

# WCAT Workers' Compensation Appeal Tribunal

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## Annual Report

For the year January 1 to December 31, 2013

*10 Years of Operation*

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March 14, 2014

The Honourable Shirley Bond  
Minister of Jobs, Tourism and Skills Training and  
Minister Responsible for Labour  
Room 138 - Parliament Buildings  
PO Box 9071 Stn Prov Govt  
Victoria, BC V8W 9E9

Dear Minister Bond:

**Re: 2013 Annual Report of the Workers' Compensation Appeal Tribunal (WCAT)**

I am pleased to provide you with the 2013 WCAT Annual Report for the year ended December 31, 2013. This report has been prepared for your review pursuant to section 234(8) of the *Workers Compensation Act*.

Yours truly,

Caroline Berkey  
Chair

CB/lc

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## GLOSSARY

Act	<i>Workers Compensation Act</i> , R.S.B.C. 1996, c. 492
<i>Administrative Tribunals Act</i>	<i>Administrative Tribunals Act</i> , S.B.C. 2004, c. 45
Appeal Division	former Appeal Division of the Workers' Compensation Board
Board	Workers' Compensation Board, operating as WorkSafeBC
BCCAT	British Columbia Council of Administrative Tribunals
FIPPA	<i>Freedom of Information and Protection of Privacy Act</i> , R.S.B.C. 1996, c.165
GECA	<i>Government Employees Compensation Act</i> , R.S., 1985, c. G-5
MRP	former Medical Review Panel
MRPP	<i>Manual of Rules of Practice and Procedure</i>
<i>Occupational Health and Safety Regulation</i>	<i>Occupational Health and Safety Regulation</i> , B.C. Reg 230/2011
Review Board	former Workers' Compensation Review Board
Review Division	Review Division of the Workers' Compensation Board
RSCM I	<i>Rehabilitation Services and Claims Manual, Volume I</i>
RSCM II	<i>Rehabilitation Services and Claims Manual, Volume II</i>
WCAT	Workers' Compensation Appeal Tribunal
<i>Workers Compensation Amendment Act (No. 2), 2002</i>	<i>Workers Compensation Amendment Act (No. 2), 2002</i> , S.B.C. 2002, c. 66 (Bill 63, 2002)

## 1. CHAIR'S MESSAGE

I am pleased to present the 2013 Annual Report for the Workers' Compensation Appeal Tribunal (WCAT). This year marked the tenth anniversary of WCAT's operations as an independent appellate tribunal and the final level of appeal for many issues in British Columbia's workers' compensation system. This report provides an overview of WCAT's statutory mandate. It also describes our activities over the past 12 months including appeal statistics, costs of operation, a list of our members, and summaries of WCAT decisions and judicial review decisions issued by the courts.

WCAT is committed to hearing appeals and applications in a timely manner and making decisions based on the merits and justice of the case. WCAT has jurisdiction over workers' compensation matters including compensation claims, employer assessments, prevention penalties and certificates for the courts regarding the status under the *Workers Compensation Act* (Act) of parties to litigation. The vast majority of the appeals and applications we received in 2013 were workers' and employers' appeals regarding benefits under workers' compensation claims.

WCAT is a high volume appellate tribunal. In 2013 workers and employers filed 5,136 appeals and applications. Our vice chairs decided 3,714 appeals and applications on the merits, and we addressed 1,213 through various summary decisions. Our intake of appeals and applications in 2013 was slightly higher than last year and the highest we have received since 2007. Our decision output was higher this year than last year, and we continue to maintain our focus on quality.

I would like to sincerely thank our employees and appointees for their exemplary work over the last ten years and their dedication to achieving WCAT's mandate.

Caroline Berkey  
Chair

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

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

Some decisions of the Review Division are final and not subject to appeal to WCAT. 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 there is no range in the Board's rating schedule or the range does not exceed 5%;
- 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 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 (Bill 56 - 2004)*. 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 2013

There was one change to the Act in 2013. Section 6.2 was added by the *Emergency Intervention Disclosure Act*, S.B.C. 2012, c. 19 (Bill 39) (EID Act), which came into effect on March 2, 2013 (B.C. Reg. 33/2013). This section provides that if a worker is an applicant as defined in the EID Act and they contract a communicable disease, it must be presumed that the disease was due to the nature of the worker's employment if certain conditions are met.

There were no changes in 2013 to the *Administrative Tribunals Act* or to the federal *Government Employees Compensation Act*, R.S., 1985, c. G-5 (GECA). The amendments to GECA made in 2012 and described in WCAT's 2012 Annual Report

have not yet been brought into force. These amendments amend the definition of “employee,” the provisions relating to the elections employees make as to whether to receive benefits or to sue third parties in certain circumstances, and the provisions relating to the subrogation rights of the federal government and federal employers.

### **(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 or the chair’s delegate to a maximum of 90 days if the appellant requests and receives additional time to make submissions or submit new evidence and WCAT grants to the other parties a similar opportunity. The chair or the chair’s delegate 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 with respect to a matter that it considers should have been, but was not, determined by the Board, 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 it is found 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](http://www.wcat.bc.ca)).

There were no changes to the MRPP in 2013.

## 4. COSTS OF OPERATION FOR THE 2013 CALENDAR YEAR

Category	Cost
Salaries	\$ 8,488,731
Employee Benefits and Supplementary Salary Costs	\$ 2,193,107
Per Diem – Boards and Commissions	\$ 481,239
Travel	\$ 75,112
Centralized Management Support Services*	\$ 1,360,621
Professional Services	\$ 654,202
Information Technology and Operations and Amortization	\$ 1,076,865
Office and Business Expenses	\$ 393,333
Gain/Loss Capital Asset - Information Systems	\$ 1,235,572
Minor Building Service Requests and Amortization	\$ 11,972
<b>TOTAL EXPENDITURES</b>	<b>\$ 15,970,754</b>

\* These charges represent Building Occupancy and Workplace Technology Service charges which do not impact the WCAT operating budget but are charged directly to WorkSafeBC.

## 5. WCAT MEMBERS

Executive and Vice Chairs with Special Duties as of December 31, 2013		
Name	Position	End of Term
Caroline Berkey	Chair	June 30, 2015 (OIC# 512)
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, 2019
Kevin Johnson	Vice Chair & Deputy Registrar	February 28, 2017
Randy Lane	Vice Chair & Team Leader	February 28, 2015
Susan Marten	Vice Chair & Team Leader	February 28, 2018
David Newell	Vice Chair & Team Leader	January 31, 2015
Debbie Sigurdson	Vice Chair & Team Leader	February 28, 2019

Vice Chairs as of December 31, 2013	
Name	End of Term
Cathy Agnew	August 31, 2015
Luningning Alcuitas-Imperial	February 29, 2016
Beatrice K. Anderson	February 28, 2018
W. J. (Bill) Baker	February 28, 2015
Hélène Beauchesne*	March 31, 2019
Sarwan Boal	February 28, 2017
Dana G. Brinley	February 28, 2015
Patricia Broad	October 31, 2014
Kate Campbell	September 5, 2014
Lesley Christensen	February 28, 2018
Melissa Clarke	September 30, 2015
Daphne A. Dukelow	February 28, 2017
William J. Duncan	February 29, 2016

Vice Chairs as of December 31, 2013	
Name	End of Term
Andrew J. M. Elliot	August 31, 2015
Lisa Hirose-Cameron	September 30, 2018
Warren Hoole	September 30, 2014
Nora Jackson	February 29, 2016
Cynthia J. Katramadakakis	March 31, 2018
Joanne Kembel	February 28, 2015
Brian King	August 31, 2015
Rob Kyle	February 28, 2017
Darrell LeHouillier	October 31, 2014
Janice A. Leroy	February 28, 2017
Shelley Lopez	September 5, 2014
Julie C. Mantini*	February 28, 2019
Renee Miller	April 30, 2016
Herb Morton	February 28, 2015
Marguerite Mousseau	February 28, 2015
Elaine Murray	August 31, 2014
Diep Nguyen	September 5, 2014
Andrew Pendray	January 3, 2017
Carla Qualtrough	September 5, 2014
Michael Redmond	February 28, 2015
Dale Reid	February 28, 2016
Deirdre Rice	February 28, 2019
Guy Riecken	February 28, 2019
Simi Saini	September 5, 2014
Shannon Salter	September 5, 2014
Shelina Shivji	March 31, 2017
Timothy B. Skagen	March 31, 2017

Vice Chairs as of December 31, 2013	
Name	End of Term
Anthony F. Stevens	February 28, 2017
Andrew J. Waldichuk	February 28, 2017
Lois J. Williams	February 28, 2016
Sherryl Yeager	February 28, 2018

\* Part-time Deputy Registrar

Vice Chair Departures		
Name	Original Appointment Date	Departure Date or End of Term
Heather McDonald	March 3, 2003	July 24, 2013
P. Michael O'Brien	March 3, 2003	February 28, 2013
Paul Petrie	March 3, 2003	November 29, 2013
Allan Tuokko	May 1, 2010	April 30, 2013

## 6. EDUCATION

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

WCAT recognizes that professional development is essential to achieving and maintaining the expected standards of quality in decision-making. Accordingly, WCAT has pursued an extensive program of education, training, and development, both in-house and externally, where resources permit.

In 2013, 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 or facilitators. WCAT is registered as a continuing professional development provider with the Law Society of British Columbia.

WCAT is also represented on the Inter-Organizational Training Committee, which is composed of representatives from the Board (including the Review Division), WCAT, and the Workers' and Employers' Advisers Offices. The Committee's goal is to provide a forum for the various divisions and agencies to cooperate with each other, to share training ideas and materials, and to organize periodic inter-organizational training sessions.

The following is a list of sessions organized by WCAT for vice chairs during 2013:

1. January 10
  - Exploring Organic vs. Non Organic Findings
  - Update on McKnight Decision
2. February 7
  - Age 65: Circumstances at the Time of Injury
  - Diffusing Angry People
3. February 20
  - Section 252 Suspensions
4. March 7
  - CMS Update for Vice Chairs
  - Tribunal Counsel Update
  - Injuries Following Natural Body Motions at Work
5. April 11
  - Section 23(1) of the Act – Psychological Guidelines and Schedule
6. May 9
  - Initial, Long-Term, and Reopening Wage Rate Setting
  - Lessons Learned by Judicial Reviews
7. June 12
  - Appeal Expenses and the 21-Day Evidence Rule
8. September 12
  - Independent Medical Assistance or Advice (IHP Process)
9. October 3
  - Overview of Mental Disorder Claims and Appeals
10. November 8
  - Cross Examination: Techniques for Oral Hearings
11. December 5
  - Overview and Update: Mental Disorders

In addition, many WCAT vice chairs participated in Continuing Legal Education (CLE) sessions, including the CLE on Administrative Law. On November 1, 2013 WCAT provided an information & training session to representatives.

## 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 go through the performance evaluation process. The performance of vice chairs will continue to be regularly evaluated on an ongoing basis.

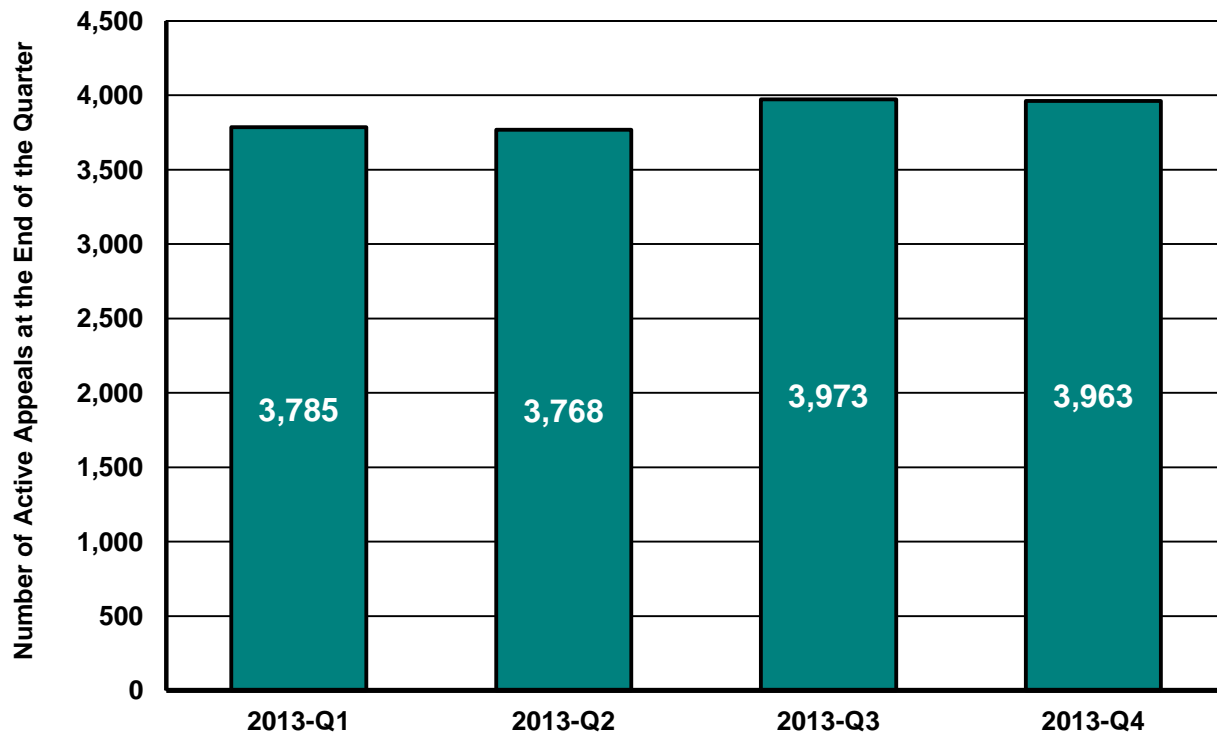
## 8. STATISTICS

### 8.1 Overview of Appeals Inventory

This section contains two charts providing a high level overview of the status of our appeals inventory for 2013. WCAT records appeals by their date of initiation.

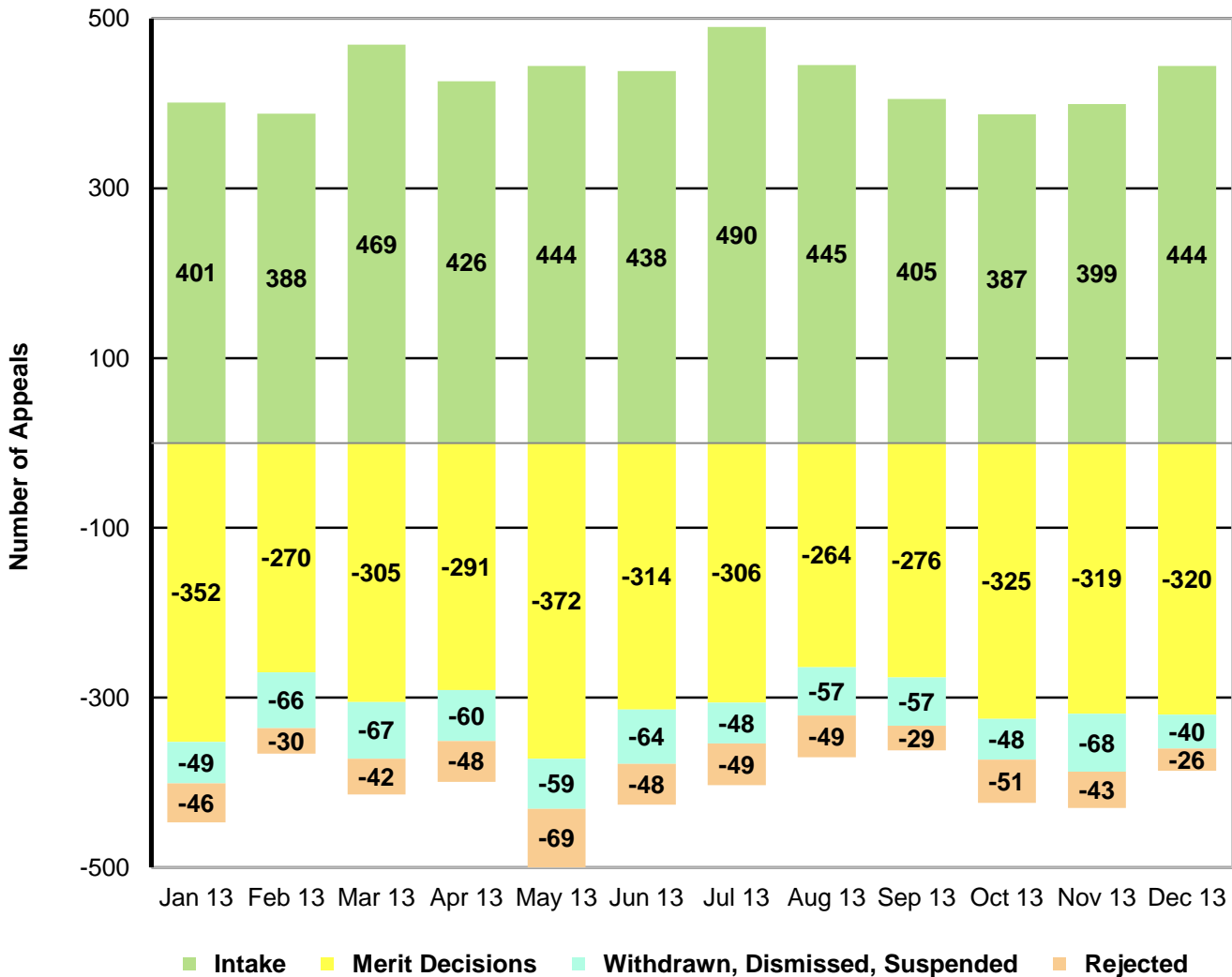
The first chart (Number of Active Appeals) provides the number of appeals in our inventory at the end of each quarter of 2013. WCAT’s total active inventory at December 31, 2013 was 3,963 appeals compared to 3,742 at the end of 2012. The second chart (Total Intake and Output) provides monthly statistics 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 5,136 new appeals in 2013, representing an increase of 12% from 2011 and a slight increase (1%) over the number of appeals we received in 2012. Our output in 2013 was 4,927 decisions and determinations representing an increase of 12% from the 4,416 decisions and determinations made in 2012.

**WORKERS’ COMPENSATION APPEAL TRIBUNAL  
NUMBER OF ACTIVE APPEALS IN INVENTORY**



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

In 12-Month Period:	
<b>Total Intake</b>	<b>5,136</b>
Completed	3,714
Withdrawn, Dismissed, Suspended	683
Rejected, Reconsideration Applications	530
<b>Total Output</b>	<b>4,927</b>



## 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.

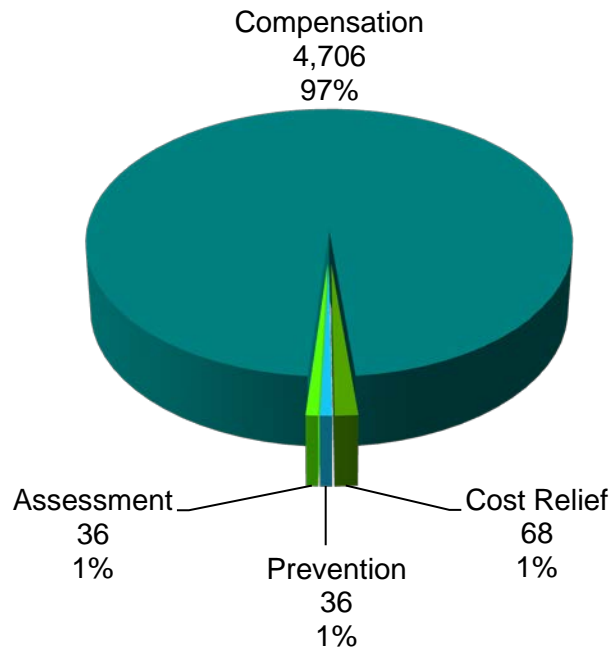
**(a) Intake**

WCAT received 5,136 appeals and applications in 2013. Of these, 4,846 appeals (94%) arose from decisions of Board review officers and 290 were direct.

Source	Intake
Review Division	4,846
Direct	290
<b>Total</b>	<b>5,136</b>

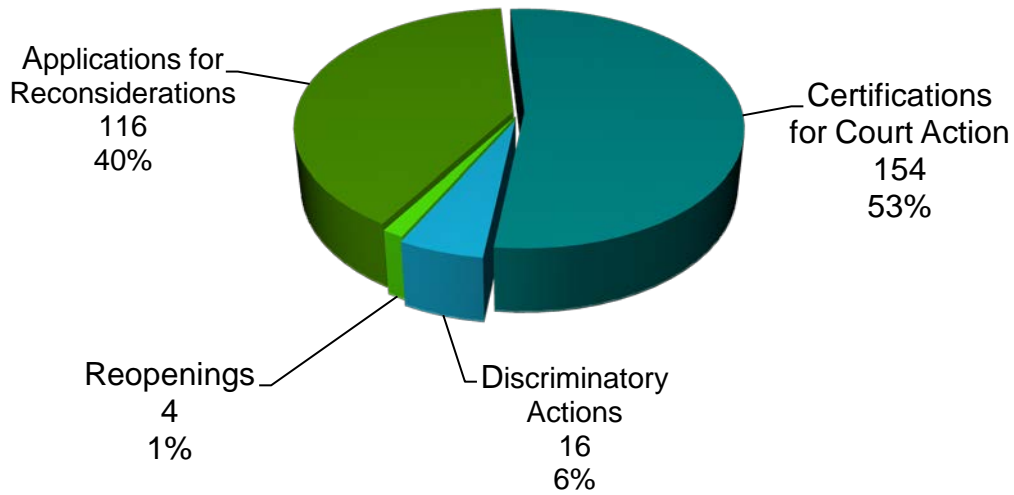
The following two charts show the breakdown of the types of appeals and applications we received in 2013.

**APPEALS FROM REVIEW DIVISION BY TYPE**





**DIRECT APPEALS AND APPLICATIONS BY TYPE**



**(b) Merit Decisions**

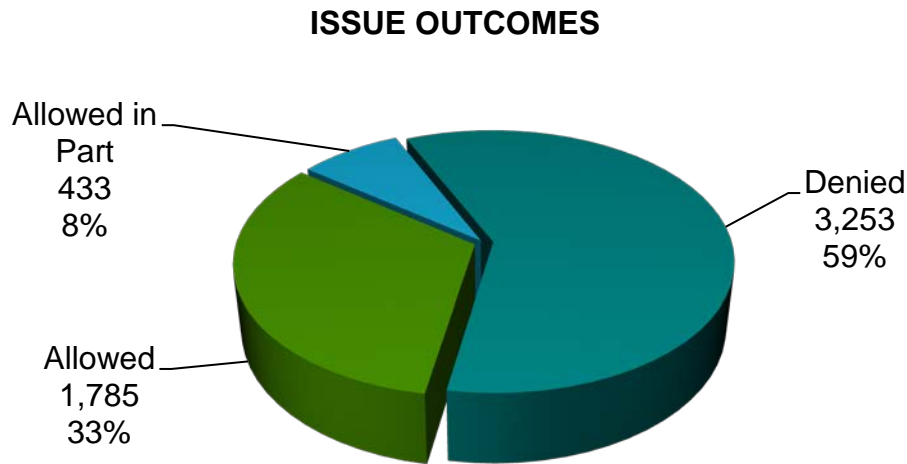
WCAT made 3,714 merit decisions on appeals and applications in 2013, 51 of which concerned applications for certificates for court actions. The remaining 3,663 merit decisions concerned appeals from decisions of the Review Division or Board officers, which may be varied, confirmed or cancelled by WCAT.

“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.

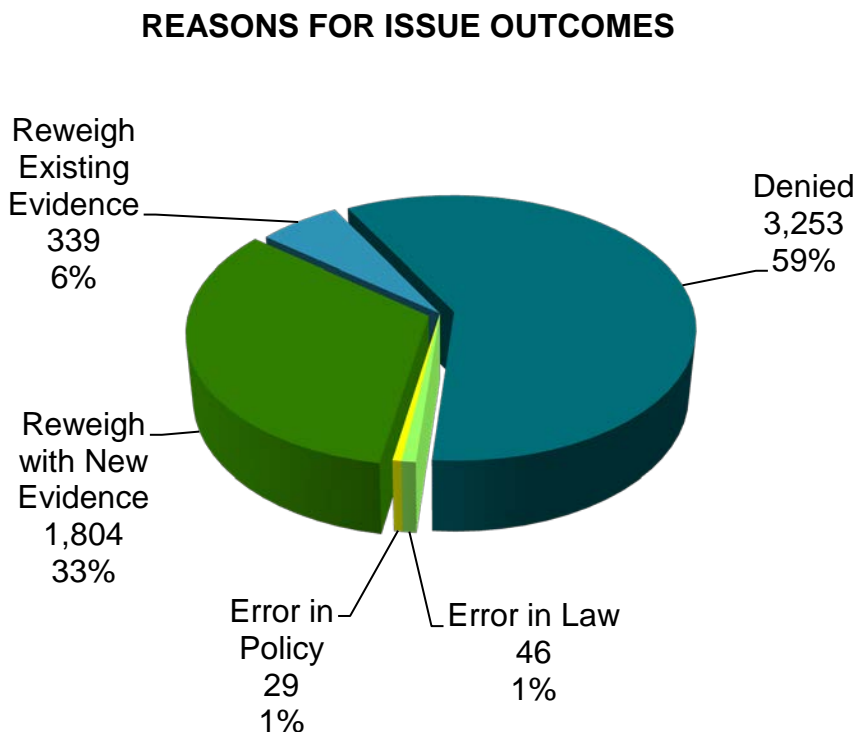
The table below shows the percentages of WCAT’s merit decisions that varied or confirmed the decision under appeal. The number of merit decisions cancelling the decision under appeal is too low to be reflected in the table below. Appeals from Review Division decisions regarding reopenings are included as compensation appeals.

Appeals		Outcome	
Appeal Type	Number of Decisions	Varied	Confirmed
Compensation	3,575	47%	53%
Relief of Costs	41	39%	61%
Prevention	19	58%	42%
Assessments	18	61%	39%
Discriminatory Actions	10	10%	90%

An appeal may raise numerous issues and WCAT may allow or deny the appeal on each issue. In 2013, WCAT decided 5,471 issues that arose out of the 3,714 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.



### (c) Summary Decisions

WCAT made 1,213 summary decisions on appeals and applications. In 656 (54%) of these decisions WCAT dismissed the appeal or confirmed that the appellant had withdrawn it. WCAT rejected 381 (31%) appeals and applications because there was no appealable issue or the decision under appeal was not appealable to WCAT. Twenty-seven summary decisions suspended appeals. Of the remaining summary decisions, 87 decided applications for reconsideration, 7 were reconsideration applications that were withdrawn and/or dismissed and 55 denied requests for extension of time to appeal.

### (d) Requests for Extensions of Time

WCAT decided 169 requests for extensions of time to appeal, allowing 114 and denying 55.

### (e) Top Five Issue Groups for WCAT Appeals

Appeal Issue	Merit Decisions	Percentage of Total Decisions	Allowed / Allowed in Part	Denied
Section 23 – Permanent Partial Disability	1,576	30%	46%	54%
Section 5 – Compensation For Personal Injury	1,516	29%	37%	63%
Section 6 – Occupational Disease	406	8%	39%	61%
Section 30 – Temporary Partial Disability	360	7%	43%	57%
Section 29 – Temporary Total Disability	283	5%	38%	62%

## 8.3 General

### (a) Appeal Paths

WCAT decides appeals and applications after an oral hearing or, if the appellant does not request an oral hearing or WCAT determines that an oral hearing is not necessary

to fully and fairly consider the matter, after reading and reviewing the Board's records, any new evidence, and the submissions of the parties.

In 2013, WCAT decided a total of 3,714 merit decisions appeals and applications. WCAT decided 1,780 (48% of the total) after convening an oral hearing and decided 1,934 appeals and applications (52% of the total) by written submission.

### (b) Locations of Oral Hearings

In 2013, WCAT held oral hearings in 12 locations around the province. The following table shows the number of oral hearings held in each location.

Location	Number of Hearings
Castlegar	10
Courtenay	58
Cranbrook	27
Fort St. John	7
Kamloops	64
Kelowna	91
Nanaimo	93
Prince George	54
Terrace	13
Victoria	148
Williams Lake	14
<b>Total outside Richmond</b>	<b>579</b>
Richmond	920
<b>Grand Total</b>	<b>1,499</b>

*Note: We have made changes to the chart above to show the number of hearings held in each location rather than the number of hearing weeks in each location. The number of hearings per week can vary so the actual number of hearings provides more precise information.*

### (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 2013. The table does not include assessment or relief of costs appeals as the appellant is always the employer.

Type of Appeal or Application	Appellant / Applicant		
	Worker	Employer	Dependant
Compensation	92.5%	7.3%	0.2%
Direct Reopening	75%	25%	0%
Discriminatory Action	81.5%	18.5%	0%
Prevention	0%	100%	0%
Reconsideration	92%	7.5%	0.5%

### (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 2013.

Type of Appeal	Percent Represented where Appellant / Applicant is:		
	Worker	Employer	Dependant
Assessment	NA	64%	NA
Compensation	76%	74%	53%
Direct Reopening	33%	100%	NA
Discriminatory Actions	18%	80%	NA
Prevention	NA	77%	100%
Reconsiderations	67%	71%	NA
Relief of Costs	NA	80%	NA

## 9. PRECEDENT PANEL DECISIONS

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

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

WCAT did not issue any precedent panel decisions in 2013. No precedent panel decisions were pending at the end of 2013.

## 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.

In 2013, one policy was referred to the chair.

### **Measurement of Earnings Loss Policy (Item #40.13)**

Policy item #40.13 of the RSCM II provides that for purposes of calculating a worker's entitlement to a loss of earnings permanent disability award the Board is to use the earnings in the occupation identified as suitable as they stood at the date of the worker's injury as opposed to the earnings in that occupation at the date of calculation of the award. To do otherwise would ignore the effect of inflation on earnings. Where the amount of earnings in the identified occupation is not available as of the date of the worker's injury the Board's policy provides that it may be necessary to use the earnings in that occupation as they were at a different date and bring the pre-injury

earnings of the worker into line by applying cost of living adjustments as described in policy item #51.00. Item #51.00 provides, among other things, that the cost of living allowance that is applied to certain benefits is to be one percentage point less than the percentage change between the consumer price index for October of one year and October of the previous year.

A vice chair concluded that the portion of policy item #40.13 incorporating the formula from policy item #51.00 into the calculation of a worker's loss of earnings award results in the unnecessary creation of two disparate classes of workers and a deliberate move away from determining the actual or real loss suffered by the worker. The vice chair found that it does this by introducing a deliberate 1% reduction in the percentage change in the consumer price index and by not reflecting the total material time period. The vice chair found that incorporating policy item #51.00 into policy item #40.13 defeats the intention in subsection 23(3) of the Act and policy item #40.13 to determine the actual or real loss of earnings suffered by a worker. For this reason the vice chair concluded that the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations and referred the policy to the chair.

## 11. NOTEWORTHY WCAT DECISIONS

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

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

WCAT decisions from 2013, 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](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))

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- 1.7 Specific Injuries
  - 1.8 Compensable Consequences (item #22.00)
  - 1.9 Out of Province Injuries (section 8(1))
  - 1.10 Compensation in Fatal Cases (section 17)
  - 1.11 Temporary Disability Benefits (sections 29 and 30)
  - 1.12 Average Earnings
  - 1.13 Vocational Rehabilitation (section 16)
  - 1.14 Deductions from Compensation (section 34)
  - 1.15 Health Care Benefits (section 21)
  - 1.16 Permanent Disability Awards (section 23)
  - 1.17 Period of Payment (section 23.1)
  - 1.18 Retirement Benefits
  - 1.19 Protection of Benefits
  - 1.20 Recurrence of Injury (section 96(2)(b))
  - 1.21 Assessments
  - 1.22 Relief of Costs
  - 1.23 Occupational Health and Safety
2. Board Procedural Issues
- 2.1 Board Jurisdiction
  - 2.2 Board Policy
  - 2.3 Board Practice
  - 2.4 What Constitutes a “Decision”
  - 2.5 Board Changing Board Decisions
  - 2.6 Evidence
  - 2.7 Federal Employees
  - 2.8 Discriminatory Actions
  - 2.9 Mediation
  - 2.10 Applications for Compensation (section 55)
  - 2.11 Refusal to Submit to Medical Treatment (Reduction or Suspension of Compensation) (section 57(2)(b))
  - 2.12 Failure to Provide Information to Board (section 57.1)
  - 2.13 Limitation of Actions (section 10)
  - 2.14 Transition Issues
  - 2.15 Who May Request Review (section 96.3)
  - 2.16 Review Division Jurisdiction
  - 2.17 Costs (section 100)
  - 2.18 Former Medical Review Panel



### 3. WCAT Procedural Issues

- 3.1 Standing to Appeal
- 3.2 Precedent Panel Decisions
- 3.3 Application of Board Policy
- 3.4 Lawfulness of Board Policy Determinations (section 251)
- 3.5 WCAT Jurisdiction
- 3.6 Evidence
- 3.7 Returning Matter to Board to Determine Amount of Benefits
- 3.8 Legal Precedents (section 250(1))
- 3.9 Summary Dismissal of Appeal
- 3.10 Matters Referred Back to Board (section 246(3))
- 3.11 Suspension of WCAT Appeal (Pending Board Decision) (section 252(1))
- 3.12 Certifications to Court (sections 10 and 257)
- 3.13 WCAT Reconsiderations
- 3.14 WCAT Extensions of Time (section 243(3))
- 3.15 Abandoning a WCAT Appeal
- 3.16 Applications to WCAT to Stay an Appealed Decision (section 244)
- 3.17 Withdrawing a WCAT Appeal
- 3.18 Costs and Expenses
- 3.19 Transitional Appeals

#### 11.1 Select Noteworthy WCAT Decisions

WCAT issued a number of noteworthy decisions in 2013. This section provides summaries of some of those decisions.

- (a) WCAT Decision No.: *WCAT-2013-00473***  
**Decision Date: February 21, 2013**  
**Panel: C. Berkey, W. Hoole, R. Lane**

The panel considered the decision of the B.C. Court of Appeal in *Lyshirka v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 457, and found that WCAT retains the necessary authority to correct earlier WCAT decisions that involve errors of "true" jurisdiction and unfairness, as well as errors of fact, law, or discretion that offend the applicable standard of review.

- (b) WCAT Decision No.: *WCAT-2013-00694***  
**Decision Date: March 14, 2013**  
**Panel: E. Murray**

The fact the worker's symptoms occurred at work does not mean that her work was of causative significance in relation to those symptoms. The worker, who experienced

knee pain when stepping off of a curb, was not entitled to compensation because the worker had a pre-existing deteriorating condition that was at a critical point where it was about to become a manifest disability.

- (c) WCAT Decision No.: WCAT-2013-00858**  
**Decision Date: March 27, 2013**  
**Panel: D. Dukelow**

Physical proximity to the workplace does not alone transform an event into one that arises out of and in the course of employment, such as when a worker observes a fight between two unknown men outside the worker's place of employment. Also, briefly witnessing a fight between two unknown men near a workplace does not constitute a traumatic event for purposes of section 5.1 of the Act.

- (d) WCAT Decision No.: WCAT-2013-01282**  
**Decision Date: May 10, 2013**  
**Panel: D. Sigurdson**

The Board's failure to implement the Review Division's directions for further investigation constituted a blatant Board error that necessitated the payment of interest on retroactive temporary disability benefits.

- (e) WCAT Decision No.: WCAT-2013-02405**  
**Decision Date: August 27, 2013**  
**Panel: W.J. Duncan, B.K. Anderson, L. Hirose-Cameron**

This decision is noteworthy for its analysis of the factors that WCAT will take into account when considering a request for reimbursement of an expert opinion where there is no applicable Board tariff or fee schedule. Those factors include: the complexity of the case; proportionality (the significance of the injury, and impact on the worker or employer); availability of specialists in the worker's geographic area; duplication of work; whether the expert had to review a significant body of material to prepare the report; and the extent to which the report can be understood by its intended readers (i.e. WCAT).

- (f) WCAT Decision No.: WCAT-2013-02463**  
**Decision Date: August 30, 2013**  
**Panel: G. Riecken, W. Hoole, E. Murray**

In cases of non-specific chronic pain, there is no discretion under policy item #39.02 of the RSCM II to grant a permanent functional impairment (PFI) permanent disability award pursuant to section 23(1) of the Act in an amount greater than 2.5%. In these circumstances, a PFI evaluation would be pointless as policy restricts the award for non-specific chronic pain to 2.5% regardless of the results of the evaluation.

**(g) WCAT Decision No.: WCAT-2013-02924**  
**Decision Date: October 23, 2013**  
**Panel: C. Berkey, B. Anderson, T. White**

A temporal relationship between a natural body motion that caused the injury and the employment activity is not, by itself, enough for a finding of sufficient employment connection between the motion and the employment. The motion must be required or incidental to the employment. A motion is required by the employment when performance of the motion is a compulsory or necessary part of the worker's employment. A motion is incidental to the employment when it is directly related to the performance of a primary employment task. A motion that is merely convenient but not directly related to the performance of a task is not incidental to that task, such as going from a sitting to a standing position when that motion is not a function, or a part of, the task of doing paperwork.

## 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 (i.e. breach of procedural fairness).

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 2013, WCAT received 116 applications for reconsideration and issued 87 stage one decisions. Of the stage one decisions issued, 23 determined that reconsideration grounds existed. The outcomes of the stage one reconsideration decisions were as follows:

Type of Reconsideration	Number of Reconsideration Decisions	Allowed	Denied
Jurisdictional Error	60	21	39
New Evidence	10	1	9
Both Grounds Alleged	17	1	16
<b>TOTAL</b>	<b>87</b>	<b>23</b>	<b>64</b>

### 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)(b)).

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 (*Administrative Tribunals Act*, section 58(3)).

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 (*Administrative Tribunals Act*, section 58(2)(c)).

In 2013, WCAT allowed 21 applications for reconsideration on the ground of jurisdictional error. Of those 21 allowed applications, 8 were allowed on the basis of a breach of procedural fairness, 9 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 3 were allowed on the basis of a missed issue. One decision was allowed on both new evidence grounds and on the basis of a patently unreasonable error.

### 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. The remedy requested will therefore be granted only in limited circumstances. A judicial review is not an appeal and does not involve an investigation of the merits of the decision.

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

#### 13.1 Judicial Review Applications

The number of judicial review applications brought in respect of WCAT decisions remained the same between 2012 and 2013. In both years, 18 judicial review applications were served on WCAT. In addition, in 2013 WCAT received 5 notices of appeal to the B.C. Court of Appeal in respect of judicial review decisions by the B.C. Supreme Court. WCAT brought one appeal. WCAT also sought leave to appeal to the Supreme Court of Canada in respect of one B.C. Court of Appeal decision and was served with two leave to appeal applications.

## 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<sup>1</sup>.

**(a) *Davis v. WorkSafe BC*, 2013 BCSC 476 (March 19, 2013)**

Decisions under review: *WCAT-2005-06898*, *WCAT-2005-06899*, *WCAT-2005-06900*, *WCAT-2005-06901*, *WCAT-2007-02852*, *WCAT-2010-03110*, and *WCAT-2012-00656*

The petitioner sought judicial review of a WCAT decision that concluded that her several compensable injuries did not culminate in a permanent disability to her low back, regardless of whether one considered the cumulative effect of the injuries alone or the injuries combined with the petitioner's work activities. WCAT relied on an opinion of the Review Division's medical advisor who found that none of the compensable injuries would have put enough force on the petitioner's low back to exacerbate her pre-existing degenerative condition. WCAT preferred the medical advisor's opinion because it was the only one to address the requirement in policy item #26.55 RSCM II that evidence must establish that a pre-existing disease has been "significantly accelerated, activated, or advanced" by work activities before the conditions can be found to be compensable. The court found that there was ample evidence upon which WCAT's conclusion could be based and, therefore, it could not be said that the WCAT decision was patently unreasonable. The petition was dismissed.

The court also found that WCAT possesses a common law authority to reconsider one of its own decisions on the basis of a patently unreasonable error. The court determined that the B.C. Court of Appeal's judgment in *Lysohirka v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 457, could be distinguished on the basis that there was sufficient indication in the Act that the legislature intended WCAT to retain a common law authority to conduct such reconsiderations. Specifically, section 253.1(5) of the Act purports not to limit "the tribunal's ability, on request of a party, to reopen an appeal in order to cure a jurisdictional defect".

**(b) *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2013 BCSC 524 (March 28, 2013)**

Decisions under review: *WCAT-2010-03503*, *WCAT-2011-03079* and *WCAT-2010-03507*, *WCAT-2011-03080*, and *WCAT-2010-03502*, *WCAT-2011-03081*

In three separate decisions, the majority of a panel of WCAT found that three hospital laboratory workers were entitled to compensation for their breast cancer on the basis that it was at least as likely as not that the breast cancer was an occupational disease due to the nature of their employment. The majority relied, in part, on the fact that there was a higher than expected rate of breast cancer amongst laboratory workers at the

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

hospital and that they had been exposed to carcinogens. WCAT denied a reconsideration request from the employer.

The employer sought judicial review of the WCAT decisions and the Court determined that there was no positive evidence to support them and that they were therefore patently unreasonable. The court found that the expert opinions before WCAT were unambiguous and uncontradicted in that there was no evidence that workplace factors caused the workers' cancers. The court found that a higher than expected rate of cancer in a workplace cannot alone provide evidence that the cancer was caused by occupational factors because cancer clusters are statistically certain to arise in various places and times. While some expert evidence did leave open the possibility that workplace factors played some role in the workers' cancer, it was only a possibility. There was no objective evidence supporting that possibility. In finding that this possibility did in fact occur and that the cancer was caused by workplace factors, WCAT was speculating into an area in which it has no expertise. In this case, the cause of the breast cancers could not be determined by the application of common sense inferences.

The decisions were set aside and a new WCAT hearing ordered. The court rejected the employer's request that the court determine the matter in favour of the employer by confirming the original decision of the Board that the workers were not entitled to compensation. The employer had argued that having found no evidence to support entitlement WCAT would have no choice but to decide in favour of the employer. The court found that the appropriate remedy was to return the matter to WCAT as it was open to WCAT or the parties to adduce new evidence at a new hearing.

The workers have appealed the court's decision to the B.C. Court of Appeal. The appeal has not yet been heard.

**(c) *Whetung v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCCA 350 (July 26, 2013)**

Decision under review: *WCAT-2010-02795*

The B.C. Court of Appeal dismissed an appeal by the Board, and confirmed the finding of the B.C. Supreme Court that WCAT had made a patently unreasonable error when it determined that the Board could change a decision it had already made on the basis of comments made by a judge in a related but separate court action.

Ms. Whetung was receiving workers' compensation benefits for dystonia. She subsequently was awarded damages in a separate court action, which was premised on the finding that her dystonia was entirely attributable to a non-work-related accident. In ruling against the defendants in the action that the benefits paid by the Board were not deductible from the award of damages, the B.C. Supreme Court in the action stated that the Board was "subrogated for that part of the [compensation benefits] attributable to the effects of dystonia".

Relying on this comment, the Board stopped paying benefits to Ms. Whetung. On appeal of that decision, WCAT held that, notwithstanding that it had been more than

75 days since the Board's decision, the Board could still give effect to the direction of the trial judge – which gave rise to a trust-like relationship - and was correct to have done so as continuing benefits would result in double recovery (WCAT found that the basis for the Board's decision could not be a subrogated interest as section 10 of the Act could not be read so as to grant the Board such an interest in these circumstances). The Court of Appeal found this part of WCAT's decision to be patently unreasonable. The Court of Appeal agreed with the B.C. Supreme Court in the judicial review proceeding in finding that it was patently unreasonable for WCAT to determine that the Board was bound to follow the comments of the court in the action. The Board was not a party to the action and the workplace injuries and the injury in the action were separate. The Act provides no basis upon which the Board could decide that Ms. Whetung was not entitled to the disability benefits already awarded. The Court of Appeal agreed with WCAT that no question of subrogation could arise despite what was said by the court in the action.

The Board had also argued that WCAT lacked the jurisdiction to hear an appeal from its decision to stop Ms. Whetung's benefits. The Court of Appeal found the Board's decision to be one respecting a compensation matter and, therefore, one which was both reviewable and appealable.

**(d) *Erskine v. British Columbia (Workers' Compensation Appeal Tribunal)*,  
2013 BCSC 1583 (August 29, 2013)**

Decision under review: *WCAT-2012-02032*

WCAT determined that while a work accident, namely a forklift running over the worker's foot, was capable of causing the various claimed injuries, they were not in fact caused by that accident. In respect of his foot injury, WCAT relied on a family doctor's note made the same day as the forklift accident which did not mention the accident but indicated the foot injury was caused by pushing a "quad" several weeks earlier. An x-ray showed pre-existing spurring in that foot. A subsequent note from the same doctor simply referenced plantar fasciitis and made no mention of the forklift accident. WCAT also relied on the fact that the worker did not pursue any further medical attention for his foot or report his injury to the Board for a lengthy period of time. His other claimed injuries did not appear in the medical records until several months after the forklift accident.

The worker applied for judicial review of the WCAT decision arguing that WCAT unfairly relied on the doctor's note to reach an unfavourable conclusion about his credibility. He argued that WCAT distorted its decision making process by relying on his credibility. The worker submitted that it was obvious he was injured at work, and he had no means of refuting the doctor's note besides testifying it was wrong. He argued that WCAT should have undertaken further investigation into his claim if it was unsatisfied with the evidence he presented in support of his appeal.

On judicial review, the court found WCAT's inquiry properly focused on the question of credibility, and that WCAT's weighing of evidence could not be criticized. The court found it must defer to WCAT's findings of fact unless they were based on no evidence,



and here found that there was some evidence on which WCAT could have come to its conclusion. The court found that WCAT was not obliged to further investigate the matter as it made no finding that the evidence was incomplete. As there are always further avenues of investigation, WCAT was only required to consider if the evidence was sufficiently complete and reliable, allowing it to reach a sound conclusion with confidence.

The worker appealed this decision to the B.C. Court of Appeal. The Court of Appeal in oral reasons dismissed the appeal.

**(e) *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391**  
(September 9, 2013)

Decisions under review: *WCAT-2004-04388-AD* and *WCAT-2010-02774*

WCAT determined that the worker was no longer entitled to workers' compensation benefits, namely a permanent functional impairment permanent partial disability award, because he had recovered from his compensable condition. More specifically, WCAT found that the work-related asthmatic component of the worker's chronic obstructive pulmonary disease (COPD) was reversible through the use of medication and was therefore not permanent. Board policy provides that no award can be made to a worker with a pre-existing state when they have returned to their pre-exposure state.

On judicial review, the B.C. Supreme Court set aside WCAT's decision on an issue not raised by the worker in either the WCAT appeal proceeding, WCAT reconsideration proceedings, or in his petition. The court found that WCAT's finding was inconsistent with an earlier finding of fact made by the former Appeal Division on the worker's claim and was therefore patently unreasonable. The court determined that the Appeal Division had found that the asthmatic component of the COPD was not entirely reversible.

On an appeal brought by WCAT, the B.C. Court of Appeal agreed with WCAT that the judge's interpretation of the Appeal Division decision was not the only rational one and that WCAT's finding was consistent with at least one other rational interpretation of the Appeal Division decision. In the result, the court found that the judge erred in finding that WCAT's decision was patently unreasonable. The court emphasized that WCAT deserves deference from the court when it is interpreting tribunal decisions.

The Court of Appeal declined to remit the new issue back to WCAT. It said that to allow a party a new hearing before an administrative tribunal because it overlooked raising an issue or making an argument at the original hearing would unduly interfere with the role entrusted to such tribunals.

- (f) ***Moore v. Workers' Compensation Appeal Tribunal***, unreported  
(September 12, 2013)

Decisions under review: *WCAT-2009-02532* and *WCAT-2011-00987*

The worker filed a petition for judicial review of a WCAT decision 15 months beyond the 60 day period for commencing an application for judicial review required by section 57 of the ATA. The petition was filed within one month of WCAT issuing a reconsideration decision. Approximately 26 months after the reconsideration decision was issued the petitioner filed an amended petition requesting that the reconsideration decision also be set aside.

On an application by the employer, the worker's amended petition for judicial review was dismissed for being out of time. The court concluded that the petitioner had not met the onus of satisfying the court that the three statutory conditions for an extension of time were satisfied. The court found that waiting for the WCAT reconsideration process to finish was not a reasonable explanation for the original 15 month delay. It found that there were no serious grounds for relief set out in the amended petition as it urged the court to reconsider the evidence which it is not permitted to do on judicial review (and in respect of the reconsideration decision it alleged no grounds). It also found that if the judicial review was successful and the matter was returned to WCAT for rehearing the employer would be prejudiced by the delay.

- (g) ***Davis v. Workers' Compensation Appeal Tribunal***, 2013 BCCA 418  
(September 23, 2013)

Decision under review: *WCAT-2012-00656*

For an overview of the decision of the B.C. Supreme Court dismissing the worker's petition see the summary above. The worker appealed the court's decision, claiming a constitutional right to have her entitlement to workers' compensation determined by a court. The B.C. Court of Appeal dismissed the appeal, observing that the supervisory jurisdiction of the superior courts over tribunals is limited to "intervening where a tribunal has embarked on decision-making that is outside of its statutory mandate, or reached a conclusion in a manner that transcends the limits of curial deference". The Court confirmed that as the decision reached by WCAT was within its exclusive jurisdiction and was not patently unreasonable, it must stand.

- (h) ***Browne v. Workers' Compensation Appeal Tribunal***, 2013 BCCA 487  
(November 8, 2013)

Decisions under review: *WCAT-2010-02714* through *WCAT-2010-02721* and *WCAT-2010-02723* through *WCAT-2010-02733*

In an application for a determination under section 257 of the Act, WCAT concluded that Ms. Browne, a defendant in an action for negligence, was not in the course of her employment when a motor vehicle accident occurred. After working a shift at a farm managed by her grandfather, Ms. Browne left the farm driving a truck with 14

passengers who had also been working at the farm. Soon after leaving, the vehicle crashed. The passengers sued Ms. Browne. WCAT found that Ms. Browne was doing a favour for her grandfather by driving the other workers back to town.

WCAT relied on policy item #21.00 (“Personal Acts”) of the RSCM II. Ms. Browne argued that no reasonable interpretation of the policy permitted WCAT to factor in a person’s subjective motivation for doing something. Instead, she said the only reasonable interpretation of the policy item, when read as a whole, required the adjudicator to look only at the nature of the person’s actions, i.e. to ask whether the person was engaged in some productive activity in furtherance of the business.

Both the B.C. Supreme Court and the B.C. Court of Appeal rejected this argument. The Court of Appeal observed that WCAT relied on several factors in support of the conclusion that Ms. Browne’s actions were not in the course of her employment. The Court of Appeal noted that the policy specifically recognizes that weighing the employment features against the personal features can never be devoid of intuitive judgment. In light of this portion of the policy, it could not be said that WCAT’s interpretation was patently unreasonable. The Court of Appeal also confirmed that, with the exception of WCAT precedent panel decisions, WCAT is not bound by its own decisions in unrelated appeals.

(i) ***Bandic v. Workers’ Compensation Appeal Tribunal***, 2013 BCSC 2063  
(November 14, 2013)

Decision under review: *WCAT-2012-01074*

WCAT determined that the worker was not entitled to a loss of earnings award under the former provisions of the Act (as it read prior to June 30, 2002) following the reopening of the worker’s claim 18 years after the original injury as he was unemployed at the time of the reopening for personal reasons.

The Court on judicial review found WCAT’s decision to be patently unreasonable, set it aside, and required WCAT to reconsider the worker’s entitlement to a loss of earnings award. The Court agreed with the petitioner’s submissions and found that the decision was patently unreasonable for mechanically applying policy item #70.20 of the RSCM I and in so doing failing to properly consider other evidence regarding the reason for the worker’s unemployment, namely the worker’s inability to work, and the worker’s explanation for applying for Canada Pension Plan benefits.

WCAT has appealed this decision to the B.C. Court of Appeal. The appeal has not yet been heard.

(j) ***Martin v. British Columbia (Workers' Compensation Appeal Tribunal)***,  
2013 BCSC 2210 (December 3, 2013)

Decisions under review: *WCAT-2004-06493-RB*, *WCAT-2004-06493a-RB*, and *WCAT-2006-01867*

WCAT determined that the worker (petitioner) was not entitled to a loss of earnings permanent partial disability award under the former provisions of the Act (as it read prior to June 30, 2002). WCAT concluded that although the worker could not return to his pre-injury occupation as a welder-fabricator because of his work-caused condition (bilateral wrist pain) he could adapt to a physically suitable occupation, specifically, automobile service advisor, without suffering a loss of earnings.

On judicial review the worker argued that WCAT's decision was patently unreasonable. He argued that the occupation was not suitable and that there was no evidence before WCAT as to the extent and intensity of the computer work involved. Further, he argued that WCAT failed to take proper account of the restrictions he has in the use of his hands and wrists and his learning limitations with respect to reading and writing.

The court dismissed the petition on the basis that there was some evidence to support WCAT's conclusion and the decision was therefore not patently unreasonable. That evidence included, but was not limited to, an employability assessment prepared by a vocational rehabilitation consultant in which the consultant specifically commented on the amount of computer work involved in the job of service advisor and concluded that it would not be beyond the worker's physical abilities given certain ergonomic assistance. Further, the consultant noted that testing showed that the worker did not have a learning disability. The court found that WCAT was entitled to rely on the experience and expertise of the vocational rehabilitation consultant.

## 14. OTHER COURT DECISIONS

The following court decision is of significance to WCAT or the workers' compensation system generally.

***Lockyer-Kash v. Workers' Compensation Board***, 2013 BCCA 459  
(October 23, 2013)

Ms. Lockyer-Kash had filed a civil claim in B.C. Supreme Court seeking certain relief against the Board including a declaration that a board of directors' policy limiting the payment of interest on retroactive payments to circumstances involving "blatant Board error" (item #50.00 RSCM) was patently unreasonable. She also sought a declaration that the Board was required to pay interest. On an application by the Board, and in respect of the requested declaration, the B.C. Supreme Court held that the challenge to policy could only be brought by way of petition for judicial review and not by way of a civil claim (*Lockyer-Kash v. Workers' Compensation Board*, 2013 BCSC 467).

Ms. Lockyer-Kash appealed. The B.C. Court of Appeal dismissed the appeal, finding that she was seeking a declaration with respect to matters within the exclusive jurisdiction of the Board and WCAT. The Board had already made orders denying her interest on her retroactive award and the court could not declare those orders away. The court concluded that Ms. Lockyer-Kash was required to apply to have those orders quashed by way of petition for judicial review.

Ms. Lockyer-Kash subsequently filed a petition for judicial review with the B.C. Supreme Court seeking, among other things, a declaration that the interest policy is patently unreasonable and an order certifying the proceeding as a class action. At the end of 2013 the judicial review had not yet been heard.