims. The second, held on December 8, 2010, focused on current research regarding chronic pain and return to work.

In 2010, 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 organized by WCAT for vice chairs during 2010:

1. January 14
 - Evidence: The “Rule” in *Browne v. Dunn*
2. March 4
 - Crisis Intervention and Suicide Awareness and Response: The Basics
3. May 13
 - Causation and Evidence: Hearsay
4. June 23
 - Researching and Writing Decisions: Tips for Using ISYS and Word 2007
5. July 21
 - Time Management
 - CMS
 - Teleclaim Applications
6. September 16
 - Oral Hearings and the Right to Cross Examination
7. October 14
 - Ethics for Decision Makers
 - Wage Rates and Average Earnings
 - Judicial Notice
8. November 4
 - When and How to Issue Orders

In addition, many WCAT vice chairs participated in Continuing Legal Education (CLE) sessions, including a webcast of the Administrative Law CLE on October 22, 2010.

7. PERFORMANCE EVALUATION

Section 234(2)(b) of the Act provides the WCAT “chair is responsible for establishing quality adjudication, performance and productivity standards for members of [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 2010. The performance of vice chairs will continue to be regularly evaluated on an ongoing basis.

8. STATISTICS

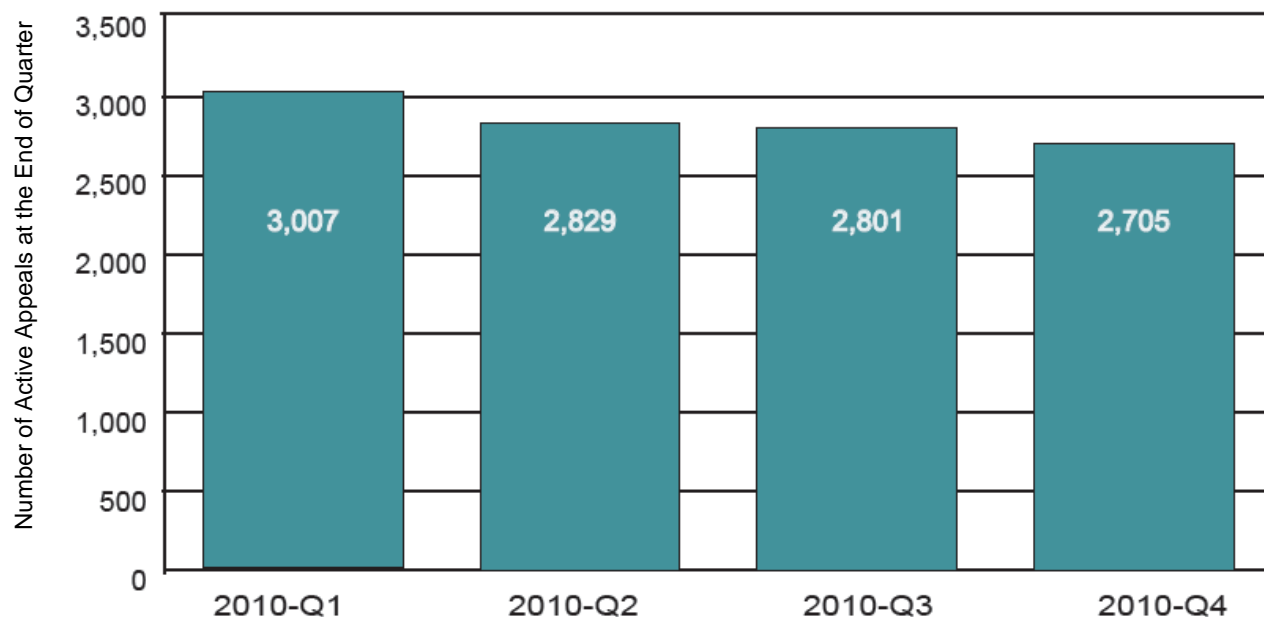
8.1 Overview of Appeals Inventory

This section contains two charts providing a high level overview of the status of our appeals inventory for 2010. WCAT records appeals by their date of initiation.

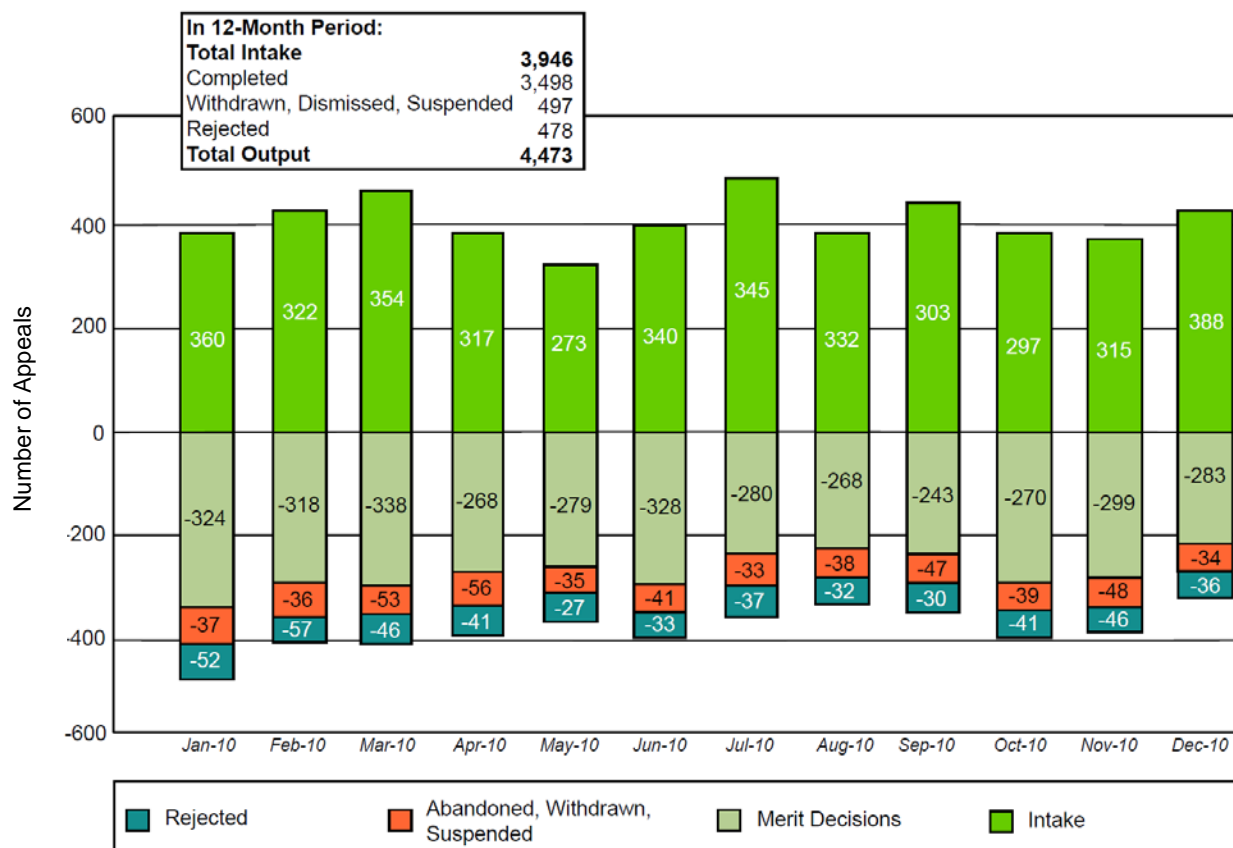
The first chart (Number of Active Appeals) provides the number of appeals in our inventory at the end of each quarter of 2010. WCAT's total active inventory at December 31, 2010 was 2,705 appeals compared to 3,228 at the end of 2009. This represented a 16% decrease in the appeals inventory during 2010.

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 3,946 new appeals in 2010, representing a decrease of 17% from the 4,767 new appeals we received in 2009. In light of increased intake of reviews by the Review Division in 2010, we anticipate a higher volume of appeals at WCAT in 2011.

WORKERS' COMPENSATION APPEAL TRIBUNAL NUMBER OF ACTIVE APPEALS IN INVENTORY



WORKERS' COMPENSATION APPEAL TRIBUNAL TOTAL INTAKE AND OUTPUT IN EACH MONTH



8.2 Appeals and Applications

Appeals and applications are comprised of:

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

The Act provides that parties may appeal to WCAT from compensation, assessment, and prevention decisions of the Review Division. The Act also provides that some Board decisions are appealable directly to WCAT without being reviewed by the Review Division, and that some other applications are made directly to WCAT. These direct appeals and applications include reopenings on application, discriminatory action complaints, requests for reconsideration of WCAT decisions, and applications for certificates for court actions.

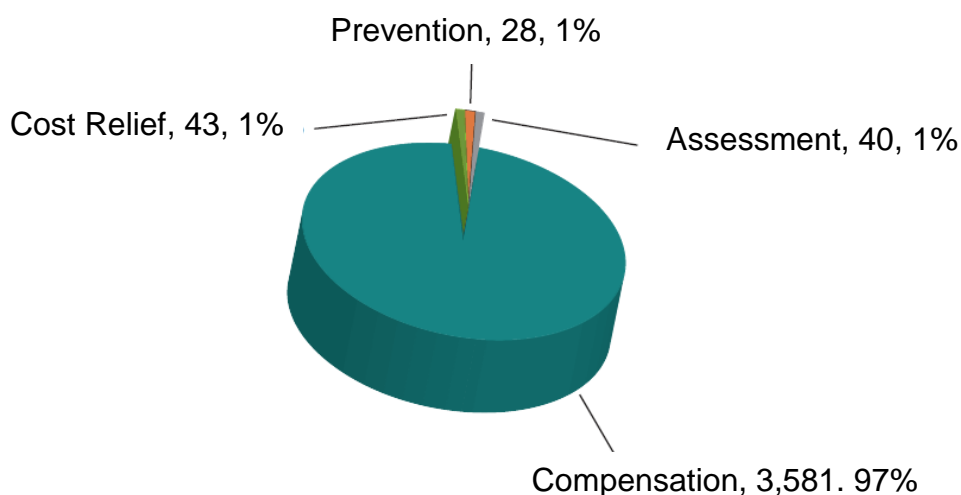
(a) Intake

WCAT received 3,946 appeals and applications in 2010. Of these, 3,692 appeals (94%) arose from decisions of Board review officers and 254 were direct.

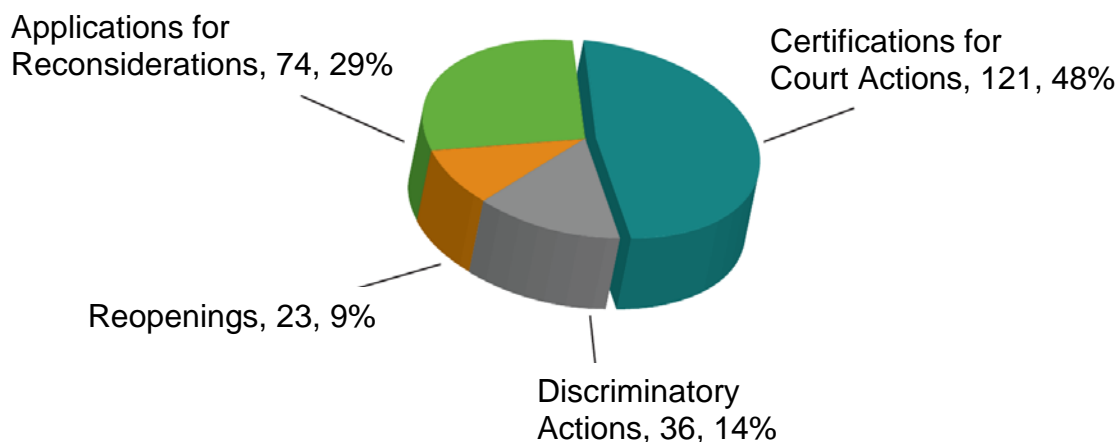
Source	Intake
Review Division	3,692
Direct	254
Total	3,946

The following two charts show the breakdown of the types of appeals and applications we received in 2010.

APPEALS FROM REVIEW DIVISION BY TYPE



DIRECT APPEALS AND APPLICATIONS BY TYPE



(b) Merit Decisions

WCAT made 3,498 merit decisions on appeals and applications in 2010, 84 of which concerned applications for certificates for court actions. The remaining 3,414 merit decisions concerned appeals from decisions of the Review Division or Board officers, which may be varied, confirmed or cancelled by WCAT.

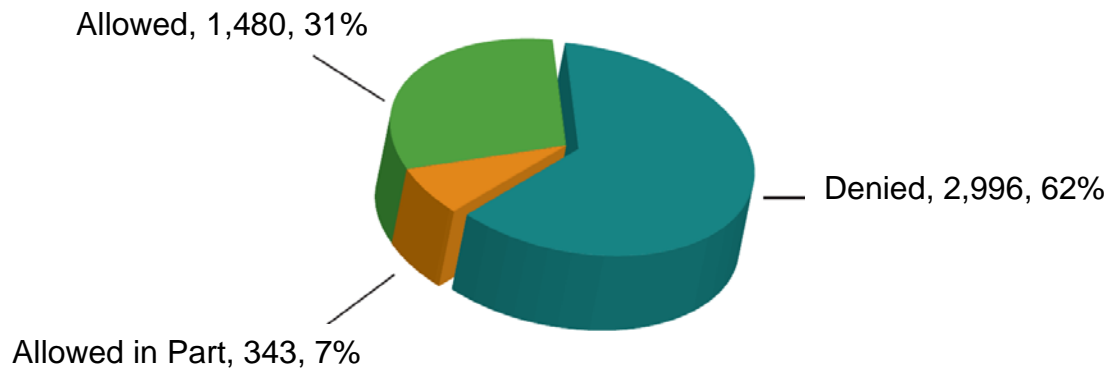
“Vary” means that WCAT varied the previous decision in whole or in part. Accordingly, whether WCAT has fully granted the remedies requested by the appellant on all issues arising under the appeal or merely changed a minor aspect of the previous decision, the decision is considered to have been “varied.” “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 compensations appeals.

Appeals		Outcome	
Appeal Type	Number of Decisions	Varied	Confirmed
Compensation	3,293	42%	58%
Relief of Costs	37	41%	59%
Assessments	33	39%	61%
Prevention	21	57%	43%
Discriminatory Actions	27	37%	63%
Reopenings	3	67%	33%

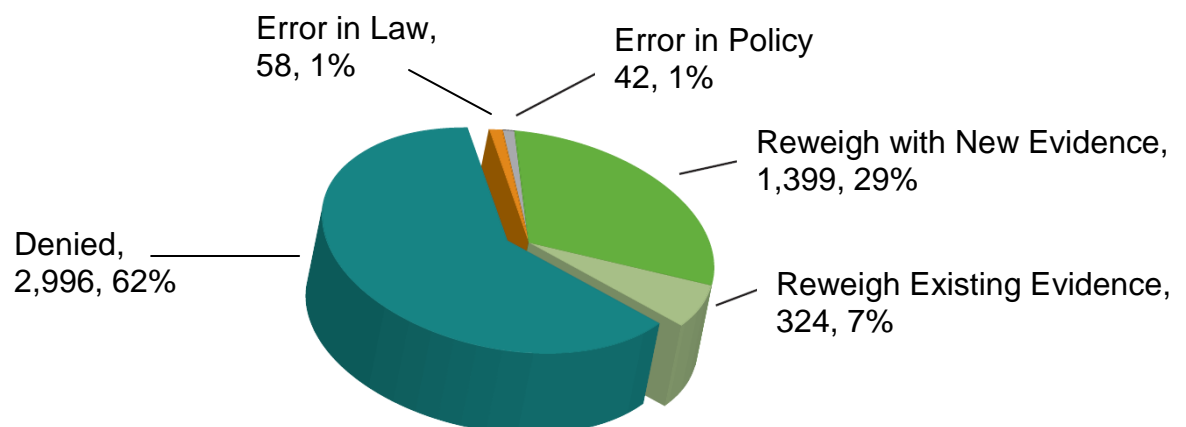
An appeal may raise numerous issues and WCAT may allow or deny the appeal on each issue. In 2010, WCAT decided 4,819 issues that arose out of the 3,414 appeals that led to merit decisions. The following chart shows the percentage of issues for which the appeals were allowed, allowed in part, or denied.

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



(c) Summary Decisions

WCAT made 975 summary decisions on appeals. In 475 (49%) of these decisions, WCAT dismissed the appeal or confirmed that the appellant had withdrawn it. WCAT rejected 342 appeals (35%) because there was no appealable issue or the decision under appeal was not appealable to WCAT. Twenty-two summary decisions suspended appeals.

Of the remaining 136 summary decisions, 87 decided applications for reconsideration and 49 denied requests for extensions of time to appeal.

(d) Requests for Extensions of Time

WCAT decided 171 requests for extensions of time to appeal, allowing 122 and denying 49.

(e) Top Five Issue Groups for WCAT Appeals

Act	Merit Decisions	Percentage of Total Decisions	Allowed / Allowed in Part	Denied
Section 5 – Compensation For Personal Injury	1,490	32%	38%	62%
Section 23 – Permanent Partial Disability	834	18%	43%	57%
Section 6 – Occupational Disease	510	11%	36%	64%
Section 30 – Temporary Partial Disability	354	8%	34%	66%
Section 29 – Temporary Total Disability	321	7%	36%	64%

8.3 General

(a) Appeal Paths

WCAT decides appeals and applications after an oral hearing or, if the appellant does not request an oral hearing or WCAT determines that an oral hearing is not necessary to fully and fairly consider the matter, after reading and reviewing the Board's records, any new evidence, and the submissions of the parties.

In 2010, WCAT decided a total of 3,498 appeals and applications. WCAT decided 1,641 (47% of the total) after convening an oral hearing and decided 1,857 appeals and applications (53% of the total) by written submission.

(b) Oral Hearing Weeks

In 2010, WCAT held oral hearings in 13 locations around the province. The following table shows the number of hearing weeks that WCAT held in each location.

Location	Number of Hearing Weeks
Castlegar	5
Courtenay	10
Cranbrook	5
Fort St. John	2
Kamloops	9
Kelowna	13
Nanaimo	11
Nelson	1
Prince George	11
Terrace	5
Victoria	18
Williams Lake	3
Total outside Richmond	93
Richmond	240
Grand Total	333

(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 2010. The table does not include assessment or relief of costs appeals as the appellant is always the employer.

Type of Appeal or Application	Appellant / Applicant		
	Worker	Employer	Dependant
Compensation	92%	7%	1%
Discriminatory Action	36%	64%	0%
Direct Reopening	96%	4%	0%
Prevention	7%	91%	2%
Reconsiderations	94%	6%	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 relate to all appeals and applications that were active at some time during 2010.

Type of Appeal	Percent Represented where Appellant / Applicant is:		
	Worker	Employer	Dependant
Assessment	NA	64%	NA
Compensation	73%	68%	95%
Relief of Costs	NA	73%	NA
Discriminatory Action	41%	83%	NA
Direct Reopening	54%	NA	NA
Prevention	25%	68%	100%
Reconsiderations	71%	80%	NA

9. PRECEDENT PANEL DECISIONS

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

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

WCAT did not issue any precedent panel decisions in 2010. No precedent panel decisions were pending at the end of 2010.

10. REFERRALS TO THE CHAIR (SECTION 251)

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

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

At the end of 2009 there were no outstanding policy referrals to the chair. In 2010, one policy was referred to the chair. After the B.C. Supreme Court's decision in *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)*, 2010 BCSC 1340, which set aside an earlier WCAT decision as being patently unreasonable, a vice chair considered an aspect of item AP1-39-2 of the *Assessment 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 provided that the Board would pay an employer interest on overpaid assessments from the date that the employer requested a review or filed a notice of appeal in relation to an assessment decision. On the basis of the express reasoning of the court in *Viking Logistics* the vice chair concluded that the aspect of the policy was patently unreasonable as it did not provide

for the payment of interest from the date the overpayment was made. For a summary of *Viking Logistics* see the judicial review of WCAT decisions section in this report.

In early 2011, the vice chair withdrew the policy referral to the chair after the board of directors of the Board amended the policy. By resolution 2010/12/08-03 the board of directors amended item AP1-39-2 to provide that interest is payable from the date the employer overpaid the Board. The new policy was effective on September 22, 2010 and applies to all decisions, including appellate decisions.

11. NOTEWORTHY WCAT DECISIONS

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

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

WCAT issued a number of noteworthy decisions in 2010. This section provides summaries of some of those decisions.

All WCAT decisions from 2010, 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))

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- 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. 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 under section 256 of the Act; and
- jurisdictional error.

Applications for reconsideration involve a two-stage process. The first stage results in a 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 the new evidence ground, 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 that meets those criteria, WCAT 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, WCAT will hear the affected portions of the appeal afresh.

During 2010, WCAT received 74 applications for reconsideration and issued 84 stage one decisions. Of the stage one decisions issued, 32 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
New Evidence	21	0	3	18
Jurisdictional Error	57	1	27	29
Both Grounds Alleged	6	0	2	4
TOTAL	84	1	32	51

12.1 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 2010, WCAT allowed 29 applications for reconsideration on the ground of jurisdictional error. Of those 29 allowed applications, 12 were allowed on the basis of a breach of procedural fairness, 10 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 6 were allowed on both grounds. The reconsideration panel on one of the 10 applications allowed on the basis of a patently unreasonable error found the original panel purported to exercise jurisdiction it did not have. One of the reconsideration applications was allowed on the basis of an error of law in respect of which the standard of review was one of correctness.

13. JUDICIAL REVIEW OF WCAT DECISIONS

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

Pursuant to section 57(1) of the *Administrative Tribunals Act*, an application for judicial review of a final decision of WCAT must be commenced within 60 days of the date the decision is issued. Under certain circumstances, the court may extend the time for applying for judicial review.

13.1 Judicial Review Applications

The number of judicial review applications brought in respect of WCAT decisions decreased significantly in 2010 from 2009. In 2009, 44 judicial review applications were served on WCAT. In 2010, 19 judicial review applications were served on WCAT.

13.2 Judicial Review Decisions

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

(a) *Lavigne v. British Columbia (Workers' Compensation Board)*, 2010 BCSC 341

Decision under review: *WCAT-2009-00183*

The Petitioner sought judicial review of a WCAT reconsideration decision on the basis that WCAT failed to follow the earlier order of the court in *Lavigne v. British Columbia (Workers Compensation Review Board)*, 2008 BCSC 1107.

The Court dismissed the petition, finding that it was not patently unreasonable for the reconsideration panel to decline to order an oral hearing, nor was it unfair in light of the fact that the Petitioner expressly asked the tribunal that there be no oral hearing. The Court further found that it had no jurisdiction to address the petitioner's wage rate and permanent disability award on this judicial review.

(b) *Jensen v. Workers' Compensation Appeal Tribunal*, 2010 BCSC 266

Decision under review: *WCAT-2007-02536*

In this judicial review, the Court considered a WCAT decision which found that the worker's rheumatoid arthritis was not caused, activated, or accelerated by his earlier 1994 compensable injury.

The Petitioner, a long-haul truck driver, was injured at work on February 9, 1994. He was manoeuvring a dolly with a load of over 100 pounds down a ramp covered in snow when his foot slipped and he fell backwards into the door jam and door of a building, and the load struck him in the chest. The Board accepted his claim for compensation for injuries to the right side of his back, right shoulder, right wrist and fingers as compensable injuries. Shortly thereafter, the Petitioner developed symptoms, which were later diagnosed as rheumatoid arthritis. He sought compensation for the rheumatoid arthritis on the basis that it was caused, activated, or accelerated by

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 compensable injury. WCAT in an August 24, 2007 decision found that the arthritis was not compensable as the evidence indicated that the disease was unlikely to be caused or aggravated by the 1994 injury. The Petitioner sought judicial review of the WCAT decision.

The Court dismissed the petition finding that there was evidence before the panel upon which it could come to the decision that it did, with the result that the WCAT decision was not patently unreasonable. The Court noted that the standard of review on questions of entitlement to compensation is patent unreasonableness, and patent unreasonableness is defined by the common law as it existed prior to the decision of *Dunsmuir v. New Brunswick*, 2008 SCC 9. The Court, applying that standard of review, found that WCAT: (1) did not err by finding that three other decisions put before the panel were not persuasive because they were based on other medical evidence and involving other injuries; and, (2) was not required to detail all of the evidence before it relating to the petitioner's injuries. It was sufficient that the panel considered the medical evidence before it within the context of the injuries described by the Petitioner and resolved the evidentiary issues.

**(c) *Sidhu v. British Columbia (Workers' Compensation Appeal Tribunal)*,
2010 BCSC 277**

Decision under review: *WCAT-2006-04471*

In this judicial review, the Court considered a WCAT reconsideration decision which upheld an earlier WCAT decision that dealt with a number of issues including the permanent disability award of a sawmill worker with right hand injuries.

On judicial review, the Petitioner initially alleged some twenty errors on the part of WCAT, but refined those down to six. The Petitioner asserted that WCAT: unlawfully failed to hold an oral hearing; unlawfully applied a patent unreasonableness standard of review to the original decision; unlawfully found that the Review Board lawfully denied the Petitioner a loss of earnings (LOE) pension prior to December 13, 1995; unlawfully found that the Review Board lawfully denied the Petitioner a permanent functional impairment (PFI) pension increase retroactive to December 13, 1989; unlawfully denied interest on the retroactive portion of the LOE pension; and unlawfully breached item #14.30 of the MRPP when it failed to give notice that its jurisdiction to reconsider previous Review Board and Appeal Division decisions was at issue.

Regarding the standard of review, the Court found that jurisprudence has established that under the *Administrative Tribunal Act* patent unreasonableness normally applies to WCAT for issues of entitlement to compensation, including pensions. Patent unreasonableness is to be defined as it stood prior to the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9. However, because the decision under review was a reconsideration decision, the Court found that correctness was the correct test to apply by reference to the original decision. The Court noted that in this case, the reconsideration panel found the original decision to not be patently unreasonable, but

also found it to be correct. The Court acknowledged that WCAT had argued that for matters of first instance considered by the reconsideration panel, the patent unreasonableness standard should apply, but the Court found it was unnecessary to decide whether that is so because the reconsideration decision easily withstood the test of correctness.

(d) *Kerton v. Workers' Compensation Appeal Tribunal*, 2010 BCSC 644

Decisions under review: *WCAT-2006-03952* and *WCAT-2008-00058*

Section 243(3) of the Act provides that where the WCAT chair is satisfied that:

- a) special circumstances precluded an appellant from appealing within the appeal period; and
- b) an injustice would otherwise result,

the chair may extend the time to file an appeal even where the time to do so has expired.

This judicial review addressed the issue of whether section 243(3) confers on WCAT a residual discretion to deny an appellant an extension of the time to appeal even where the two statutory criteria for an extension of time have been satisfied. Section 243(3) is almost identical to section 96.2(4) of the Act which creates a similar test for extensions of time in relation to request for review to the Review Division. In the WCAT decisions under review (and as was set out in the MRPP) the panels determined that WCAT had a residual discretion.

The Court found, on a correctness standard of review, that WCAT does not have a residual discretion. It did so principally on the basis that the legislature could not have intended an extension of time to be refused where there would be a proven injustice. The Court returned the matter to WCAT for rehearing and to consider afresh what "special circumstances" and "injustice" means in the absence of a residual discretion. On an interim basis WCAT amended its MRPP to remove any reference to a residual discretion under section 243(3). Both WCAT and the Board appealed the court's decision to the B.C. Court of Appeal. Early in 2011 the Court of Appeal issued its decision allowing both appeals. It found that WCAT's interpretation of section 243(3) was reviewable on a patently unreasonable standard and that it was not a patently unreasonable interpretation.

**(e) *Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal)*,
2010 BCSC 1279**

Decisions under review: WCAT-2008-01126, WCAT-2008-01448, and WCAT-2008-03611

In this judicial review the Court considered three WCAT decisions which decided a number of issues including whether the Petitioner was entitled to an award for upper extremity nerve impairment or symptoms and whether the Petitioner was entitled to a loss of earnings assessment under section 23(3) of the Act. On judicial review, all three WCAT decisions were set aside.

With respect to the first decision the issue was whether the Petitioner suffered a low back injury, or an aggravation of a pre-existing low back condition, during the rehabilitation program he was attending due to an earlier compensable injury. The Petitioner wanted to cross examine two staff members at the rehabilitation program with regard to his allegation that they witnessed his injury during the program when he fell off of an exercise bike. The WCAT panel elicited the witnesses' evidence in writing. The Petitioner was of the view that the written responses were unsatisfactory. The Court found that in denying the Petitioner the right to cross examine the witnesses to the alleged event, which was relevant and central to the appeal, there was a denial of procedural fairness.

The issue before the second WCAT panel was whether the Petitioner was entitled to an additional award for upper extremity nerve impairment or upper extremity symptoms. The panel relied on the Board medical advisor's opinion that an award be given only for reduced range of motion. The panel found that there was no expert opinion contrary to the Board medical advisor's opinion. The court concluded that there were medical opinions to the contrary on file and that while it was open to WCAT to reject those opinions, WCAT committed a jurisdictional error by finding that there was no such evidence.

In the third decision the Court found that WCAT erred in law due to its central reliance on a report by the Board's Disability Awards Department with respect to whether the Petitioner was entitled to a loss of earnings assessment under section 23(3) of the Act. In particular, the Board's report relied on a Board practice directive which provided an interpretation of "impossible" under Board policy item #40.00 which was applicable when its report was prepared but which had been significantly modified by the time the WCAT decision was made. Despite this modification, the WCAT panel relied on the report which had applied the outdated policy and the court found the decision patently unreasonable.

**(f) *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)*,
2010 BCSC 1340**

Decision under review: *WCAT-2008-02206*

In this judicial review the Court considered a WCAT decision which addressed the date from which interest is payable by the Board under section 259(2) of the Act. The Petitioner sought to quash not only the WCAT decision, but the decisions of the Review Division and Assessment Department which underlay the WCAT decision. In addition, the Petitioner sought a declaration that Board assessment policy AP-35-2 regarding payment of interest was invalid.

The Petitioner provided home delivery of newspapers and advertising materials through drop-site supervisors and carriers. In 1998 the Board registered the Petitioner as the “employer” of “workers” or “labour contractors”, and issued an assessment of premiums that it required the Petitioner to pay. The Petitioner maintained that the carriers and drop-site supervisors were independent contractors, and that its relationship with them therefore fell outside the scope of the Act. The Petitioner requested a manager’s review of the Board’s decision. For two years the Board did not respond to this request, finally responding when the Petitioner’s counsel sent a follow-up letter. In 2007 WCAT allowed the Petitioner’s appeal and directed the Board to refund assessed and paid premiums on the basis that the Petitioner’s status had been based on insufficient evidence from an inadequate investigation.

Under section 259(2) of the Act the Board must pay interest on an amount refunded to an employer after the employer’s successful appeal or review and the interest is to be calculated in accordance with the Board’s policy. The Board’s policy AP-35-2 provided that interest was to be paid only from the time the employer filed a formal review or appeal. This, in effect, limited the payment of interest to only part of the period during which the Board held the funds to be refunded.

The Court concluded that the Board’s policy restricting the period of interest was out of accord with section 259(2) of the Act, and that the WCAT decision upholding the Board’s interest decision was patently unreasonable. In particular, the Court found that WCAT assumed that the policy conformed to section 259(2) without interpreting that section to determine its restrictive effect, if any, on the Board’s jurisdiction to limit the period of interest. The Court remitted the matter to WCAT for reconsideration. It suggested that WCAT consider whether section 259 of the Act, read in light of the statutory scheme as a whole, allows the Board to significantly restrict the period for which interest will be paid on amounts refunded; and, if it does, whether the Board’s policy, as applied to the Petitioner’s situation, is supported by the Act and its Regulations. The Court found it could properly order the other forms of relief sought.

On reconsideration, WCAT concluded that the impugned aspect of the policy was so patently unreasonable that it was not capable of being supported by the Act and its regulations. In early 2011, the vice chair withdrew the policy referral to the chair after

the board of directors of the Board amended the policy. By resolution 2010/12/08-03 the board of directors amended item AP1-39-2 to provide that interest is payable from the date the employer overpaid the Board. The new policy was effective on September 22, 2010 and applies to all decisions, including appellate decisions.

(g) *Lalli v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 BCSC 1501

Decisions under review: *WCAT-2008-01199* and *WCAT-2009-00637*

In this judicial review the Court considered a WCAT decision which found that the worker's death did not arise out of and in the course of his employment and therefore, the worker's widow was not entitled to benefits as a result of the worker's death.

The Petitioner was the widow of the worker who was killed in a motor vehicle accident on May 31, 2006, during the course of his employment. The widow claimed compensation under the Act. The claim was initially approved by the Board but subsequently denied based on medical evidence.

On appeal, WCAT denied the appeal, finding that the worker's death did not arise out of and in the course of his employment, therefore, the worker's widow was not entitled to benefits as a result of the worker's death. WCAT relied on a medical opinion that death was due to the combined effects of acute cocaine intoxication and atherosclerotic coronary artery disease, and would have occurred even without the blunt force injuries from the vehicle accident.

The Court allowed the application. The Court found that the medical opinion was based on an understanding of the facts which was that the worker was incapacitated before the vehicle accident as evidenced by the fact that his truck drifted off the road, and there was no braking to avoid the accident. The Court concluded that the medical opinion lacked a factual foundation to support its conclusions as, for example, the Court found that the evidence of the witnesses did not support a finding that the truck drifted off the road, and found that there was no objective medical evidence that Mr. Lalli had a cardiovascular event before his death. The Court concluded that, as material facts were unsupported by the evidence, the decision was patently unreasonable.

(h) *Emergency and Health Services Commission v. Wheatley*, 2010 BCSC 1769

Decision under review: *WCAT-2008-03840*

In this judicial review the court considered a WCAT decision which found that the employer had engaged in discriminatory action against one of its workers contrary to section 151 of the Act.

The worker, a paramedic, requested accommodation in relation to his employer's requirement that its paramedics wear an N95 respirator that required them to be

clean-shaven. The accommodation was requested on the basis that, because of a skin condition, the worker experienced skin irritation from frequent shaving and wished to use a different type of respirator. He also questioned the adequacy of the N95 respirator. Following this, the employer placed the employee on a Short Term Illness and Injury Plan (STIIP) with a consequent 25% reduction in his income. The employer and the worker could not subsequently agree on the extent of medical evidence required to establish a need for accommodation. Ultimately the worker was disciplined, such discipline including a period of suspension.

The worker brought a discriminatory action claim against his employer under section 151 of the Act. The Board found that the employer had engaged in discriminatory action contrary to section 151 of the Act. The Board's decision was confirmed by WCAT in part. WCAT found that certain actions by the employer were not discriminatory. The employer sought judicial review of WCAT's decision. The court dismissed the application. In relation to the standard of review to be applied to WCAT's decision the court found, contrary to the Petitioner's argument, that if there is a spectrum within the standard of patent unreasonableness, decisions of WCAT with respect to the issue of discriminatory action under sections 150-153 of the Act are not subject to a lower level of deference than other WCAT decisions.

The court found that it was not patently unreasonable for WCAT to find that the worker had made a *prima facie* (on the face of it) case of discriminatory action in contravention of section 151 of the Act, which was not rebutted by the employer. In coming to this conclusion the court noted that it was not patently unreasonable for WCAT to conclude that:

- placing the worker on STIIP resulted in a 25% reduction in his income, and this fell within the definition of "discriminatory action" in section 150 of the Act;
- placing the worker on STIIP the day after the employee expressed his concerns about the adequacy of N95 respirators was at least in part motivated by the safety concerns raised by the worker with respect to that type of respirator; and,
- the letters to the worker, and suspension of the worker were contrary to the Act's prohibition against discrimination, which includes prohibitions against coercion, intimidation and suspension.

The Court further found, contrary to the Petitioner's argument that there is a spectrum within the standard of patent unreasonableness, decisions of WCAT with respect to the issue of discriminatory action under sections 150-153 of the Act are not subject to a lower level of deference than other WCAT decisions.

14. OTHER COURT DECISIONS

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

(a) *British Columbia (Workers Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2010 BCCA 77, Leave to Appeal granted June 14, 2010 SCC Bulletin, 2010, page 854

This was an appeal from a decision of the B.C. Supreme Court quashing the Human Rights Tribunal's decision to proceed with the appellant's human rights complaint. The appellant's complaint was that Board's chronic pain policy, item #39.01 of the RSCM II, contravened the *Human Rights Code*. Prior to filing the human rights complaint, the appellants had obtained a determination by the Review Division that the impugned policy did not contravene the Code. The Board applied to the Tribunal to have the complaint dismissed because the matter had already been dealt with by the Review Division. The Tribunal dismissed the Board's application and the Board sought judicial review of that decision. The Chambers Judge quashed the Tribunal's decision on the grounds that the Tribunal failed to properly consider the principles of *res judicata* (a matter already judged), mootness, issue estoppel, collateral attack, and abuse of process when it decided to proceed with hearing the complaints.

The Court of Appeal allowed the appeal. The Court found that the Tribunal's decision under section 27(1)(f) of the Code as to whether to proceed with the complaint was purely discretionary. The Code conferred on the Tribunal jurisdiction to adjudicate a human rights complaint even where the same issue has already been raised before or has been dealt with by another adjudicative body. The fact that a body such as the Review Division had already dealt with the human rights issue did not have the effect of nullifying the Tribunal's jurisdiction. The common law doctrines of *res judicata* (a matter already judged), mootness, issue estoppel, collateral attack, and abuse of process were not determinative, but served only to inform what was ultimately an exercise of discretion. The decision to allow the complaints to proceed to a hearing was not patently unreasonable and should not have been quashed.

Leave to appeal to the Supreme Court of Canada was granted to the Board and the hearing of the matter has been set for March 16, 2011.

(b) *Gonzalez v. British Columbia (Workers Compensation Board)*, 2010 BCSC 476

This was an application by the Petitioner Gonzalez for an order setting aside two decisions of the Appeal Division. The Petitioner was injured in a workplace accident in 1995. The Board determined that his injury was permanent and he was assessed with a loss of earnings pension. The Petitioner challenged the amount of the loss of earnings pension, arguing that his pension wage rate should be based on full-time employment at his hourly rate at the time of injury. The Board had determined the wage

rate based upon the Petitioner's earnings in the year before his injury after discounting for one month in which he was off work due to a non-compensable injury. The Petitioner pursued avenues of appeal within the Board. The first Appeal Division decision confirmed the Board's determination of the Petitioner's long-term wage rate. The second Appeal Division decision held that there was no reason to increase the Petitioner's permanent functional impairment award since he was already receiving a 100% loss of earnings pension award and under the Act, the Petitioner could not receive both pensions.

The Petitioner sought a court order setting aside both Appeal Division decisions. The Court applied a reasonableness standard to the decisions of the Appeal Division and determined that the decisions were reasonable. The respective Appeal Division panels reached their conclusions based on the evidence before them, and their conclusions fell within the range of possible acceptable outcomes. Both decisions of the Appeal Division were the product of due consideration and the logic of their reasoning appeared justifiable, transparent and intelligible. The Court also noted that it had no power in a judicial review proceeding to provide much of the relief sought by the Petitioner, including an order for compensation, non-pecuniary damages, past and future income loss, future care costs, legal fees and costs, aggravated damages, compensation for injured dignity, punitive damages and special costs.