2011 Annual Report For the year January 1 to December 31, 2011

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

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Website: www.wcat.bc.ca

March 5, 2012

The Honourable Dr. Margaret MacDiarmid
Minister of Labour, Citizens' Services
and Open Government
Room 346 Parliament Buildings
Victoria, BC V8V 1X4

Dear Minister,

RE: The Workers' Compensation Appeal Tribunal's 2011 Annual Report

I am pleased to forward the 2011 Annual Report of the Workers' Compensation Appeal Tribunal for the year ended December 31, 2011. 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*, 2009 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, 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 2011, 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 2011 were workers' and employers' appeals regarding benefits under workers' compensation claims.

WCAT is a high volume administrative tribunal. In 2011, workers and employers filed 4,583 appeals and applications. Our vice chairs decided 3,315 appeals and applications and we disposed of 897 through various summary decisions. Our 2011 intake of appeals was 16% greater than our 2010 intake. This is because our 2010 intake was unusually low due to the delays in initial adjudication at WorkSafeBC that flowed from their transition to the Claims Management Solutions (CMS) system for compensation claims. Our 2011 intake was comparable to our 2009 intake.

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 appeal 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.

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.

Some decisions of the Review Division are final and not subject to appeal to WCAT. Review Division decisions regarding the following matters 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; and
- 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 2011

There were no changes in 2011 to the *Workers Compensation Act,* the *Administrative Tribunals Act,* or 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 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 in *Kerton v. Workers' Compensation Appeal Tribunal*, 2011 BCCA 7 and restored WCAT's discretion to deny an extension of time to appeal when the special circumstances and injustice criteria set out in section 243(3) of the Act have been met.

In 2011, the MRPP was revised twice. The first revision, dated March 9, 2011, related to applications for extensions of time to appeal and reflected the judgment of the B.C. Court of Appeal in *Kerton*. These changes applied to all extension of time applications received on or after January 10, 2011. The first revision also made housekeeping amendments as a result of the new *Supreme Court Civil Rules*, B.C. Reg. 168/2009. These amendments were made effective March 9, 2011. The second revision, dated May 31, 2011, updated fee information set out in the British Columbia Medical Association (BCMA) Fee Schedule and the WorkSafeBC Psychologist Fee Schedule included in Appendix 11.

4. COSTS OF OPERATION FOR THE 2011 CALENDAR YEAR

Category	Cost
Salaries	$ 8,434,196
Employee Benefits and Supplementary Salary Costs	$ 2,040,690
Per Diem – Boards and Commissions	$ 236,805
Travel	$ 73,751
Professional Services	$ 411,961
Information Technology and Operations	$ 1,136,496
Office and Business Expenses	$ 444,741
Amortization	$ 139,007
Management Support Services (includes building occupancy charges and workplace technology services)	$ 1,288,192
TOTAL EXPENDITURES	**$ 14,205,839**

5. WCAT MEMBERS

Executive and Vice Chairs with Special Duties as of December 31, 2011		
Name	***Position***	***End of Term***
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
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

Vice Chairs as of December 31, 2011	
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 28, 2015
Sarwan Boal	February 28, 2014
Dana G. Brinley	February 28, 2015
Patricia Broad	April 30, 2013
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 28, 2015
Brian King	August 31, 2012
Rob Kyle	February 28, 2014
Randy Lane	February 28, 2015
Darrell LeHouillier	April 30, 2013
Janice A. Leroy	February 28, 2014
Julie C. Mantini	February 28, 2014
Renee Miller	April 30, 2013
Herb Morton	February 28, 2015
David Newell	January 31, 2015
P. Michael O'Brien	February 28, 2013

Vice Chairs as of December 31, 2011 (continued)	
Andrew Pendray	January 3, 2014
Michael Redmond	February 28, 2015
Dale Reid	February 28, 2013
Deirdre Rice	February 28, 2014
Allan Tuokko	April 30, 2013
Shelina Shivji	March 31, 2014
Debbie Sigurdson	February 28, 2014
Timothy B. Skagen	March 31, 2014
Anthony F. Stevens	February 28, 2014
Andrew J. Waldichuk	February 28, 2014
Kathryn P. Wellington	February 28, 2013
Lynn M. Wilfert	February 28, 2012
Lois J. Williams	February 28, 2013
Sherryl Yeager	February 28, 2013

Vice Chairs Appointed in 2011	
Name	**Effective Date**
Kate Campbell	September 6, 2011
Shelley Ion	September 6, 2011
Elaine Murray	September 1, 2011
Diep Nguyen	September 6, 2011
Carla Qualtrough	September 6, 2011
Simi Saini	September 6, 2011
Shannon Salter	September 6, 2011

Vice Chair Departures in 2011		
Name	***Original Appointment Date***	***Departure Effective Date***
Heather McDonald	March 3, 2003	June 30, 2011
Lorne Newton	March 3, 2003	February 28, 2011
Eric S. Sykes	March 3, 2003	August 31, 2011
Judith Williamson	March 3, 2003	March 31, 2011

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, we have pursued an extensive program of education, training, and development, both in-house and externally, where resources permit.

In 2011, 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. WCAT is registered as a continuing professional development provider with the Law Society of British Columbia.

Commencing in September 2011, the WCAT education group provided an extensive orientation and training program for our new WCAT vice chairs, involving several weeks of classroom sessions and mentoring.

WCAT is also represented on the Inter-Organizational Training Committee, which was established in 2001 and 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. On June 1, 2011 WCAT sponsored and organized an Inter-Organizational Training Committee one-half day session. The topic was "Exploring the Concept of Causative Significance." Speakers included legal counsel from WCAT's Tribunal Counsel Office.

In 2011, 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 2011:

1.	January 26	• Cross Cultural Communications (Oral hearings)
2.	February 3	• Permanent Disability Award Appeals • Procedural Fairness • Teachable Moments – Tribunal Counsel Update • Privacy Breaches and tips to avoid them • Overview of New Chapter 3, *Rehabilitation Services and Claims Manual, Volume II*
3.	June 16	• Scope of WCAT Jurisdiction • Update on CMS • Tips on Clear and Concise Writing
4.	September 15	• Recent Judicial Review – Lessons Learned • Fostering Consistent Decision-Making
5.	September 16	• Ethics for Decision-Makers • CMS • Teleclaim Applications
6.	October 14	• Ethics for Decision-Makers • Wage Rates and Average Earnings • Judicial Notice
7.	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 CLE on Causation in Tort on June 3, 2011.

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 2011. The performance of vice chairs will continue to be regularly evaluated on an ongoing basis.

8. STATISTICS

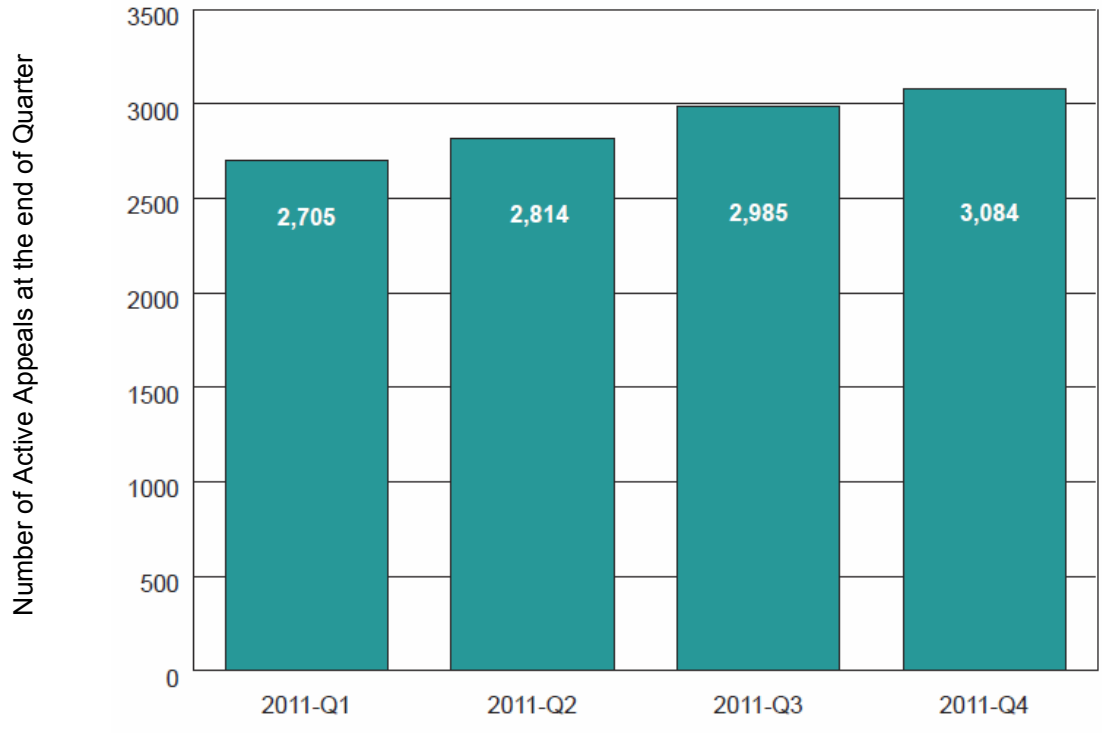
8.1 Overview of Appeals Inventory

This section contains two charts providing a high level overview of the status of our appeals inventory for 2011. WCAT records appeals by their date of initiation.

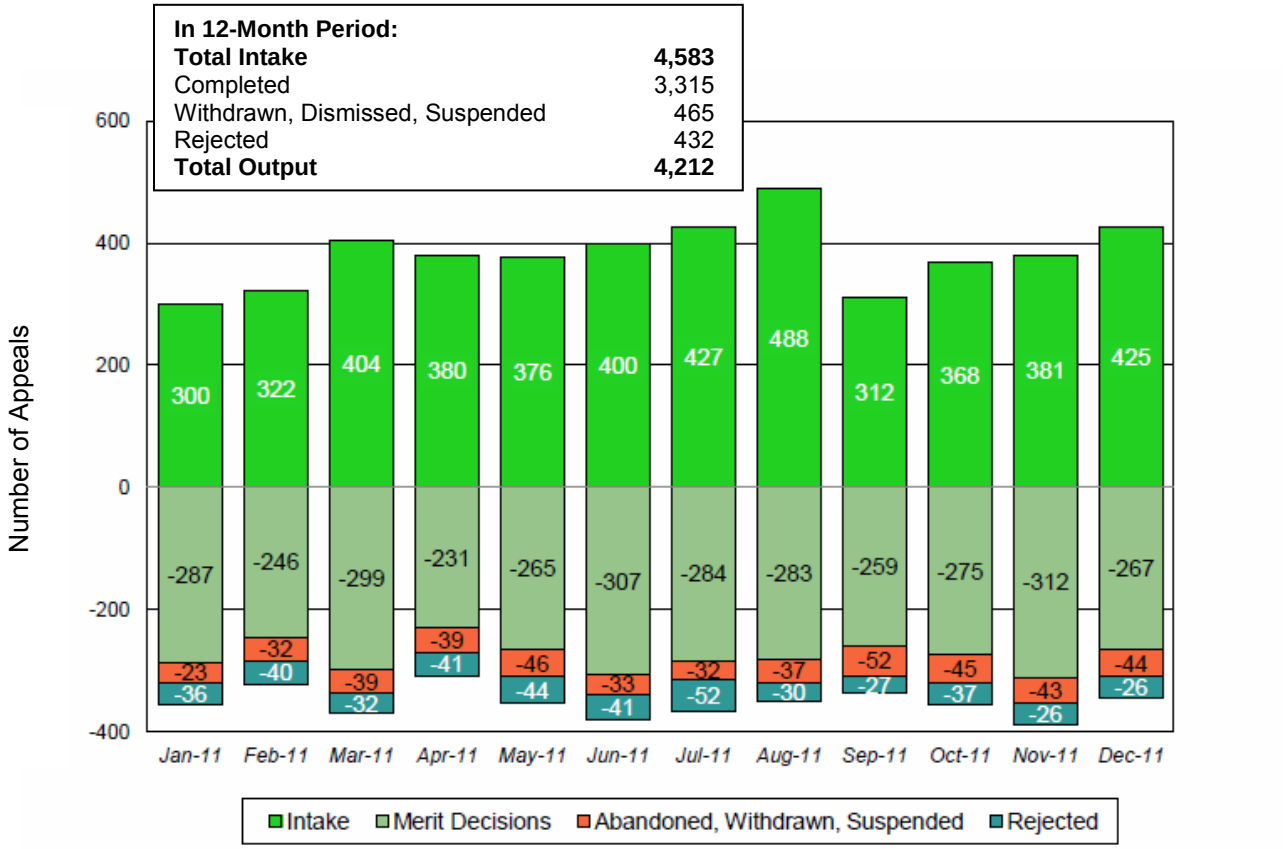
The first chart (Number of Active Appeals) provides the number of appeals in our inventory at the end of each quarter of 2011. WCAT's total active inventory at December 31, 2011 was 3,084 appeals compared to 2,705 at the end of 2010. This 14% increase during 2011 was due to the fact that the appeals inventory decreased significantly in 2010 because of adjudication delays at the Board that resulted from their implementation of a new case management system.

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 4,583 new appeals in 2011, representing an increase of 16% from the 3,946 new appeals we received in 2010. The 2011 intake was comparable to the 2009 intake of 4,767 appeals.

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.

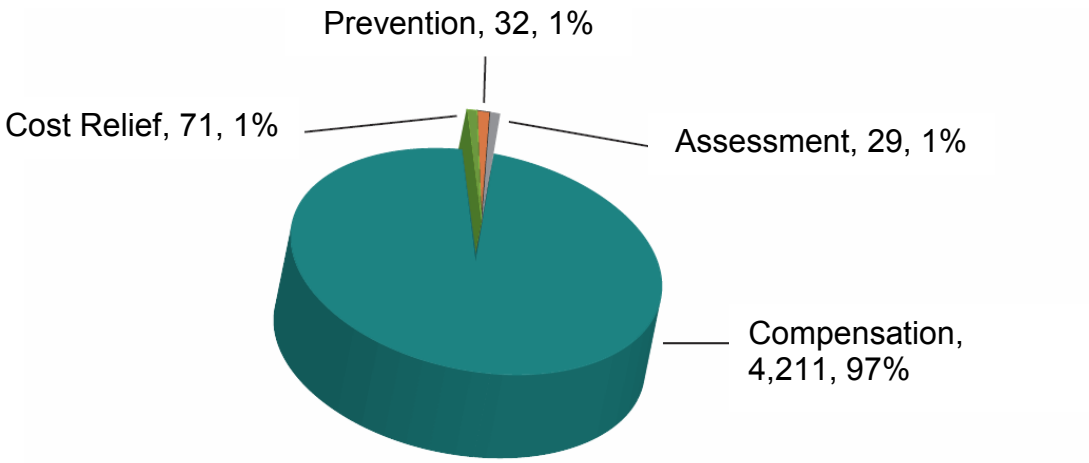
(a) Intake

WCAT received 4,583 appeals and applications in 2011. Of these, 4,343 appeals (95%) arose from decisions of Board review officers and 240 were direct.

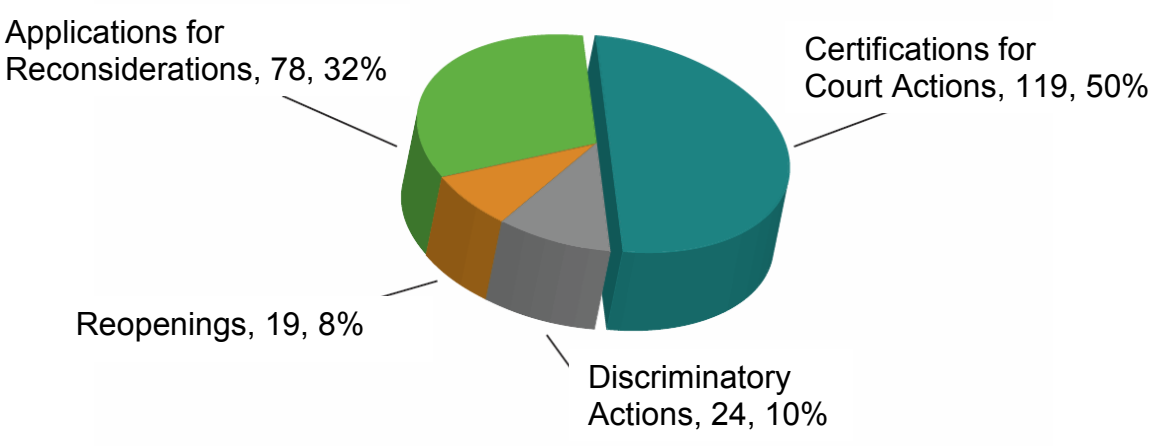
Source	Intake
Review Division	4,343
Direct	240
Total	**4,583**

The following two charts show the breakdown of the types of appeals and applications we received in 2011.

APPEALS FROM REVIEW DIVISION BY TYPE



DIRECT APPEALS AND APPLICATIONS BY TYPE



(b) Merit Decisions

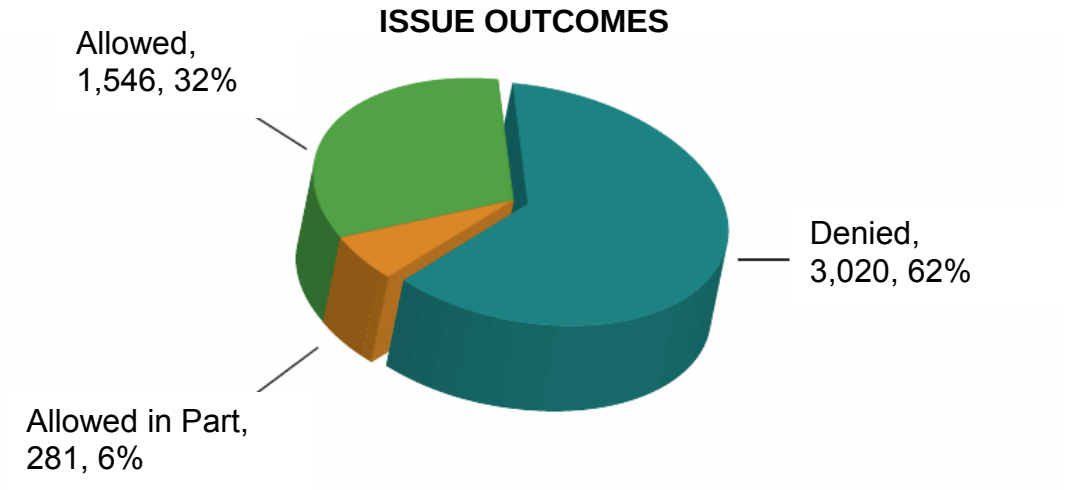
WCAT made 3,315 merit decisions on appeals and applications in 2011, 59 of which concerned applications for certificates for court actions. The remaining 3,256 merit decisions concerned appeals from decisions of the Review Division or Board officers, which may be varied, confirmed or cancelled by WCAT.

"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.

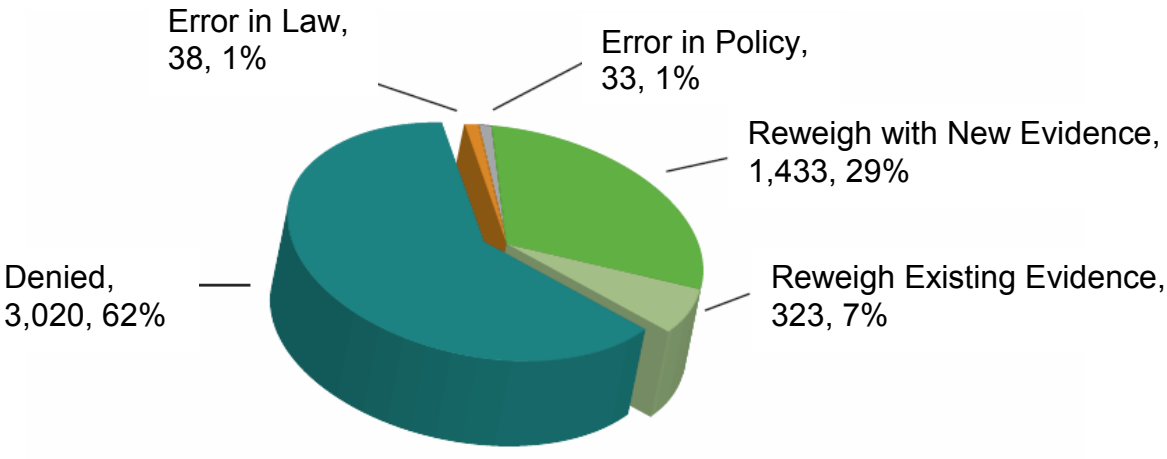
Appeals		Outcome	
Appeal Type	Number of Decisions	Varied	Confirmed
Compensation	3,129	44%	56%
Relief of Costs	60	40%	60%
Discriminatory Actions	25	60%	40%
Prevention	22	50%	50%
Assessments	20	45%	55%

An appeal may raise numerous issues and WCAT may allow or deny the appeal on each issue. In 2011, WCAT decided 4,847 issues that arose out of the 3,256 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.



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 897 summary decisions on appeals. In 434 (48%) of these decisions, WCAT dismissed the appeal or confirmed that the appellant had withdrawn it. WCAT rejected 312 appeals (35%) because there was no appealable issue or the decision under appeal was not appealable to WCAT. Thirty-one summary decisions suspended appeals.

Of the remaining 120 summary decisions, 95 decided applications for reconsideration and 25 denied requests for extensions of time to appeal.

(d) Requests for Extensions of Time

WCAT decided 155 requests for extensions of time to appeal, allowing 130 and denying 25.

(e) Top Five Issue Groups for WCAT Appeals

Appeal Issue	Merit Decisions	Percentage of Total Decisions	Allowed / Allowed in Part	Denied
Section 5 – Compensation For Personal Injury	1,501	32%	36%	64%
Section 23 – Permanent Partial Disability	753	16%	48%	52%
Section 6 – Occupational Disease	505	11%	39%	61%
Section 30 – Temporary Partial Disability	403	9%	36%	64%
Section 29 – Temporary Total Disability	287	6%	29%	71%

8.3 General

(a) Appeal Paths

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

In 2011, WCAT decided a total of 3,315 appeals and applications. WCAT decided 1,549 (47% of the total) after convening an oral hearing and decided 1,766 appeals and applications (53% of the total) by written submission.

(b) Locations of Oral Hearings

In 2011, WCAT held oral hearings in 12 locations around the province. The following table shows the number weeks during which WCAT held oral hearings in each location.

Location	Number of Hearing Weeks
Castlegar	4
Courtenay	10
Cranbrook	4
Fort St. John	1
Kamloops	7
Kelowna	17
Nanaimo	17
Prince George	7
Terrace	2
Victoria	22
Williams Lake	3
Total outside Richmond	**94**
Richmond	248
Grand Total	**342**

(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 2011. 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%	7.5%	0.5%
Direct Reopening	100%	0%	0%
Discriminatory Action	52.5%	47.5%	0%
Prevention	7%	93%	0%
Reconsideration	88%	12%	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 2011.

	Percent Represented where Appellant / Applicant is:		
Type of Appeal	**Worker**	**Employer**	**Dependant**
Assessment	NA	64%	NA
Compensation	78%	68%	95%
Direct Reopening	54%	NA	NA
Discriminatory Actions	41%	83%	NA
Prevention	25%	70%	100%
Reconsiderations	72%	80%	NA
Relief of Costs	NA	73%	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 2011. No precedent panel decisions were pending at the end of 2011.

10. REFERRALS OF POLICY 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 2010 there were no outstanding policy referrals to the chair. In 2011, two policies were referred to the chair.

(a) Loss of Earnings Policy (Item #40.00)

The first policy referral related to item #40.00 of the RSCM II (the loss of earnings policy) and arose after the B.C. Supreme Court's decision in *Jozipovic v. Workers' Compensation Appeal Tribunal*, 2011 BCSC 329.

In *Jozipovic*, the court determined that a WCAT decision, as well as a subsequent WCAT reconsideration decision, was patently unreasonable insofar as they assessed

the worker's eligibility for a loss of earnings award by reference to policy item #40.00, which the court found is not rationally supported by the Act. Specifically, the court found the policy was not rationally supported by the Act on the basis that there is nothing in the Act that contemplates consideration of other occupations of a similar type or nature as the occupation performed by the worker prior to his injury. The only reference to other employment is the statutory requirement to consider "suitable occupations." The court found that to import into sections 23(3.1) or (3.2) of the Act consideration of other occupations of a similar type or nature goes beyond the language of the provisions. The additional criterion is inconsistent with section 23(3.2) which requires the Board to consider the worker's ability to continue in his occupation at the time of the injury and not in any other similar occupations except in the context of adapting to another suitable occupation. Lastly, the court found that the additional criterion was not rationally connected to the purposes of section 23(3) because the expansive definition of "occupation" itself found in policy accomplished the objective of the board of directors in limiting section 23(3) awards to exceptional cases.

The court ordered WCAT to reconsider the worker's appeal with due regard to the principles set out in the Court's reasons but declined to grant a declaration that the policy was of no force and effect. The reconsideration of the worker's appeal was assigned to the chair. In *WCAT-2011-00833*, the chair agreed with the Court's reasoning and conclusions. She found that the addition of "an occupation of a similar type or nature" to each of the three so exceptional criteria in item #40.00 and elsewhere in the policy is so patently unreasonable that the inclusion of that phrase is not capable of being supported by the Act. The chair acknowledged that the court applied a reasonableness standard of review to the policy and recognized that the standard of patently unreasonable which she was required to apply was a more deferential standard of review. However, the chair concluded that in addition to establishing unreasonableness, the Court's analysis supported the conclusion that the inclusion of the impugned phrase is also patently unreasonable.

The chair notified the board of directors of the Board of her determination. The board of directors declined to make a determination under section 251(6) of the Act on the basis that the Board had subsequently appealed the *Jozipovic* decision to the B.C. Court of Appeal. The chair withdrew her referral. She did so on the basis that: (a) for the purpose of the rehearing of the appeal it was not necessary to obtain the permission of the board of directors under section 250(6) of the Act to refrain from applying the impugned aspect of the policy as the court had prohibited WCAT from applying the impugned aspect of the policy in the rehearing of the appeal; and (b) the board of directors agreed to provide a direction to the Board that, pending a decision of the court of Appeal in *Jozipovic*, the words "an occupation of a similar type or nature" found in policy item #40.00 and Practice Directive #C6-2 are suspended and will not form part of the adjudicative criteria for determining eligibility for a permanent disability award under section 23(3) of the Act. The chair advised the board of directors that it was possible that a WCAT panel may refer the impugned portions of item #40.00 to the chair in the context of another appeal.

The B.C. Court of Appeal has heard the appeal in *Jozipovic* and has reserved judgment.

(b) Classification Policy (AP1-37-1 and AP1-37-3)

The second policy referral related to items AP1-37-1 and AP1-37-3 of the *Assessment Manual*. Those policies permitted the Board to assign and reassign employers to a classification unit for assessment purposes on an annual basis. They depended on the notion that each employer's classification decision expires at the end of the year in which it is made. This permits classifications and reclassifications that were said to not offend the 75-day reconsideration limit set out in subsection 96(5) of the Act. The referring vice chair found the policies to be patently unreasonable because the Act provides no foundation for the expiry of classification decisions each year.

In *WCAT-2011-02362*, the chair agreed that the impugned aspects of the policy were so patently unreasonable that they could not be supported by the Act and its regulations and notified the board of directors of the Board of her determination. The chair found that the policies of the board of directors cannot grant the Board the authority to vary or cancel assignments that are based on Board error more than 75 days after those erroneous assignments are made. However, the chair considered section 37(2)(f) of the Act and decided that the authority to withdraw an employer from a classification unit and transfer the employer to a different classification unit was an authority separate and distinct from the authority to assign an employer to a classification unit. As a result, decisions to withdraw and decisions to transfer are new decisions rather than decisions that vary or cancel the decision to assign. Therefore, the Board may make a new decision to withdraw an employer from a classification unit and may make a new decision to transfer it to another classification unit after 75 days.

By resolution 2011/11/08-01 the board of directors amended items AP1-37-1, AP1-37-3 and AP1-96-1 to remove reference to an annual classification cycle, to set out the Board's power to withdraw and transfer, and to provide for periodic reviews of an employer's classification. The new policies were effective on November 8, 2011 and apply to all decisions, including appellate decisions. By letter dated November 18, 2011 the board of directors of the Board advised the chair that WCAT may refuse to apply the impugned aspect of the policies.

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.

All WCAT decisions from 2011, 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

11.1 Select Noteworthy WCAT Decisions

WCAT issued a number of noteworthy decisions in 2011. This section provides summaries of some of those decisions.

(a) *WCAT-2011-00152*

Decision Date: January 19, 2011 **Panel: H. McDonald**
W. Hoole
D. Sigurdson

Common law or employment standards approaches to remedies for wrongful dismissal or termination do not incorporate the "make whole" approach to remedy contemplated by section 153(2) of the Act relating to discriminatory action complaints by workers against employers and unions. Therefore, they should be rejected as the basis for awarding remedies under the section.

(b) *WCAT-2011-00503*

Decision Date: February 24, 2011 **Panel: H. McDonald**

There is a difference between an employer's obligations when dealing with a generally unsafe workplace and one that is unsafe to a particular worker only because of his or her physical or mental impairment. The panel found the odour of tobacco smoke in the workplace made it unsafe for the worker only because of the worker's asthma. Unlike a situation of a generally unsafe work condition, the employers in this case were not obliged to remedy the smell of smoke. Therefore, the physically impaired worker could not use the fact that his employers did not remedy the condition as evidence of constructive dismissal. In the circumstances, the panel determined that the employers were not motivated in any part to retaliate against the worker under section 150 of the Act because he refused to work in an area that smelled of smoke.

(c) *WCAT-2011-00522*

Decision Date: February 25, 2011 **Panel: J. Callan**

This WCAT reconsideration decision is noteworthy for its enumeration of potentially relevant factors to consider when determining whether a party should be reimbursed expenses relating to written evidence, such as expert reports. The panel identified the following non-exhaustive list of factors: whether the party provided an invoice to WCAT in advance of the WCAT decision, whether there was a fee schedule or tariff amount established by the Board and whether it was publicly accessible, whether the fee schedule or tariff was negotiated between the Board and a professional association (or simply established with certain professionals that provide services to the Board under contract), and whether the relevant professional association has established standard fees or rates for providing reports.

(d) ***WCAT-2011-01042***

Decision Date: April 27, 2011 **Panel: C. Katramadakis**
A. Stevens
A. Tuokko

The worker sought payment of a personal care allowance because she required assistance in activities of daily living, including personal hygiene such as bathing, washing her hair, housecleaning, laundry, and shopping. The panel considered these to be requests for assistance for the purpose of a greater level of independence in the home, thus falling within the independence and home maintenance allowance. The panel's interpretation of the kind of self-care activities intended for coverage under the personal care allowance excludes most of these types of activities. The interpretation of the kind of coverage intended by the personal care allowance, such as assistance with self-care activities like eating, grooming, toileting, dressing, and bathing is supported by policy item #80.00 in the RSCM I. The panel considered that only bathing and hair washing fell within the rubric of policy item #80.00.

(e) ***WCAT-2011-01422***

Decision Date: June 8, 2011 **Panel: R. Lane**

This decision provides guidance on the approach to adjudication of an activity-related soft tissue disorder that is listed in Schedule B of the Act, where the requirements in the second column of Schedule B are not met. Regard must be had to policy item #27.40 in the RSCM II. The requirements in Schedule B should not be imported into adjudication under section 6(1) of the Act. Neither should the statements in Board Practice Directive #C3-2 regarding awkward posture be determinative.

(f) ***WCAT-2011-01582***

Decision Date: June 27, 2011 **Panel: T. White**
J. Leroy
A. Pendray

Policy items #22.33 and #22.35 of the RSCM II do not preclude the Board from adjudicating a worker's diagnosed pain disorder where it has previously accepted a permanent chronic pain condition. Pain disorder is a diagnosis found in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders,* fourth edition. Item #22.35 provides that "pain is not to be assessed as a psychological impairment." A refusal by the Board to adjudicate a worker's claim for a pain disorder in these circumstances constitutes an implicit denial of the claim for pain disorder. Such a decision is reviewable by the Review Division.

(g) ***WCAT-2011-02362***

Decision Date: September 22, 2011 **Panel: J. Callan**

Portions of policies AP1-37-1 and AP1-37-3 of the Board's *Assessment Manual* are so patently unreasonable that they cannot be supported by the Act to the extent that they declare that classification decisions are essentially cancelled at the end of each year, and purport to authorize the Board to correct its classification errors by annually assigning employers to classification units. The policies of the board of directors cannot grant the Board the authority to vary or cancel assignments that are based on Board error more than 75 days after those erroneous assignments are made. However, pursuant to section 37(2)(f) of the Act, the authority to withdraw and transfer is separate and distinct from the authority to assign. Decisions to withdraw and decisions to transfer are new decisions rather than decisions that vary or cancel the decision to assign. Even in the absence of a change in an employer's operations or policy, or fraud or misrepresentation, the Board may make a new decision to withdraw an employer from the assigned classification unit and a new decision to transfer it to another classification unit after 75 days. As set out above, the policies were referred to the board of directors of the Board pursuant to section 251 of the Act and the board of directors subsequently amended these policies – see Resolution 2011/11/08-01.

(h) ***WCAT-2011-02455***

Decision Date: September 29, 2011 **Panel: A. Pendray**

This decision concludes that the general approach to the consideration of section 23.1 of the Act and policy item #41.00 in the RSCM II regarding a worker's retirement age would appropriately involve a consideration of the worker's intentions at the time of injury as set out in the Board's Practice Directive #C5-1.

(i) ***WCAT-2011-02457***

Decision Date: September 29, 2011 **Panel: D. Rice**

When determining whether a worker is entitled to a loss of earnings permanent disability award under item #40.00 of the RSCM II, the amount of the worker's functional impairment award is properly taken into account when determining whether, for the purposes of the third criterion in policy item #40.00, a worker will sustain a significant loss of earnings. The panel declined to follow other WCAT decisions in which it was determined that functional awards are not to be taken into account because functional awards are not intended to compensate for a loss of earnings.

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 2011, WCAT received 74 applications for reconsideration and issued 90 stage one decisions. Of the stage one decisions issued, 26 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
Jurisdictional Error	62	1	22	39
New Evidence	16	0	3	13
Both Grounds Alleged	12	0	1	11
TOTAL	**90**	**1**	**26**	**63**

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."

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 2011, WCAT allowed 22 applications for reconsideration on the ground of jurisdictional error. Of those 22 allowed applications, 9 were allowed on the basis of a breach of procedural fairness, 7 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 1 was allowed on both grounds. In the remaining 5 decisions, the reconsideration panel found the original panel purported to exercise jurisdiction it did not have or failed to exercise jurisdiction that it did have.

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 increased slightly between 2010 and 2011. In 2010, 19 judicial review applications were served on WCAT. In 2011, 22 judicial review applications were served on WCAT. In addition, in 2011 WCAT received 6 notices of appeal to the B.C. Court of Appeal and one application for leave to appeal to the Supreme Court of Canada.

13.2 Judicial Review Decisions

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

(a) *Kerton v. Workers' Compensation Appeal Tribunal*, 2011 BCCA 7

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

Brief Summary: The B.C. Court of Appeal allowed an appeal from the B.C. Supreme Court's decision in *Kerton v. Workers' Compensation Appeal Tribunal*, 2010 BCSC 644. The Court of Appeal determined that WCAT was not patently unreasonable when it concluded that section 243(3) of the Act permitted WCAT to deny an extension of time

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

to appeal where the statutory special circumstances and injustice criteria have been met.

Summary: The Court of Appeal concluded the correct standard of review of WCAT's decisions was patent unreasonableness. Section 254 of the Act manifestly places the issue of an extension of an appeal period under section 243(3) under the exclusive jurisdiction of WCAT. The court found that WCAT's interpretation of section 243(3) was well within the range of interpretative options. By characterizing the issue in question as one of jurisdiction, the lower court asked itself the wrong question and consequently came to the wrong conclusion. The court found that the WCAT decisions were neither irrational nor unreasonable as their interpretation of section 243(3) is well within the range of interpretative options. The court further determined that WCAT's interpretation was in fact the most reasonable interpretation. It is the same decision that the court would reach.

(b) *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 329

Decisions under review: *WCAT-2006-02312* and *WCAT-2009-02631*

Brief Summary: The B.C. Supreme Court allowed the petition and set aside the WCAT decisions. The court determined that the original WCAT decision was patently unreasonable to the extent that it concluded that a worker is precluded from receiving a functional permanent disability award on the basis of a loss of range of motion in cases where the loss of range of motion is due to chronic pain. The court also found an aspect of the policy on loss of earnings permanent disability awards (item #40.00 of the RSCM II) was unreasonable as it could not be rationally supported by the Act.

The Board has appealed the portion of the B.C. Supreme Court decision relating to item #40.00. The petitioner has cross-appealed on the decision not to grant a declaration in relation to the lawfulness of item #40.00. The B.C. Court of Appeal has heard the appeal and cross-appeal and has reserved judgment.

Summary: The B.C. Supreme Court set aside as patently unreasonable a WCAT decision that determined that the petitioner's entitlement to a permanent disability award under section 23(1) of the Act (loss of function award) was limited to a chronic pain award of 2.5% (no award being given for range of motion loss) and that the petitioner was not entitled to a permanent disability award under section 23(3) of the Act (loss of earnings award).

In relation to the petitioner's loss of function award, the court found that there was at least some evidence before WCAT to support its conclusion that the petitioner's reduction in range of motion was due to "complaints of pain and fear of re-injury" as opposed to any "mechanical or neurological explanation." However, the WCAT decision was patently unreasonable as it involved a patently unreasonable interpretation of the Act, namely the conclusion that a worker is precluded from a loss of function award on

the basis of a loss of range of motion in cases where the loss of range of motion is due to chronic pain. Further, the court found that it is not sufficient to say that there was no evidence of functional impairment due to the unreliability of the range of motion measurements. If chronic pain can lead to a compensable loss of range of motion, it was circular to say that no range of motion award could be made because the range of motion measurements were unreliable because of chronic pain.

On the loss of earnings award issue the court found that those portions of item #40.00 of the RSCM II that require an adjudicator to consider whether a worker has the essential skills of "an occupation of a similar type or nature" as a precondition to eligibility for an award under section 23(3) are unreasonable as they cannot be rationally supported by the Act. The court found that there is nothing in the Act that contemplates consideration of other occupations "of the same type or nature" as the occupation performed by the worker prior to his injury. The court found that to import into sections (3.1) or (3.2) consideration of "other occupations of the same type or nature" goes beyond the language of the provisions and is ostensibly redundant. The court declined to make a declaration that the policy was unlawful and instead returned the appeal to WCAT to rehear with a direction not to apply the unlawful aspect of the policy. The court also found the definition of "occupation" and the "impossibility" standard set out in item #40.00 were rationally supported by the Act.

(c) *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCSC 409 and 2011 BCCA 476

Decision under review: *WCAT-2010-00733* and *WCAT-2010-01612*

Brief Summary: The B.C. Court of Appeal dismissed an appeal from the judgment of the B.C Supreme Court. The Court of Appeal found that the lower court made no errors when it concluded that: (1) it was not patently unreasonable for WCAT to find that the employer could discharge the reverse onus under section 152(3) of the Act (the discriminatory action provision) by hearing from some but not all of the decision-makers involved in terminating the petitioner; and (2) it was not patently unreasonable for WCAT to conclude that the employer discharged its burden of proof in this case. The Court of Appeal also determined that WCAT did not have standing in this case to make submissions to the court.

Summary: The petitioner was dismissed by the respondent employer following the sinking of a motor vessel. He alleged that he was dismissed because he had raised safety concerns at the respondent employer's inquiry into the sinking of the vessel. The employer denied that it had terminated his employment for the reason alleged, and advanced various other reasons why it had "lost confidence in the Complainant's ability to command." In the course of the WCAT proceeding, the employer led evidence from two members of the executive team that made the decision to terminate the petitioner's employment. WCAT rejected the petitioner's argument that the employer could not discharge its onus under the Act without calling all members of the employer's executive

team. WCAT concluded that it is enough for the employer to lead evidence from the primary or key players involved in the decision.

The B.C. Supreme Court found there was some evidence that the employer's decision-makers adopted a recommendation by one of the employer's witnesses (a manager) for dismissal and therefore that recommendation reflected the mindset of the corporate entity. The court found that WCAT conducted a meticulous review of the evidence and submissions and reached its findings weighing the totality of the evidence. The court was satisfied that WCAT understood the whole of the management witness' testimony and did not ignore it. The court found that WCAT's decision was not patently unreasonable.

The Court of Appeal determined that the lower Court's decision was correct. Evidence from the two members of the employer constituted some evidence in support of WCAT's conclusion that the employer's conduct was not tainted with an anti-safety *animus* and that the presumption against the employer had been rebutted.

(d) *Squires v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 556

Decisions under review: *WCAT-2009-00446* and *WCAT-2010-00808*

Brief Summary: The B.C. Supreme Court allowed the petition for judicial review and set aside the WCAT decisions. It found that WCAT acted unfairly when it failed to postpone an oral hearing.

Summary: The petitioner, an automobile detailer, injured his left knee at work. The Board accepted his claim for compensation for a left knee injury and a minor low back strain. The Board referred the petitioner to an occupational rehabilitation (OR2) program in order to maximize his function for a return to work. The program was suspended as the petitioner had acquired an Achilles tendinitis condition in his right calf, which the petitioner claimed arose as a result of his involvement in the program. The Board suspended his temporary wage loss benefits after concluding that his Achilles tendinitis was not a consequence of the OR2 program. In arriving at this conclusion, the Board relied primarily on the medical documentation that indicated that the petitioner reported the onset of calf pain on a day when he was not attending the OR2 program and had not attended for several days, as well as the Board's assessment that the OR2 program activities did not have the necessary risk factors that would be considered causative of Achilles tendinitis. The Review Division confirmed the Board's decision. The petitioner appealed to the WCAT. Among other things, he argued that he had complained of right calf pain earlier than was recorded in the medical documentation relied upon by the Board.

The petitioner filed a notice of appeal at WCAT and requested an oral hearing on the basis that he wished to testify about the mechanism of injury. WCAT scheduled an oral hearing and notified the petitioner on more than one occasion of the hearing date. On

the morning of the scheduled oral hearing, the petitioner's representative advised the WCAT panel by letter that the petitioner was unable to attend or participate in the hearing due to two serious medical conditions (an eye condition diagnosed a few months earlier and a more recently diagnosed asbestos-related condition). He requested that the oral hearing be postponed. WCAT denied the postponement request and advised the petitioner that the hearing would proceed on the basis of written submissions. The petitioner subsequently provided written submissions to WCAT. In those submissions the petitioner did not object to the method of hearing. As reasons for denying the petitioner's postponement request, the panel in its decision noted that the petitioner's notice to WCAT was short. The panel also said that the petitioner's medical conditions seemed unlikely to resolve quickly, if at all, and that if they had prevented the petitioner from attending the scheduled oral hearing they were likely to continue to do so.

WCAT denied the petitioner's appeal. The panel found that the OR2 program was not of causative significance. The panel noted that there was no documentation of Achilles tendon pain at the beginning of the OR2 program when it might have been expected and that the risk factors in the OR2 program were not intensive enough to have caused an activity-related soft tissue disorder. The panel preferred the evidence of a Board medical advisor on the matter of causation over that of other doctors. The petitioner requested a reconsideration of the original decision on a number of bases, including that the original panel had acted unfairly when it refused to postpone the oral hearing. WCAT denied the reconsideration request.

On judicial review, the court determined that the original WCAT panel breached the rules of procedural fairness and natural justice by denying the petitioner's request to postpone the oral hearing and by proceeding without holding an oral hearing. It found that the WCAT reconsideration decision was not capable of remedying the breach in the original decision. The court ordered WCAT to rehear the petitioner's appeal and to provide the petitioner with an opportunity to give oral evidence.

The court determined that the original decision was unfair because the original panel did not follow the rules, practices and procedures set out in WCAT's MRPP, specifically former item #8.90 ("Method of Hearing") and former item #9.21 ("Postponements").

Item #8.90 provided that "WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility." The court found that the petitioner's credibility was central to the appeal as it turned largely on weighing the medical evidence which supported the petitioner's view of what caused his leg injury against the Board medical advisor's evidence and on the question of when the petitioner's right calf pain started.

Item #9.21 sets out seven criteria that WCAT could consider in determining whether a postponement should be granted. The court found that the original panel only considered one of the seven, namely, how far in advance the request was made. At least three other criteria were relevant but appear to have not been considered. First,

the petitioner had "serious medical problems" which "may not permit timely notice to WCAT." While the original panel commented upon the medical problems it did not do so in the context of why the petitioner had not made the request in a timely way. Second, there was no prejudice to any other party if the postponement was granted as there was no other participating party. Third, WCAT had not granted a prior postponement.

The court also found that the original panel had failed to provide the petitioner with an opportunity to make submissions or to provide adequate reasons in respect of its finding that the petitioner's medical conditions "seemed unlikely to resolve quickly, if at all" and in respect of its decision to cancel the oral hearing. Lastly, the court concluded that the petitioner could not be said to have waived his right to an oral hearing by failing to challenge WCAT's decision to proceed with the hearing on the basis of written submissions. WCAT's decision in this respect was communicated to the petitioner in a letter that presented itself as a decision already made, with no hint of a suggestion that it might be reconsidered.

(e) *Phillips v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 576

Decision under review: *WCAT-2009-02116*

Brief Summary: The B.C. Supreme Court dismissed the petition for judicial review. It found that the WCAT decision relating to the petitioner's long-term wage rate was not patently unreasonable and that the panel did not fetter its discretion in its application of item #67.21 of the RSCM I (Class Averages/New Entrants to Labour Force). The court also found that WCAT provided adequate reasons for its decision.

Summary: The petitioner moved from Saskatchewan to British Columbia in 1991. She had a record of full time employment in the health care industry in Saskatchewan. She attempted to start a business in B.C. which failed. She then obtained casual employment as a care aide in a long-term care facility. Her objective was to attain full-time employment in B.C. at some point. However, she was injured on the job and eventually became competitively unemployable. The Board accepted her injury as compensable and granted her a 100% loss of earnings permanent disability award (pension). The Board calculated her wage rate for the award using her average earnings as a casual care aide in the one year prior to her injury.

The petitioner appealed many issues to WCAT, one of which was the wage rate. The worker asserted that the wage rate for pension purposes should be based on the average earnings of a full-time care aide in the facility in which she worked or the statistical average wage rate for full-time care aides. WCAT found the Board correctly determined the wage rate. The worker sought reconsideration of WCAT's decision. The reconsideration panel allowed the reconsideration and directed a new hearing. The new panel reheard the appeal solely on the wage rate issue and denied the appeal.

The petitioner sought judicial review of the latter decision. She alleged a lack of adequate reasons, a fettering of discretion in the application of item #67.21 of the RSCM I, and a patently unreasonable finding that the worker would not achieve full-time employment.

The court found that three standards of review applied to the decision. Adequacy of reasons was a natural justice issue and the court owed no deference to WCAT's usual practice or press of work. The exercise of discretion was subject to patent unreasonableness as defined in section 58(3) of the *Administrative Tribunals Act*, that is, whether the discretion was exercised arbitrarily, in bad faith, for an improper purpose, based on irrelevant factors, or failed to take statutory requirements into account. The finding that the worker would not achieve full-time employment was subject to patent unreasonableness.

In applying these standards, the court found that WCAT clearly described why it chose not to accept the worker's evidence and what evidence it did rely on thus articulating sufficient reasons for the decision that was made.

With regard to policy item #67.21, the court found that WCAT recognized that the policy only gave examples but went on to define the common grounds in the examples. WCAT then applied the common grounds to the evidence and found that the evidence did not establish that the worker shared the common characteristic. Therefore, WCAT did not improperly fetter its discretion in applying the policy.

Finally, the court found that WCAT's decision was not patently unreasonable in the sense that it is so divorced from the record of the case heard that no amount of judicial deference could preserve it. The court found there was evidence in the record that cast doubt on the worker's assertion that she would have achieved full-time employment and thus supported WCAT's finding that the evidence was insufficient to support the worker's contention.

(f) *Johnson v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 255

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

Brief Summary: The B.C. Court of Appeal set aside the September 9, 2009 judgment of the B.C. Supreme Court and dismissed the judicial review petition. The court found that the respondent had failed to exhaust the internal remedy available under section 251 of the Act.

Summary: The B.C. Court of Appeal determined that the B.C. Supreme Court erred in exercising its discretion to directly review a policy of the board of directors of the Board. The Court of Appeal determined that a party wishing to challenge a Board policy on the basis that it is not supported by the Act and its regulations must exhaust internal remedies before WCAT and, if necessary, the board of directors of the Board, before

seeking relief in court. As the petitioner in this case had challenged item #50.00 of the RSCM I and II (Calculation of Interest) for the first time on judicial review instead of during his WCAT proceeding, the Court of Appeal allowed the Board's appeal and dismissed the petition.

The court found that the internal process for challenging the lawfulness of a policy set out in section 251 of the Act was an adequate remedy, despite the fact that WCAT cannot make an enforceable order based on its finding that a Board policy is patently unreasonable. The court found the process adequate because it allows all affected workers and employers to be treated consistently, affords the board of directors at first instance an opportunity to use its expertise as representatives of the affected community to adjust or change the policy, and provides an opportunity for creating a record containing the expert views of WCAT, the chair of WCAT and the board of directors as to the validity of the policy.

The court also determined that where WCAT does make a decision in respect of the lawfulness of a Board policy, the reviewing judge is not at liberty to reach her own conclusions about policy in view of the fact that it is not the policy *per se* that is being reviewed on judicial review, but rather the interpretation of the Act made by the administrative body charged with interpreting its legislation and the consistency of the policy with the legislation on a patently unreasonable standard.

The petitioner applied to the Supreme Court of Canada for leave to appeal this decision and the Supreme Court of Canada denied the Petitioner's application in January 2012.

(g) *Jensen v. Workers' Compensation Appeal Tribunal*, 2011 BCCA 310

Decision under review: *WCAT-2007-02536*

Brief Summary: The B.C. Court of Appeal dismissed an appeal from a chambers judge's decision to dismiss an application for judicial review of a WCAT decision. WCAT had found that the appellant worker's rheumatoid arthritis was not caused, activated, or accelerated by an earlier compensable injury arising from a fall. The chambers judge found that WCAT's decision was not patently unreasonable because it was supported by at least some evidence.

Summary: On appeal, the worker argued that the chambers judge erred in dismissing the judicial review petition. He argued that WCAT had in fact exceeded its jurisdiction in two ways, first by requiring a "necessary connection" in the medical evidence in order to find that the earlier injury caused or aggravated the appellant's rheumatoid arthritis, and second, by applying the standard set out in section 250(4) of the Act only to the medical evidence.

The Court of Appeal rejected the worker's argument that WCAT had isolated the analysis to the medical evidence in determining the question of aggravation, rather than considering that question in the context of the evidence as a whole. The court found that

WCAT had in fact considered the whole of the evidence on this issue, including: (1) the appellant's testimony before it, in which he indicated his subjective belief that the fall had precipitated the onset of his arthritis, and (2) the evidence of the temporal connection between the fall and the onset of the arthritis symptoms.

The court noted that the causative connection could not be established on the non-medical evidence alone. WCAT reviewed the medical evidence and concluded that it did not rise above speculation and did not, when considered with the rest of the evidence, serve to establish a causative connection to the standard of at least equal probability as required by section 250(4) of the Act. The court found that WCAT considered and weighed all the evidence, both medical and non-medical, and applied the relevant Board policies, in determining that there was an insufficient basis to find a causal connection. WCAT's reasons were thorough and complete. Therefore, there was no basis upon which the chambers judge could find that WCAT's decision was patently unreasonable. The evidence, or absence of evidence before WCAT, supported the decision within the legal framework.

(h) *Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal*, 2011 BCSC 1129

Decisions under review: *WCAT-2010-02811* and *WCAT-2010-02812*

Brief Summary: The B.C. Supreme Court dismissed the petition for judicial review. A worker had sued her employer and her supervisor for damages arising from an alleged humiliating incident at work. She also brought an appeal from a decision of the Board that held that she was not entitled to compensation. WCAT denied her appeal and decided in an application under section 257 of the Act, brought by her employer and a supervisor that the incident in question was not unexpected and therefore could not be the basis for a mental stress claim. For this reason, her injuries did not arise out of and in the course of her employment. The court found that WCAT's decision was not patently unreasonable.

Summary: The worker stopped working for her employer after an alleged humiliating incident at work involving a supervising employee of the employer. The worker was subsequently diagnosed with post-traumatic stress disorder among other psychological conditions. The worker sued her employer and the supervisor alleging negligence and breach of contract and seeking damages for personal injury, including mental stress.

In the lawsuit, the employer and the supervisor argued that the worker's claim was barred by section 10(1) of the Act. Section 10(1) prohibits a worker from suing an employer or coworker for any injury, disablement or death if it arises out of and in the course of employment and if the actions of the employer or coworker which caused the injury also arose out of and in the course of employment. The employer and supervisor applied to WCAT under section 257 of the Act for a determination as to whether these two conditions were met in this case.

Soon after the worker brought her lawsuit she also applied to the Board for compensation for mental stress arising from the incident. The Board, and subsequently the Review Division, denied her claim on the basis that it did not meet the requirements set out for mental stress claims in section 5.1(a) of the Act, that is her psychological condition was not "an acute reaction to a sudden and unexpected traumatic event." The employer appealed the Review Division decision to WCAT.

As the issues were essentially identical in both matters, WCAT issued a single decision (with two decision numbers) which addressed both the employer's appeal to WCAT as well as the employer's section 257 application. WCAT found that the worker was not entitled to compensation under the Act because although the actions of the employer and supervisor arose out of and in the course of their employment, the worker's mental stress injury did not arise out of and in the course of her employment. WCAT found that while the worker did suffer an acute reaction to a sudden traumatic event, the incident was not unexpected as the supervisor had treated the worker similarly in the past on multiple occasions in similar circumstances and was therefore behaviour that the worker could reasonably have expected on the day in question.

The employer and supervisor applied for judicial review of WCAT's decision, which the court dismissed. The court found that WCAT's decision was not patently unreasonable.

The court found that WCAT's conclusion that the trauma was not unexpected was not patently unreasonable. First, the court found that WCAT's findings of fact relating to the supervisor's previous behaviour were supported by the record. Second, the court found nothing unreasonable about WCAT inferring an expectation from the evidence about the supervisor's prior course of conduct. The court found that it was not patently unreasonable for WCAT to have applied the legal test that it did when determining whether an event was unexpected, that is one that was not wholly objective as urged by the employer and supervisor but rather one that took into account the worker's knowledge of how her supervisor reacted to a particular situation.

The court also rejected the supervisor's argument that WCAT's decision was patently unreasonable in that it found that the words "sudden" and "unexpected" had different meanings. The court found that the statutory language could bear more than one interpretation and WCAT's finding that they had different meanings was within the rationally defensible range of choices. As an example, the court suggested that to describe an event as "sudden" may import an aspect of temporality, whereas "unexpected" may relate to the predictability of the event.

Lastly, the court rejected the supervisor's argument that WCAT's decision was patently unreasonable because it determined that the worker's injury did not arise out of and in the course of her employment simply on the basis that the worker was not entitled to compensation under section 5.1. The court said that this argument misapprehends the reasoning in the Court of Appeal's decision in *Plesner v. Workers' Compensation Appeal Tribunal*, 2009 BCCA 188 and other cases. This reasoning suggests that the criteria in section 5.1 is to properly be viewed as setting a "causative threshold" that

describes when mental stress will have arisen out of and in the course of employment, as opposed to a section which simply limits the situations in which compensation may be payable (a distinction discussed in the WCAT decision).

The court said that if the supervisor's argument was correct, the worker would be left without any remedy under either the Act or in tort. This result could create a "black hole" for workers and would be contrary to the legislative scheme. The court said that absent a right to claim no fault benefits under workers' compensation legislation, workers are otherwise able to sue coworkers and employees for tortious conduct that occurs in the workplace. A proper understanding of the Act in its legislative context supports the view that workers who may not be entitled to claim under the Act retain their right to sue for tortious conduct and the employer loses any entitlement to rely on section 10.

(i) *Franzke v. Workers' Compensation Appeal Tribunal*, 2011 BCSC 1145

Decisions under Review: *WCAT-2008-00281* and *WCAT-2009-02191*

Brief Summary: The B.C. Supreme Court dismissed the petition for judicial review. The petitioner was injured in a motor vehicle accident and an issue arose in the resulting lawsuit whether the lawsuit was barred by section 10 of the Act. In an application under section 257 of the Act WCAT found that the petitioner was a worker at the time of the accident and that her injuries arose out of and in the course of her employment as she had been in the course of travel between two points of work. The court found that the WCAT decision was neither patently unreasonable nor procedurally unfair. The petitioner had argued that WCAT had failed to investigate and had failed to require production of a transcript of an examination for discovery of the petitioner.

Summary: The petitioner left work early to go home and avoid the difficulties of a rush hour complicated by snow. She took some files home with her when she left and planned on working from home that day. On her way home she was involved in a motor vehicle accident. The petitioner commenced a tort action against the individual driving the other vehicle, and the limited company that owned the vehicle. The individual and company applied to WCAT for a section 257 determination. WCAT's original panel found that the petitioner was a worker pursuant to the Act and that her injuries arose out of and in the course of her employment. It was determined that the petitioner had been in the course of travel between two points of work within the meaning of policy item #18.32 of the RSCM II. The reconsideration panel denied an application for reconsideration on the basis of jurisdictional defect and new evidence. The petitioner sought judicial review of both WCAT decisions.

The petitioner sought to challenge various factual findings and inferences made by the original panel in support of its conclusion that the petitioner was in the course of travel between two points of work when the accident occurred. This included the inference that the petitioner was required to work 7.5 hours per day. The petitioner also challenged, as being excessive, the weight that both WCAT panels gave her statement,

given two days after the accident, in which she said that she had planned on working from home that day.

The court found that, in challenging these findings, the petitioner essentially sought to have the court reconsider the evidence that was before WCAT. This was not the task of a court on judicial review. There was evidence before the original panel to support the inference that the petitioner worked 7.5 hours a day, and thus this inference did not amount to speculation. There was evidence on which the other challenged findings of the original panel could reasonably be based and thus the original decision was not patently unreasonable in this regard. It followed that the reconsideration decision in this respect was correct.

While the original panel had made reference to the "scant" evidence in relation to the petitioner's intention to work at home on the day of the accident, and the requirements of the employer in this regard, the decision to carry out further investigation into these matters was a matter of discretion for WCAT. In a case such as this, where WCAT had informed the parties of item #20.41 from the MRPP (which indicated that parties should not assume that WCAT would carry out any further investigations, and should not omit any evidence), and where the evidence was known to the parties and they had the opportunity to make submissions, the discretion was not exercised in a manner engaging any of the factors enumerated in section 58(3) of the *Administrative Tribunals Act*. The original panel's decision in this regard was not patently unreasonable, and the reconsideration panel's dismissal of this ground was correct.

Finally, no breach of procedural fairness arose from the fact that the individual and limited company failed to provide the transcript of the petitioner's examination for discovery to the original panel. It was clear that from the time the section 257 application was filed, to the time the original decision was delivered, the petitioner was aware of the issues being determined, was advised of the potentially relevant Board policies, was aware of the evidence and submissions of the other parties, was given the opportunity to give her own evidence and reply to the other parties' evidence, and was advised of WCAT's policies and procedures. In the circumstances, it could not be said that the petitioner did not know the case she had to meet; nor could it be said that she did not have the opportunity to present her case. The discovery evidence was the petitioner's own evidence, and she and her counsel made the tactical decision not to adduce it before the original panel. Her failure to adduce this evidence was her own decision. Therefore, it could not be said that a breach of natural justice arose in these circumstances. The reconsideration panel had reached the same conclusion and was therefore correct.

In early 2012 the petitioner's application to the B.C. Court of Appeal for an extension of time to appeal this decision was denied.

(j) *Young v. British Columbia* (Workers' Compensation Appeal Tribunal), 2011 BCSC 1209

Decision under review: *WCAT-2010-01367* and *WCAT-2010-03282*

Brief Summary: The B.C. Supreme Court allowed the petition for judicial review and set aside the WCAT decisions. WCAT had found that the petitioner could be a bookkeeper with appropriate vocational rehabilitation training and was entitled to a partial loss of earnings permanent disability award under the former provisions of the Act. The court found that the original WCAT decision was patently unreasonable for not considering that aspect of a policy of the Board that required one to consider whether a worker was competitively employable. The court also found that the original WCAT decision was procedurally unfair in not permitting the worker to cross-examine the Board's vocational rehabilitation consultant.

Summary: The petitioner, a customer service representative, was 57 years old when she was injured at work. As she was injured before the effective date of the current Act (which was June 30, 2002), the former provisions of the Act applied to her claim. After a number of decisions of the Board and related appeals, the petitioner received a loss of earnings permanent disability award (pension) under section 23(3) of the former Act.

The Board's pension decision was based on an employability assessment performed by a Board vocational rehabilitation consultant (VRC). The assessment was performed when the petitioner was 64 years old. The VRC provided a report and her conclusion was that given the petitioner's transferable skills, employment history, education, and her accepted restrictions and limitations, there were other occupations that were suitable for her and reasonably available in the long-term. She specifically identified the occupation of accounting bookkeeper as it capitalized on the petitioner's skills and abilities and is a field predominantly made up of part-time jobs. She noted that the Board would update the petitioner's bookkeeping skills to today's current standards and if necessary provide ergonomic tools. The VRC concluded that the petitioner was capable of working 20 hours per week and that over the long term she would be earning $18.00 per hour.

The Review Division of the Board varied the Board's pension decision. While the review officer agreed with the Board that the occupation of part-time bookkeeper was suitable and reasonably available to the petitioner and that the petitioner was capable of working at least 20 hours a week, he found that the petitioner's long-term earnings were only $11.85 an hour given her circumstances.

After conducting an oral hearing, the original WCAT decision confirmed the decision of the Review Division. The panel agreed with the review officer that the challenges that the petitioner faced in the occupation, including her age, were compensated for by the reduction of long-term earnings from $18.00 to $11.85 an hour. The petitioner sought reconsideration of WCAT's decision on the basis that the original panel made patently unreasonable findings of fact in relation to the suitability and availability of the

bookkeeping position and that the original panel had acted unfairly when it refused to order the attendance of two witnesses for cross-examination, namely the VRC and the program advisor of a training school who advised the VRC that the petitioner was uncooperative. WCAT denied the reconsideration request.

The court found the original WCAT decision to be both patently unreasonable and unfair. The court set the decision aside and remitted it to WCAT for reconsideration. The decision was patently unreasonable because it failed to consider Board policy: in particular, the portion of item #40.12 of the RSCM I that provides that "if the realities are that a worker with the particular disability is not likely to obtain such a job, that is not a reasonably available job."

The court found that WCAT, by relying on a VRC report based only on statistics obtained from various government databases, failed to analyze the words of the policy and therefore the question of whether the petitioner was competitively employable. The court stated that the very purpose of the words is to prevent a decision being made only on statistics. The court said that neither the WCAT decision nor the VRC report references the likelihood of the petitioner, with her particular disability, obtaining such a job if there are always better qualified applicants.

The court also noted that no consideration was given to how many hours the petitioner would have to work soliciting business and doing administrative work associated with running her own business in order to be able to bill for 20 hours per week of home-based bookkeeping. In addition, there was no consideration of the effect of the passage of time, which was due to errors within the Board's appeal process and not to any fault of the petitioner, on her ability to retrain and start up a new business. WCAT mentioned that she was 60 years old at the date of the initial award, but she was 65 years old by the time of its decision. The court said that whether that should form part of the relevant considerations should be addressed as well.

The decision was unfair because the original panel failed to make the VRC available for cross-examination. The court found that the central issue in the appeal was the VRC's determination of the petitioner's employability and the availability of bookkeeping employment. The court found that the VRC made assumptions, did selected statistical research, and came to a deemed conclusion as to the employability of the petitioner without apparent consideration of the applicable Board policy. It was not open to WCAT to simply prefer the expert evidence of the VRC where the VRC's report did not take into account the part of the policy that requires consideration of whether jobs are likely available to this particular worker. Failure to allow cross-examination of the VRC in these circumstances undermined the fairness of the hearing, since the court found that WCAT simply relied on the VRC's untested report and conclusions.

The court did not find it unfair for WCAT to refuse to order the program advisor of the training school to attend for cross-examination as her interview with the petitioner took place after the VRC performed the employability assessment and that in any event it

was the effect of the advisor's impressions on the VRC and not the program adviser's impressions themselves that was relevant.

14. OTHER COURT DECISIONS

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

(a) *Lysohirka v. Workers' Compensation Board of British Columbia and Workers' Compensation Appeal Tribunal*, 2011 BCSC 453

The petitioner sought judicial review of three decisions of the Review Division of the Board considering his entitlement to retroactive vocational rehabilitation benefits. The petitioner also sought judicial review of a decision of WCAT, which addressed the question of retroactive vocational rehabilitation benefits but did not involve the petitioner. At the hearing, the petitioner limited his argument to the Board decisions. Therefore, and because decisions of the Board pertaining to vocational rehabilitation benefits are not appealable to WCAT, WCAT's involvement in this matter was limited.

The petitioner's claim for compensation was initially denied and it was not until a successful appeal to WCAT that the Board considered the petitioner's entitlement to benefits. More than three years after his injury, the petitioner's claim was referred to a vocational rehabilitation consultant, who decided that the petitioner was entitled to certain vocational rehabilitation benefits, but not to retroactive benefits.

The Review Division ultimately determined that the petitioner was entitled to retroactive benefits, but only insofar as he could provide evidence confirming his participation in vocational rehabilitation activity (such as a job retraining program). The petitioner had argued that particularly for the period during which his claim was wrongly denied, he was entitled to full retroactive vocational rehabilitation benefits from the date of his disablement, without having to give evidence of his involvement in vocational rehabilitation activities.

In dismissing the petition for judicial review, the court determined that the Review Division's requirement for evidence of participation in vocational rehabilitation activities, as a prerequisite for receiving retroactive benefits, was a reasonable exercise of the Board's discretion.

(b) *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52

This was an appeal by the Board from a judgment of the B.C. Court of Appeal setting aside a decision of the B.C. Supreme Court which quashed a decision of the Human Rights Tribunal. The Human Rights Tribunal had decided that it was appropriate to proceed with the workers' human rights complaint. The workers' complaint was that the Board's chronic pain policy contravened the *Human Rights Code* (the Code). Prior to filing the human rights complaint, the workers had obtained a determination by the

Board's 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 chambers judge quashed the tribunal's decision on the grounds that the tribunal failed to properly consider the common law principles of *res judicata*, issue estoppel, and abuse of process when it decided to proceed with hearing the complaints. The Court of Appeal allowed the appeal, finding 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 Supreme Court of Canada allowed the Board's appeal. The court applied a standard of patent unreasonableness to the tribunal's decision. The court found section 27(1)(f) of the Code was not a statutory invitation either to judicially review another tribunal's decision or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section was oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. The workers' strategy of starting fresh proceedings before a different tribunal rather than seeking judicial review of the Review Division decision represented a "collateral appeal" to the tribunal. The tribunal's analysis made it complicit in the attempt to collaterally appeal the merits of the Board decision and decision-making process by focusing on factors having to do with whether it was comfortable with the process and merits of the Review Division's decision. The majority of the Supreme Court of Canada found that such concerns were questions that were properly the subject of judicial review, not grounds for a collateral attack by a human rights tribunal under the guise of section 27(1)(f). Because the tribunal based its decision to proceed with the complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under section 27(1)(f), its decision was patently unreasonable. The court allowed the appeal, set aside the tribunal's decision and dismissed the complaints.

(c) *Currie v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 445

The Board terminated the petitioner's benefits. She then participated in a training program on her own initiative and without vocational rehabilitation assistance from the Board. She did not complete this program as she found it be physically beyond her. Subsequently, WCAT found that the petitioner's injuries had not resolved as of the date the Board had terminated her benefits and remitted the matter back to the Board to consider further, including the question of any vocational rehabilitation entitlement. The Board eventually paid the petitioner vocational rehabilitation benefits retroactively, but only from the date of the WCAT decision. The petitioner sought retroactive vocational rehabilitation benefits to cover the time period, prior to the date of the WCAT decision, when she had engaged in the training program on her own initiative.

The Review Division agreed with the Board that it should not pay retroactive vocational rehabilitation benefits for the petitioner's training program, because it was not a program

that the Board would have authorized. WCAT denied the petitioner's appeal on a summary basis, as it does not have jurisdiction over vocational rehabilitation matters.

The B.C. Supreme agreed with WCAT that the Review Division decision was the proper subject of judicial review. It found this decision to be unreasonable and remitted the matter back to the Review Division with direction to consider the reasoning in *WCAT-2003-01744-RB*, a WCAT decision in an unrelated appeal. That decision said that when considering retroactive vocational rehabilitation benefits, the sufficiency of a worker's efforts must be assessed in context and one must consider "the extent of effort exerted by the worker in the context of available resources, the nature of the effort expended, the duration of the effort, and whether the effort was undertaken in good faith."

The B.C. Court of Appeal found that it was inappropriate for the chambers judge to treat the decision in *WCAT-2003-01744-RB* as having precedential value, and to conclude that the Review Division's decision was unreasonable in part because it failed to follow the WCAT holding. Given the discretionary nature of section 16 benefits, and the parameters of "reasonableness" established in the case law, the Review Division's approach, and the result in this case, was entirely reasonable. The review officer examined the main objective of vocational rehabilitation benefits, which is to allow workers to re-enter the workforce in a position that overcomes the impact of their injury. The Review Division's conclusion that in this case the Board had exercised its discretion in accordance with this objective, was reasonable. Ultimately, the vocational rehabilitation benefits received by the petitioner allowed her to re-enter the workforce in a position that overcame the impact of her injury. Overall, the Review Division's decision was supported by the evidence; its decision-making process was justified, transparent, and intelligible; and the result fell within the range of acceptable and rational conclusions. The court of appeal allowed the appeal and restored the Review Division's decision.