WCAT

Workers' Compensation Appeal Tribunal

Annual Report

For the year January 1 to December 31, 2016

150 – 4600 Jacombs Road, Richmond, British Columbia V6V 3B1
Telephone: (604) 664-7800 Toll-Free: 1-800-663-2782 Fax: (604) 664-7898

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Fax: (604) 664-7898
Website: www.wcat.bc.ca

March 13, 2017

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: 2016 Annual Report of the Workers' Compensation Appeal Tribunal (WCAT)

I am pleased to provide you with the 2016 WCAT Annual Report for the year ended December 31, 2016. This report has been prepared for your review pursuant to section 234(8) of the *Workers Compensation Act.*

Sincerely,

Andrew Pendray
Chair

AP/gn

GLOSSARY

Act	*Workers Compensation Act*, R.S.B.C. 1996, c. 492
Administrative Tribunals Act	*Administrative Tribunals Act*, S.B.C. 2004, c. 45
Board	Workers' Compensation Board, operating as WorkSafeBC
BCCAT	BC Council of Administrative Tribunals
GECA	*Government Employees Compensation Act*, R.S.C., 1985, c. G-5
MRPP	*Manual of Rules of Practice and Procedure*
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 (No. 2), 2002	*Workers Compensation Amendment Act (No. 2)*, 2002, S.B.C. 2002, c. 66 (Bill 63, 2002)

1. CHAIR'S MESSAGE

I am pleased to present the 2016 Annual Report for the Workers' Compensation Appeal Tribunal (WCAT). This report provides an overview of WCAT's operations in 2016.

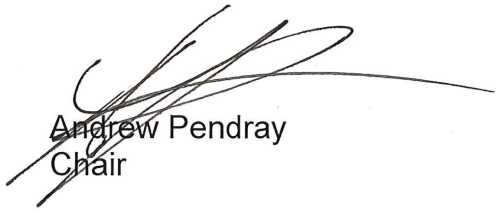
WCAT is an independent appellate tribunal and the final level of appeal for many issues in British Columbia's workers' compensation system. WCAT has jurisdiction over workers' compensation matters including compensation claims, employer assessments, some occupational health and safety matters[1] and certificates for the courts regarding the status under the *Workers Compensation Act* (Act) of parties to litigation. The majority of the appeals and applications we received in 2016 were appeals regarding benefits under compensation claims.

WCAT is a high volume appellate tribunal. In 2016 workers and employers filed 4,513 appeals and applications. Our vice chairs decided 3,464 appeals and applications on the merits, and we addressed 1,083 through various summary decisions for a total output of 4,547 decisions.

Our intake of appeals and applications in 2016 was slightly lower than 2015. While our decision output was higher than our output between 2009 and 2013, it was slightly lower than our output last year. This decrease in output reflects the fact that in 2016 WCAT was engaged in transitioning to a new case management system. A number of WCAT staff were committed to that implementation project on a full time basis, and almost all WCAT staff were required to undergo training in order to learn the new system.

WCAT is committed to providing quality decision making consistent with the Act, policy and WCAT precedent decisions in a timely and efficient manner. The new case management system enhances WCAT's ability to meet all of those commitments. In 2017 WCAT will be working towards implementing a process to enable electronic filing of notices of appeal and participation in order to further our ability to provide prompt and responsive client service.

I would like to take this opportunity to thank all of WCAT's employees and appointees for a successful year. Their dedication and productivity has enabled the tribunal to carry out our mandate and at the same time launch a new case management system.



Andrew Pendray
Chair

[1] This Report also uses the term "prevention" when referring to occupational health and safety matters.

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 occupational health and safety 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 such as decisions respecting vocational rehabilitation.

3. STATUTORY FRAMEWORK

The statutory framework governing the operation of WCAT is found in Part 4 of the *Workers Compensation 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. WCAT is also subject to the *Administrative Tribunals Act.* Section 245.1 of the *Workers Compensation Act* provides that the following sections of the *Administrative Tribunals Act* apply to WCAT:

- Parts 1; 3; 8; 9 (except section 59); and,
- Sections 7.1; 11; 13; 14; 15; 28; 29; 30; 31; 32; 35(1) to (3); 37; 38; 42; 45; 46.3; 48; 49; 52; 60(1)(a), (b) and (g) to (i) and (2); and 61.

(a) Changes in 2016

There were no substantive amendments to the *Workers Compensation Act* or to the *Administrative Tribunals Act* in 2016. There were no amendments to the federal *Government Employees Compensation Act*.

(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 submits 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. 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, there is 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 most matters 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 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. Pursuant to sections 250(3) and (3.1) of the Act, a decision by a precedent panel must be followed by other WCAT panels unless:

- the circumstances of the matter under appeal are clearly distinguishable from the circumstances in the panel's decision;
- subsequent to the panel's decision, a policy of the board of directors relied upon in the panel's decision is repealed, replaced or revised; or,
- the prior decision has been overruled by another panel appointed under section 238(6).

The authority of a precedent panel to overrule a prior precedent panel came into effect on May 14, 2015. 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 error 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 by clicking on the link called "Manual of Rules of Practice and Procedure (MRPP)."

After a period of public consultation the WCAT's MRPP was amended, effective April 26, 2016. The primary purpose of the revision was to reflect the *Administrative Tribunals Statutes Amendment Act, 2015*, and consequential amendments to the *Workers Compensation Act* in 2015, which included changes to the jurisdiction of WCAT to decide constitutional questions and to overrule prior WCAT precedent panel decisions. Additionally, amendments were made to clarify the requirements for authorization of representatives.

The amendments are found in the following MRPP items:

- Glossary;
- Item #2.7.2: Precedent Panels;
- Item #3.1.1: Compensation Issues;
- Item #3.1.3: Occupational Health and Safety Issues and Monetary Penalties;
- Item #3.4.1: Constitutional Questions;
- Item #3.4.3: *Administrative Tribunals Act* (ATA);
- Item #3.4.4: Regulations;
- Item #6.3.1: Representative Authorizations;
- Item #7.3: Facilitated Settlement and Alternative Dispute Resolution (ADR);
- Item #8.4: Suspension of an Appeal;

- Item #9.4.4: Except Precedent Panel Decisions; and,
- Item #16.1.1: General.

The amendments were made by the Chair's Decision No. 22, which can be found on WCAT's website at www.wcat.bc.ca.

4. COSTS OF OPERATION FOR THE 2016 CALENDAR YEAR

Category	Cost
Salaries	$ 8,772,180.01
Employee Benefits and Supplementary Salary Costs	$ 2,220,423.84
Per Diem – Boards and Commissions	$ 871,913.60
Travel	$ 62,143.66
Centralized Management Support Services*	$ 1,236,768.41
Professional Services**	$ 637,184.65
Information Technology, Operations and Amortization***	$ 1,561,443.40
Office and Business Expenses	$ 459,224.03
Building Service Requests and Amortization	$ 8,056.20
TOTAL EXPENDITURES	**$ 15,829,337.80**

* These charges represent Building Occupancy and Workplace Technology Service charges.
** This includes coroner's inquest costs.
*** This charge represents expenses associated with WCAT's new case management system.

5. WCAT MEMBERS

Executive and Vice Chairs with Special Duties as of December 31, 2016		
Name	**Position**	**End of Term**
Andrew Pendray	Chair	November 7, 2019 (OIC #780)
Luningning Alcuitas-Imperial	Senior Vice Chair & Registrar	February 28, 2021
David Newell	Senior Vice Chair & Tribunal Counsel	January 31, 2020
James Sheppard	Vice Chair, Quality Assurance & Training	February 28, 2019
David Bird	Vice Chair & Deputy Registrar	January 5, 2020
Warren Hoole	Vice Chair & Team Leader	September 30, 2019
Randy Lane	Vice Chair & Team Leader	February 29, 2020
Susan Marten	Vice Chair & Team Leader	February 28, 2018
Debbie Sigurdson	Vice Chair & Team Leader	February 28, 2019

Vice Chairs as of December 31, 2016	
Name	**End of Term**
Cathy Agnew	August 31, 2018
Beatrice K. Anderson	February 28, 2018
W. J. (Bill) Baker	February 28, 2018
Jacqueline Barnes	June 21, 2018
Hélène Beauchesne*	March 31, 2019
Sarwan Boal	February 28, 2020
Dana G. Brinley	February 28, 2018
Kate Campbell	September 5, 2017
Grace Chen	January 5, 2020
Lesley Christensen	February 28, 2018
Melissa Clarke	September 30, 2020
William J. Duncan	February 28, 2019

Vice Chairs as of December 31, 2016 *(continued)*	
Name	**End of Term**
Andrew J. M. Elliot	August 31, 2018
Scott Ferguson	June 21, 2018
Sherelle Goodwin	January 5, 2020
Janice Hight	January 5, 2020
Nora Jackson	February 28, 2019
Kevin Johnson	February 28, 2022
Cynthia J. Katramadakis	March 31, 2018
Joanne Kembel	February 28, 2018
Brian King	August 31, 2018
Robert Kyle	February 28, 2020
Darrell LeHouillier	October 31, 2017
Lori Leung	June 21, 2018
Deborah Ling	June 21, 2018
Shelley Lopez	September 5, 2017
Jane MacFadgen	February 29, 2020
Julie C. Mantini*	February 28, 2019
Renee Miller	April 30, 2019
Herb Morton	February 29, 2020
Elaine Murray	August 31, 2019
Paul Pierzchalski	June 21, 2018
Dale Reid	February 28, 2019
Deirdre Rice	February 28, 2019
Guy Riecken	February 28, 2019
Ellen Riley	January 5, 2020

Vice Chairs as of December 31, 2016 *(continued)*	
Name	**End of Term**
Simi Saini	September 5, 2017
Shelina Shivji	March 31, 2022
Debe Simpson	January 5, 2020
Timothy B. Skagen	March 31, 2020
Anthony F. Stevens	February 29, 2020
Andrew J. Waldichuk	February 29, 2020
Terri White	December 31, 2019
Lois J. Williams	February 28, 2018
Kim Workun	January 5, 2020
Sherryl Yeager	February 28, 2018
Terry Yue	January 5, 2020
Lyall Zucko	January 5, 2020

** Part-time Deputy Registrar*

Vice Chair Departures in 2016		
Name	**Original Appointment Date**	**Departure Date or End of Term**
Caroline Berkey	June 30, 2012	July 22, 2016 (OIC# 741)
Daphne A. Dukelow	March 1, 2003	December 2, 2016
Lisa Hirose-Cameron	September 6, 2005	January 29, 2016

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 2016, 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 Interorganization 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 training sessions organized by WCAT for vice chairs during 2016:

1. January 20
   - Roundtable Discussion: Overview of Average Earnings Decisions
2. February (various dates)
   - WCAT-CMS Training
3. January 21
   - Presentation from the WorkSafeBC Clinical Services Manager: Disability Awards WSBC on Complex Regional Pain Syndromes
4. March 23
   - Discriminatory Action Complaint Process
5. April 7
   - Independent Health Professional Opinions
     - Practice and Procedure
     - Process in WCAT-CMS
6. April 14
   - Round Table Discussion: Occupational Respiratory Diseases
7. May 2
   - Round Table Discussion: Psychological Validity Testing and Fitness to work
8. June 2
   - Presentation from the WorkSafeBC Evidence Based Practice Group
9. September 15
   - Psychological Disabilities, Pain Disorders, and Return to Work

10.	October 6	• Review of Recent Judicial Review Decisions • Appeal Expenses
11.	November 3	• Dealing with High Conflict Personalities
12.	December 1	• Permanent Disability Evaluation Schedule: Review of Amendments

In addition, many WCAT vice chairs attended the BC Council of Administrative Tribunals (BCCAT) Education Conference on October 17, 2016, or the Continuing Legal Education (CLE) Society Administrative Law Conference on November 18, 2016.

7. PERFORMANCE EVALUATION

Section 234(2)(b) of the Act provides that 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

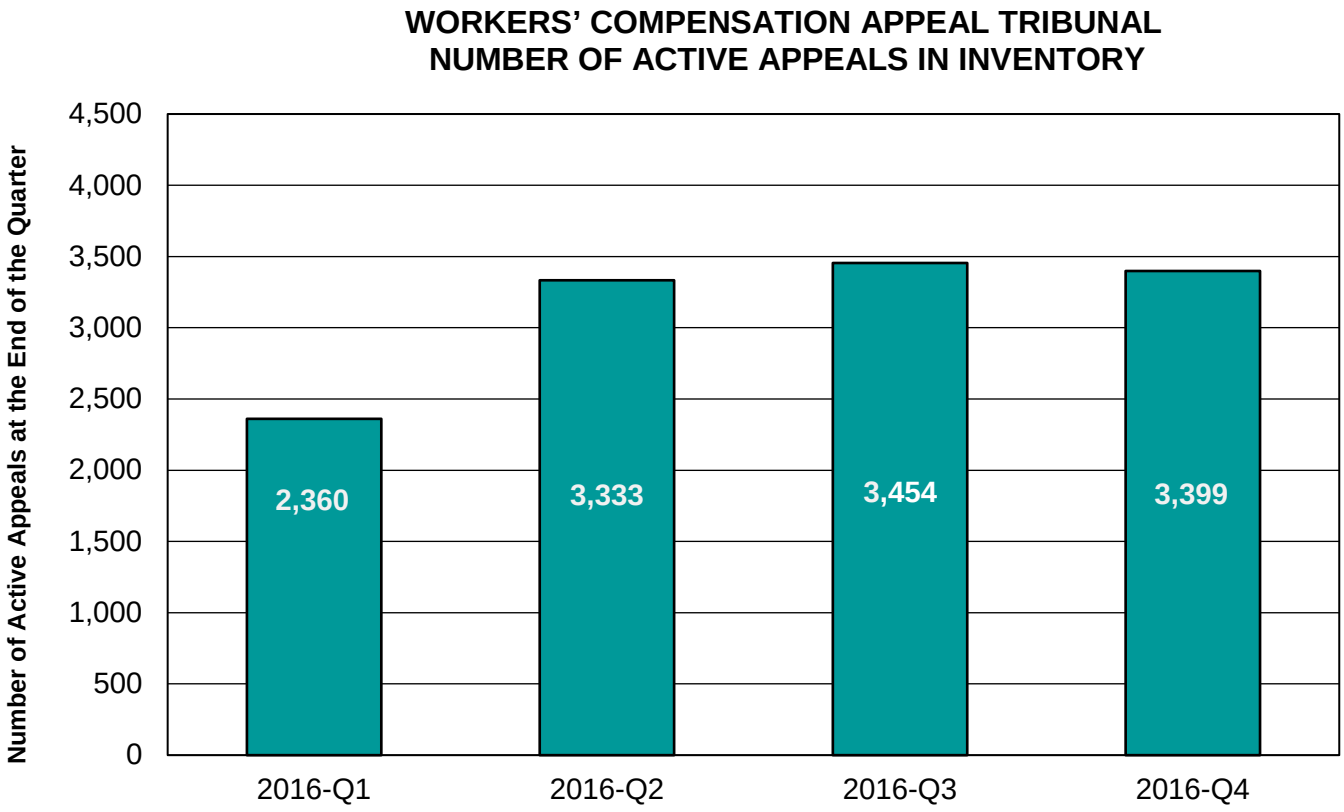
This section contains two charts providing a high level overview of the status of our appeals inventory for 2016. WCAT records appeals by their date of initiation.

The first chart (Number of Active Appeals) provides the number of appeals in our inventory at the end of each quarter of 2016. WCAT's total active inventory at December 31, 2016 was 3,399 appeals compared to 3,440 at the end of 2015.

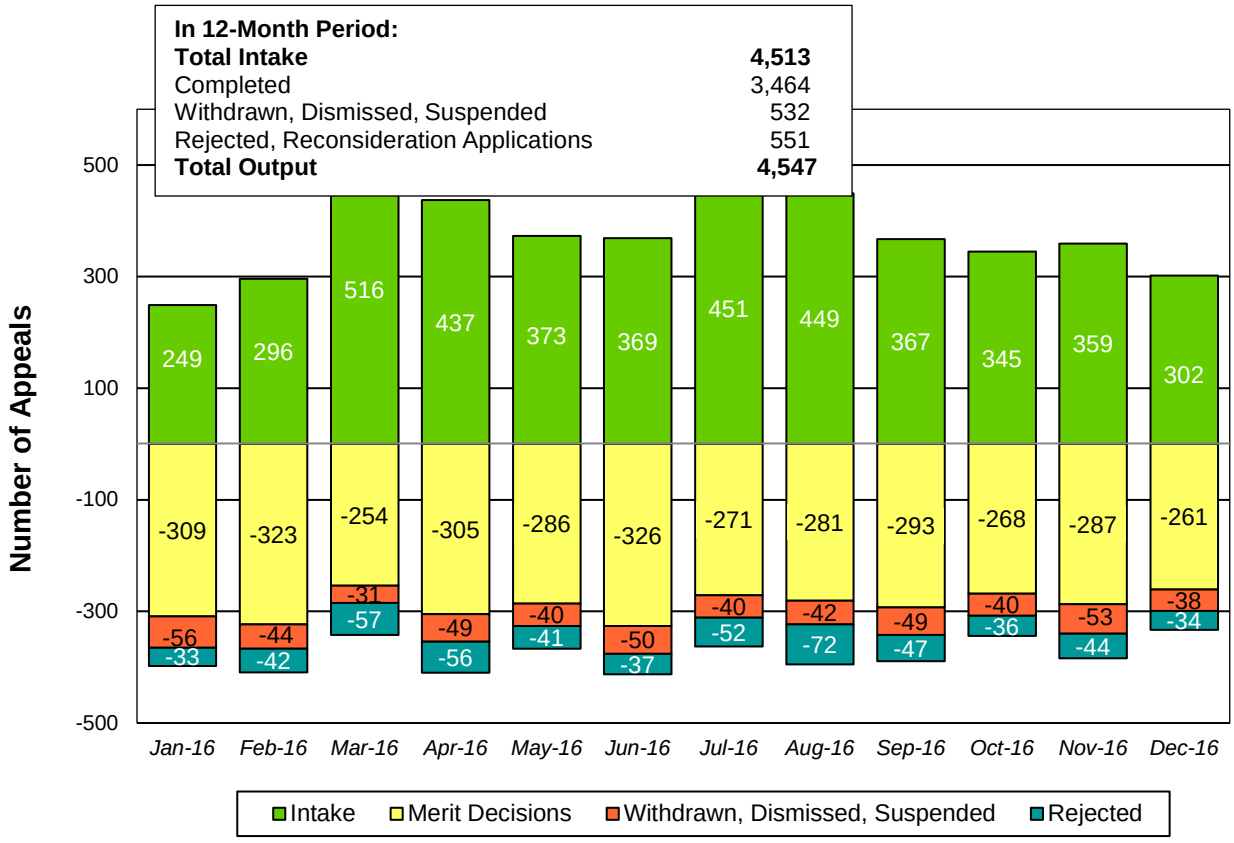
The second chart (Total Intake and Output) provides monthly statistics regarding our intake of appeals (including reactivated appeals) and our output which includes completed appeals, rejected appeals, and appeals that were dismissed, withdrawn, or suspended. We received 4,513 new appeals in 2016, representing a decrease in the number of appeals we received as compared to 2015, 2014, 2013, and 2012, but still higher than the number of appeals received in 2010 and 2011.

Given the total intake of new reviews at the Review Division in 2016, we forecast that the number of new appeals we receive in 2017 will be similar to the number received in 2016.

Our output in 2016 was 4,547 summary and merit decisions and determinations. This number reflects a decrease in output from 2015, related to the implementation of both a new case management system and a reduction in adjudicative staff.


WORKERS' COMPENSATION APPEAL TRIBUNAL
NUMBER OF ACTIVE APPEALS IN INVENTORY
Number of Active Appeals at the End of the Quarter
4,500
4,000
3,500
3,000
2,500
2,000
1,500
1,000
500
0
2,360
3,333
3,454
3,399
2016-Q1
2016-Q2
2016-Q3
2016-Q4

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



8.2 Time to Decision

WCAT is required to decide new appeals within 180 days from the date that WCAT receives from the Board the records (disclosure) relating to the decision under appeal. It is only once that disclosure is received from the Board that the appeal submission process commences.

This 180 day statutory 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 submits new evidence and WCAT grants to the other parties a similar opportunity (additional time for submissions).

The chair or the chair's delegate may also extend the statutory time frame on the basis of complexity (additional time for decision). For example, additional time may be required where a WCAT panel finds it necessary to pursue further investigations.

Lastly, an appeal may be suspended in situations where WCAT is waiting for any of the following:

- 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 Board decision respecting a matter that is related to an appeal; or,
- a pending report from an independent health professional.

The 180 day statutory time frame clock is stopped in such situations.

The table below illustrates the average number of days for completing appeals in 2016, taking into account the various situations described above.

Time to Decision	
Description	**Average Number of Days**
Appeals With No Additional Time: Time from the date of receipt of disclosure from the Board to the date the final decision is issued (excluding appeals where there was either additional time for submissions or additional time for decision).	133
All Appeals: Time from the date of receipt of disclosure from the Board to the date the final decision is issued for all appeals (including those where additional time for submissions and additional time for decision was granted).	204
Notice of Application: Time from the date of receipt of the notice of appeal to the date the final decision is issued.	291

Note: These statistics are based on the last seven months of the calendar year (June to December 2016) as WCAT's former case management system did not capture the required statistical information.

As part of its strategic plan, one of WCAT's goals is to provide timely decision making. With a new case management system enabling earlier appeal assignment, WCAT expects to see its ability to make decisions in a timely manner improve in 2017.

8.3 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 occupational health and safety 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.

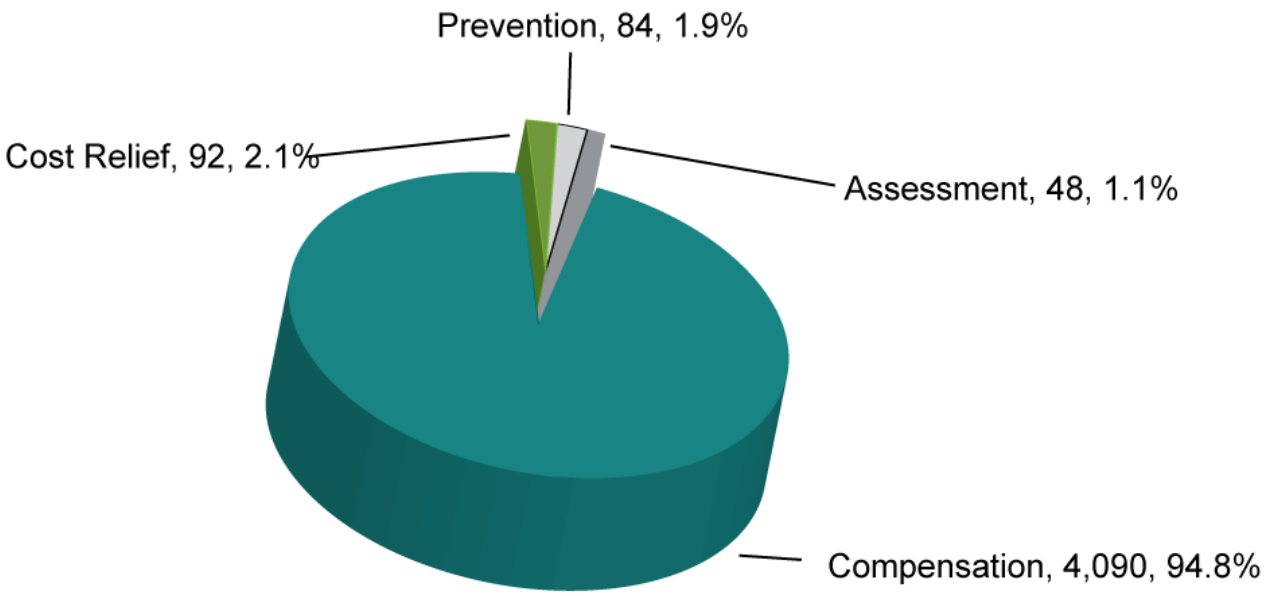
(a) Intake

WCAT received 4,513 appeals and applications in 2016. Of these, 4,314 appeals (95%) arose from decisions of Board review officers and 199 were direct.

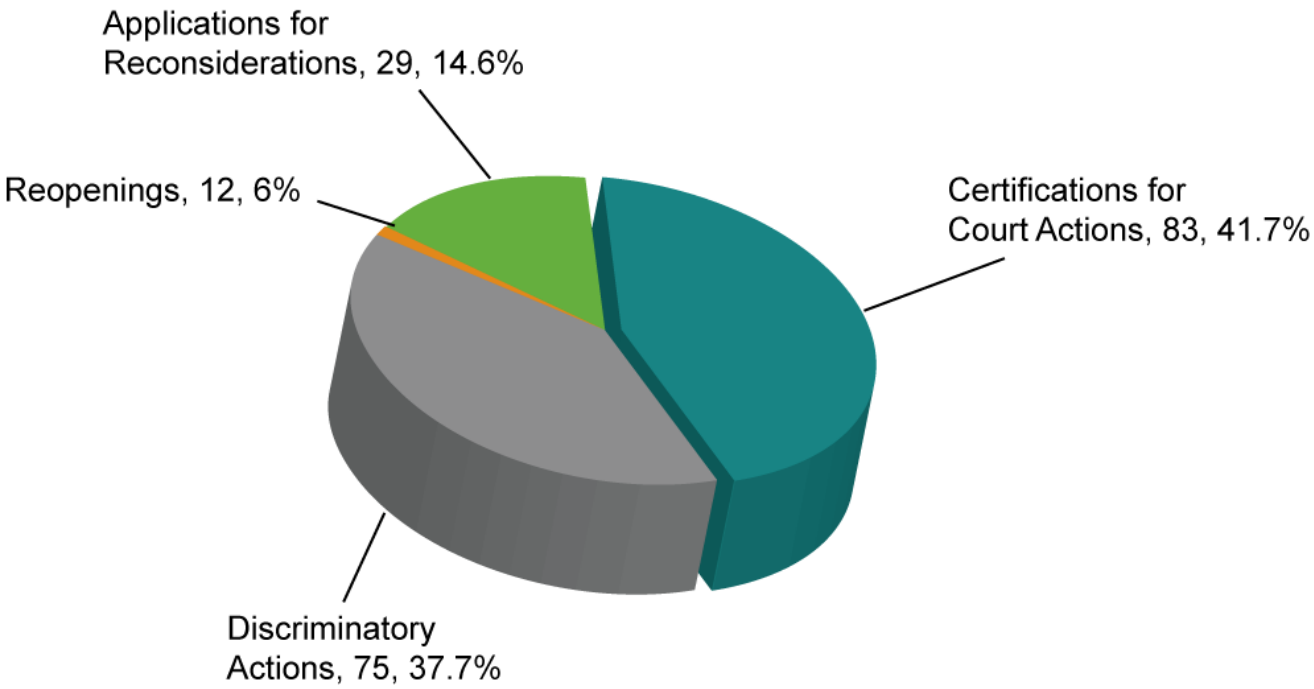
Source	Intake
Review Division	4,314
Direct	199
Total	**4,513**

The two charts on the next page show the breakdown of the types of appeals and applications we received in 2016.

APPEALS FROM REVIEW DIVISION BY TYPE



DIRECT APPEALS AND APPLICATIONS BY TYPE



(b) Merit Decisions

WCAT made 3,464 merit decisions on appeals and applications in 2016, 41 of which concerned applications for certificates for court actions. The remaining 3,423 merit decisions concerned appeals from decisions of the Review Division or Board officers, which may be varied, confirmed, or cancelled by WCAT.

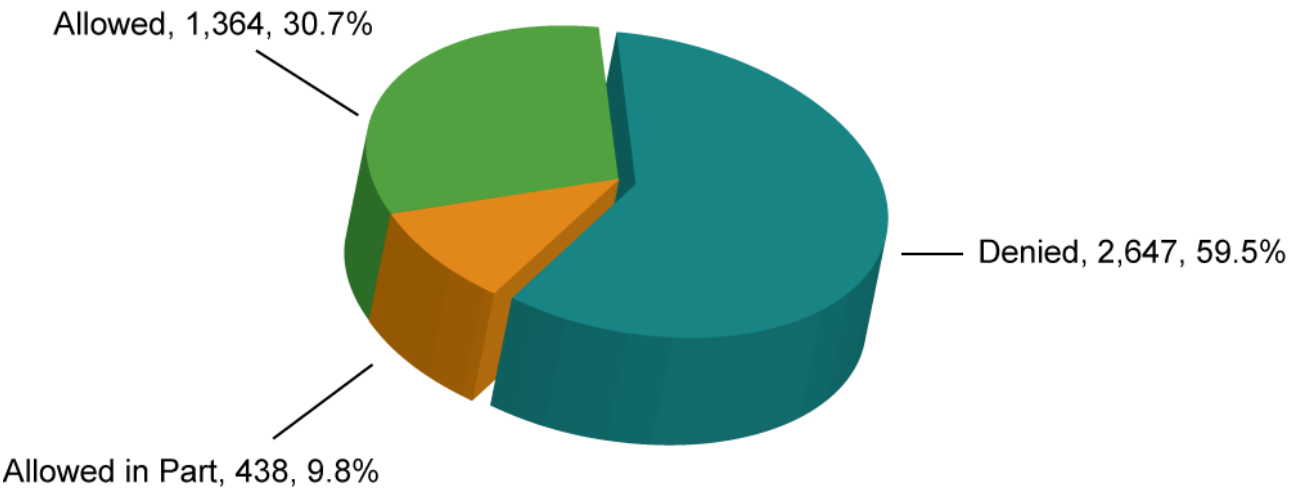
"Vary" means that WCAT varied the previous decision in whole or in part. Accordingly, whether WCAT has fully granted the remedies requested by the appellant on all issues arising under the appeal or merely changed a minor aspect of the previous decision, the decision is considered to have been "varied." "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	Cancelled
Compensation	3,255	44%	54.5%	1.5%
Relief of Costs	48	29%	69%	2%
Discriminatory Actions	57	26%	70%	4%
Assessments	38	61%	39%	0%
Prevention	22	41%	59%	0%

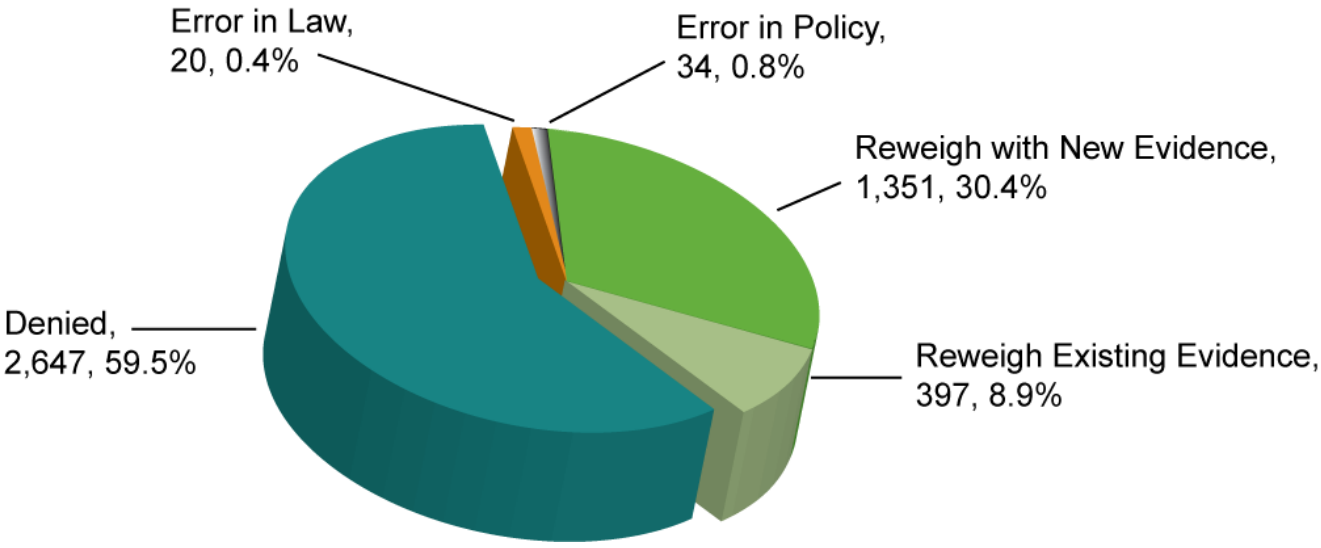
An appeal may raise numerous issues and WCAT may allow or deny the appeal on each issue. In 2016, WCAT decided 4,449 issues that arose out of the 3,464 appeals that led to merit decisions. The following chart shows the percentage of issues for which the appeals were allowed, allowed in part, or denied.

ISSUE OUTCOMES



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

REASONS FOR ISSUE OUTCOMES



(c) Summary Decisions

WCAT made 1,083 summary decisions on appeals and applications. In 689 of these decisions, WCAT dismissed the appeal or confirmed that the appellant had withdrawn it. WCAT rejected 213 appeals and applications because there was no appealable issue or the decision under appeal was not appealable to WCAT. Twenty-two summary decisions suspended appeals. Of the remaining summary decisions, 61 decided applications for reconsideration and 98 denied requests for extension of time to appeal. Reconsiderations in the new case management system are recorded as merit decisions and not summary decisions.

(d) Requests for Extensions of Time

WCAT decided 324 requests for extensions of time to appeal; allowing 225 and denying 99.

(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	1,349	30%	37.4%	62%
Section 23 – Permanent Partial Disability	937	21%	54%	46%
Section 30 – Temporary Partial Disability	421	9.5%	37%	63%
Section 6 – Occupational Disease	262	6%	38%	62%
Section 96 – Jurisdiction of Board	210	5%	29%	71%

8.4 General

(a) Appeal Paths

WCAT decides appeals and applications in one of two ways:

1) after an oral hearing; or,

2) 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 2016, WCAT decided a total of 3,464 appeals and applications on the merits. WCAT decided 1,516 (44% of the total) after convening an oral hearing and decided 1,948 appeals and applications (56% of the total) by written submission.

(b) Locations of Oral Hearings

In 2016, 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	9
Courtenay	68
Cranbrook	24
Fort St. John	4
Kamloops	63
Kelowna	81
Nanaimo	105
Prince George	50
Terrace	11
Victoria	107
Williams Lake	5
Total outside Richmond	**527**
Richmond	814
Grand Total	**1,341**

Note: Since 2013 this chart was changed in the Annual Report 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 2016. The table does not include assessment or relief of costs appeals as the appellant is always the employer in these types of appeals.

	Appellant / Applicant		
Type of Appeal or Application	**Worker**	**Employer**	**Dependant**
Compensation	90.5%	9.4%	0.2%
Direct Reopening	100%	0%	0%
Discriminatory Action	67%	33%	0%
Prevention	5%	95%	0%
Reconsideration	90.6%	9.4%	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 2016.

	Percent Represented where Appellant / Applicant is:		
Type of Appeal	**Worker**	**Employer**	**Dependant**
Assessment	NA	73%	NA
Compensation	70%	79%	100%
Direct Reopening	25%	NA	NA
Discriminatory Actions	27%	88%	NA
Prevention	NA	73%	NA
Reconsiderations	58%	71%	NA
Relief of Costs	NA	94%	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 sections 250(3) and (3.1) of the Act, a decision by a precedent panel must be followed by other WCAT panels unless:

- the circumstances of the matter under appeal are clearly distinguishable from the circumstances in the panel's decision;
- subsequent to the panel's decision, a policy of the board of directors relied upon in the panel's decision is repealed, replaced or revised; or,
- the prior decision has been overruled by another panel appointed under section 238(6).

WCAT did not issue any precedent panel decisions in 2016 and no precedent panel decisions were pending at the end of 2016.

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. The board of directors has 90 days to review the policy and determine whether WCAT may refuse to apply it. After making that determination the board of directors must refer the matter back to WCAT, and the tribunal is bound by that determination.

There were no new referrals, under section 251(1) of the Act, to the chair in 2016.

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, 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 contains documents listing all noteworthy WCAT decisions organized by subject and date.

11.1 Summaries of Noteworthy WCAT Decisions

This section provides summaries of the decisions WCAT identified as noteworthy in 2016.

(a) WCAT-2015-00574

Decision Date: February 20, 2015 **Panel: D. Sigurdson**

Policy item #31.20 of the RSCM II specifically recognizes that damage can continue to occur to lower hearing frequencies after more than 10 years of exposure to hazardous occupational noise. Consequently, while current scientific research may suggest that hazardous occupational noise does not affect hearing at the lower frequencies, a permanent partial disability award for occupational noise-induced hearing loss cannot be denied on the primary basis that the loss of hearing is in those lower frequencies.

(b) WCAT-2015-01459

Decision Date: May 7, 2015 **Panel: M. Clarke**

Section 5.1 of the Act applies to federal employee claims for compensation for a mental disorder on the basis that there is no direct conflict between section 5.1 of the Act and the *Government Employees Compensation Act.*

(c) WCAT-2015-01712

Decision Date: May 29, 2015 **Panel: G. Reicken**

The exclusion of compensation for a mental disorder caused by a decision of the employer relating to the worker's employment (as set out in section 5.1(1)(c) of the Act) is not absolute. Where the significant stressor or series of significant stressors that were the predominant cause of the worker's mental disorder would not have occurred but for the employer's employment-related decision, and that decision was more than a trivial cause of the mental disorder, section 5.1(1)(c) of the Act may not exclude compensation if, in the circumstances, the employment-related decision was too remote in the chain of causation.

(d) WCAT-2015-03772

Decision Date: December 15, 2015 **Panel: W. Hoole**

In a reconsideration application, the decision whether to exercise the panel's discretionary authority to obtain further evidence in an appeal is better characterized as a question of procedural fairness rather than a question of substance; consequently, it falls within the scope of WCAT's reconsideration jurisdiction.

(e) WCAT-2015-03834

Decision Date: December 21, 2015 **Panel: G. Reicken**
L. Alcuitus-Imperial
D. Dukelow

Policy item #39.02 of the RSCM can rationally be supported by section 23 of the Act and is not patently unreasonable under the Act. That policy takes the nature of a worker's chronic pain into account by adopting definitions of "pain," "acute pain," "chronic pain," "specific" chronic pain, and "non-specific" chronic pain. That policy also takes the degree or extent of the injury into account by establishing the threshold criteria for a worker becoming eligible for a chronic pain award. As policy item #39.02 allows only for a fixed award of 2.5% of total disability, the panel found it was appropriate for the Board to assess the award based on the evidence available in the claim file without referring the worker for a PFI evaluation.

(f) WCAT-2015-03855

Decision Date: December 22, 2015 **Panel: G. Riecken**

Where a physiological change, such as a heart condition, is attributed to workplace stress, but the worker does not have a diagnosed mental disorder, the compensability of the condition is determined under section 5(1) of the Act.

(g) WCAT-2016-01148

Decision Date: May 2, 2016 **Panel: E. Murray**

Where claims costs arising from a claim commenced during the three-year "experience rating window" could be taken into consideration in the calculation of an employer's assessment on re-registration with the Board, the employer is directly affected by a WCAT decision relating to such a claim and therefore has standing to apply for reconsideration of the decision. Authorizing a representative to act in all compensation matters does not mean an employer may ignore correspondence from WCAT regarding an appeal, particularly when it ought to have been apparent from the correspondence the employer received that the authorized representative might not have received the same communication. Under such circumstances, WCAT did not deny the employer an opportunity to participate in the appeal and did act unfairly in making a decision without the employer's participation.

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 2016, WCAT received 29 applications for reconsideration and issued 58 stage one decisions. Of the stage one decisions issued, 7 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 Defect	22	5	17
New Evidence	17	2	15
Both Grounds Alleged	19	0	19
TOTAL	**58**	**7**	**51**

12.1 Reconsideration on the Basis of Jurisdictional Error

In deciding whether WCAT has made a jurisdictional error by breaching the rules of procedural fairness, WCAT considers whether, in all of the circumstances, WCAT acted fairly. WCAT applies the same test for unfairness as the courts do on judicial review (*Administrative Tribunals Act*, section 58(2)(b)).

In deciding whether WCAT has made an error in respect of its narrow jurisdiction, WCAT considers whether it decided a matter that it had no power to decide or failed to decide a matter that it was required to decide.

In 2016, WCAT allowed 5 applications for reconsideration on the ground of jurisdictional error. Of those 5 allowed applications, 4 were allowed on the basis of a breach of procedural fairness and 1 was allowed on the basis of an error in respect of a narrow question of jurisdiction.

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 into 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

In 2016, WCAT was served with 30 applications for judicial review of WCAT decisions and 4 appeals of a B.C. Supreme Court judicial review decision.

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[2].

(a) *Stovicek v. Providence Health Care Society*, 2016 BCSC 227 (January 27, 2016)

Decision under review: *WCAT-2014-03769*

The worker sustained an injury at work when she struck her arm. The Board decided that the worker recovered from her injury and denied the condition of Complex Regional Pain Syndrome (CRPS) under her claim. That decision was confirmed by the Review Division, and WCAT confirmed the Review Division decision finding that the greater weight of medical evidence supported the conclusion that the worker did not develop CRPS from her injury.

The Court allowed the worker's petition for judicial review. The Court acknowledged that if WCAT had not made errors in characterizing the medical evidence, and still had preferred the Board medical advisor's opinion over the other medical evidence, the Court would likely give deference to that decision as one WCAT was entitled to make on the evidence. However, the errors resulted in patently unreasonable findings of fact with respect to the medical evidence which rendered the conclusion based on those findings patently unreasonable.

(b) *Macrae v. Workers' Compensation Appeal Tribunal*, 2016 BCSC 133 (January 2, 2016)

Decision under review: *WCAT-2011-01330*

WCAT had determined that the owner of a vehicle involved in an accident was an employer engaged in an industry within the meaning of Part 1 of the Act. This determination, made pursuant to WCAT's authority under section 257 of the Act, was relevant to an action for negligence arising from the motor vehicle accident. The vehicle owner was a company that did not appear to employ anyone, including the vehicle's driver, under a contract of employment. The vehicle owner was not registered as an employer with the Board. In its application for judicial review of the WCAT

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

determination, the owner of the vehicle argued that the company was not an employer for the purposes of the Act.

WCAT noted the Board's policy item AP1-1-4 and practice directive 1-38-2(A). The policy states that as an incorporated entity is considered the employer; a director, shareholder, or other principal who is active in the business operations of the company is generally considered to be a worker under the Act. WCAT found that one or both of the company's shareholders must have been a worker for the company.

The Court confirmed that WCAT is entitled to deference with respect to its application and interpretation of Board policy. The Court also noted that even if other WCAT decisions in the past had interpreted the policy differently section 250(1) of the Act establishes that WCAT is not bound by previous decisions and, as long as WCAT's interpretation of a policy is not clearly irrational, it cannot be said to be patently unreasonable solely on the basis that it departed from previous decisions. The Court concluded that WCAT's decision was not patently unreasonable and dismissed the petition for judicial review.

(c) *Scanlan v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2016 BCSC 314 (February 24, 2016)

Decision under review: *WCAT-2015-00123*

WCAT found that the worker's right hand infection did not arise out of and in the course of his employment. WCAT accepted the medical opinion of a Review Division Medical Advisor (RDMA) in this regard. WCAT denied the worker's appeal from the Review Division decision which had also accepted the RDMA's opinion. The Court dismissed the petition for judicial review. It found that it was not patently unreasonable for WCAT to prefer the medical opinion on causation over the worker's (petitioner's) opinion on causation and over the scientific textbooks that he had relied upon. The textbooks did not relate directly to the petitioner and the causation of his infection. The Court also rejected the argument that WCAT had been procedurally unfair. WCAT did not deny the petitioner the ability to quote from a textbook at the oral hearing. The petitioner was aware of the policies governing WCAT. He was also aware that he did not succeed at the Review Division because there was no medical opinion presented by him to contradict that of the RDMA. Thus, the Court rejected the argument that the petitioner did not have notice that the vice chair would not rely on his evidence regarding causation because it was not within his knowledge and expertise.

(d) *Goghari v. ACM Environmental Corporation*, 2016 BCCA 158 (April 8, 2016)

Decision under review: *WCAT-2012-02679*

The petitioner filed a discriminatory action complaint with the Board alleging that he was dismissed for reasons prohibited by section 151 of the Act, specifically, in response to his complaints that unsafe equipment had created occupational health-related

problems. The employer said that the petitioner was laid off because of a slowdown in work, his lack of productivity, and the availability of another employee to do his work. The Board found that the petitioner had not established a *prima facie* case of discriminatory action and dismissed his complaint.

Prior to the WCAT oral hearing, the petitioner requested orders for the employer's president and chief operating officer to testify and an order for disclosure of the employer's business records. In a preliminary decision, WCAT ordered only one witness to testify, finding that the petitioner had not established the necessity of the second witness. WCAT denied the request for the production of business records as being overly broad. The petitioner did not renew his requests at the hearing but repeated his requests in his written submission provided at the end of the hearing. In its decision, WCAT noted that no new reasons in support of the request were offered and confirmed its preliminary denial of the requests.

With respect to the merits of the appeal, WCAT found there was a temporal connection between a safety complaint and the petitioner's termination; thus, the petitioner established a *prima facie* case of discriminatory action. However, the employer rebutted the *prima facie* case. WCAT accepted that the employer terminated the petitioner due to overstaffing and a slowdown in work. WCAT dismissed the appeal.

The Court dismissed the petitioner's application for judicial review. The Court found that there was at least some evidence to support WCAT's conclusion that there was a slowdown in business. The Court found that WCAT did not act unfairly when it denied the petitioner an opportunity to cross examine a witness as the petitioner did not provide information as to why the evidence could not be obtained from a witness that was in attendance at the hearing. The Court further found that WCAT did not act unfairly in refusing to order disclosure of certain documents from the employer because the petitioner had not demonstrated the relevance or necessity of the documents. Lastly, the Court found that WCAT did not act unfairly in asking extensive questions of the petitioner at the hearing.

The Court rejected the argument that WCAT was obliged to review each finding in the Board's decision and determine if an error was made. The Court held that the manner in which WCAT conducted the appeal was within its legislative mandate. In any event, WCAT did review the Board's decision, referring to the Board's findings, the evidence submitted to the Board, and concluding its analysis by confirming the Board's decision.

With respect to procedural fairness, the Court found that WCAT has a broad discretion to admit or compel evidence as well as a broad discretion as to how it will fulfill the requirements of procedural fairness. There will be most often a range of different procedures that meet the requirements. An appeal cannot be founded upon the argument that another reasonable outcome was available to the tribunal. The tribunal cannot be faulted for failing to pursue requests the appellant himself did not renew during the hearing. When the request was renewed in written submissions after the

hearing, without providing any new reasons in support of the request, it was not unfair for the tribunal to again dismiss it.

(e) *Cima v. Workers' Compensation Appeal Tribunal*, 2016 BCSC 931 (May 25, 2015)

Decision under review: *WCAT-2015-02101*

The worker had an undiagnosed progressive neuromuscular disorder (later diagnosed as ALS) that made his speech difficult to understand. Over a period of approximately nine months in 2013, the worker's supervisor sent the worker a text message containing vulgar language, described the worker as a "liar" to a customer, and sent the worker a cartoon that the worker interpreted as racist. On December 25, 2013, the supervisor sent the worker an offensive text message, which he received at home, which contained vulgar language and implied by use of the word "retard" that the worker was mentally disabled. Shortly afterwards, the worker developed Major Depressive Disorder. Without interviewing the worker the Board and Review Division denied the worker's claim for a mental disorder under section 5.1 of the Act.

On appeal to WCAT, the panel concluded that receiving the text message, which the panel acknowledged was offensive, was neither a "traumatic event" nor a "significant stressor" within the meaning of section 5.1 of the Act. The panel also concluded that the supervisor's conduct, although it reflected bad taste, poor judgment, and unprofessionalism, did not cross the line into bullying or harassment and was not a series of significant work related stressors. The appeal was denied.

The Court found that the panel had applied a purely objective standard of what might be considered a traumatic event but some consideration of the subjective impact on the worker was required. The Court found there was no evidence to support the panel's finding that the worker did not suffer trauma because the Board did not interview the worker. Consequently, the finding was patently unreasonable. The fact that the worker did not request an oral hearing at WCAT did not rectify the Board's error in that regard. The Court also found that the panel applied an objective test to the question of whether the supervisor's conduct amounted to bullying and harassment but there was no analysis to show how the panel concluded that the supervisor could not reasonably have been expected to know that the worker would interpret the events as humiliating or degrading; consequently, the conclusion was patently unreasonable. The Court found that the panel had failed to consider evidence from the worker's physician that was relevant to the worker's reaction to the December 25 text message. In the result, the WCAT decision was set aside as patently unreasonable.

(f) *Erskine v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2016 BCSC 936 (May 25, 2016)

Decision under review: *WCAT-2015-01971*

WCAT denied the worker's application for reconsideration of an original decision on new evidence grounds. The WCAT new evidence panel found that the issue in the original decision, which was whether the worker had been injured as a result of a forklift incident, had turned on an assessment of credibility. The new evidence panel found that the proffered new evidence did not address in any detail the concerns identified by the original panel which related to the original panel's assessment of credibility, and that as a result the proposed new evidence was not "substantial" to the original decision within the meaning of section 256(3) of the Act.

The Court found that by confining what constituted new evidence to only that which related to the line of reasoning in the original decision, the new evidence panel prevented a meaningful change to the factual matrix from which the original line of reasoning arose. The Court concluded that the new evidence provided by the worker potentially changed the factual matrix because it provided direct and objective medical evidence indicating a mechanism of injury consistent with the forklift incident. The Court set the new evidence decision aside as being patently unreasonable.

(g) *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 (June 24, 2016)

Decisions under review: *WCAT-2010-03503 and WCAT-2011-03079, WCAT-2010-003507 and WCAT-2011-03080, and WCAT-2010-03509 and WCAT-2011-03081*

The majority of the Supreme Court of Canada determined that WCAT's original decision was not patently unreasonable when it determined that the breast cancers of three hospital laboratory workers were due to the nature of their employment. The majority determined that the causation finding of the majority of the WCAT panel is subject to deference and that there was evidence before the panel (primarily evidence of historic exposure to carcinogens and an observed breast cancer cluster) which, viewed reasonably, was capable of supporting the conclusion.

Specifically, the majority of the Court indicated that the presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not determinative of causation. The majority of the Court found that it is open to a trier of fact to consider other evidence, including circumstantial evidence, in determining whether that other evidence supported an inference of causation, such as WCAT had in finding that the workers' breast cancers were caused by their employment.

The Court also emphasized that it was important to recognize, as WCAT had, that a less stringent standard of proof applies in the workers' compensation context than applies in civil tort claims. The applicable standard also contrasts sharply with the

"scientific" standards employed by the authors of the expert reports which the Court described as a standard of scientific certainty wholly inapplicable to determining causation in the workers' claims. The majority held that the lower Courts (B.C.C.A and B.C.S.C.) had therefore erred in law in relying upon the inconclusive quality of the expert reports as determinative of the causation question.

WCAT's appeal of the finding of the majority of the B.C. Court of Appeal that WCAT lacks the power to reconsider an earlier WCAT decision if it is patently unreasonable was dismissed by the Court. The Court did so on the basis that the respondent, the Fraser Health Authority, agreed that the reconsideration decision was a nullity.

(h) *Denton v. Workers' Compensation Appeal Tribunal*, 2016 BCSC 1219 (July 5, 2016)

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

The Court denied the petitioner's application for an extension of time to file a petition seeking to set aside a WCAT decision. The Court found that the petitioner was unable to provide a reasonable explanation for the seven month delay in filing. An intent to file a reconsideration with WCAT was not enough as it would render the statutory time frame for filing meaningless. Even if an intent to apply for reconsideration was enough, the petitioner was unable to provide a reasonable explanation for the additional five month delay in bringing the petition after the Court determined that WCAT had no power to reconsider an earlier decision on the basis that it was patently unreasonable. The petitioner had argued that it took time for the executive committee of her union to decide whether it would assist her with the judicial review and, once it did, a further delay was due to her representative waiting for disclosure of the full Board's claim file. The Court also found there were no serious grounds for relief. The petitioner had challenged the constitutionality of WCAT's interpretation of certain policies of the board of directors of the Board. The petitioner also challenged the constitutionality of section 5.1 of the Act and related policies of the Board but had failed to exhaust internal remedies at the Review Division.

(i) *Shamji v. Workers' Compensation Appeal Tribunal*, 2016 BCSC 1352 (July 22, 2016)

Decision under review: *WCAT-2015-02475*

The Court followed the decision in *Preast v. Workers' Compensation Tribunal*, 2015 BCCA 377 to conclude that it was not patently unreasonable for the WCAT panel to rely on a two-stage methodology to address the petitioner's entitlement to loss of earnings pension, or to rely on different wage figures during the "assessment" stage of its exercise than were used by the Review Division in the "eligibility" stage. WCAT is not bound to use the same figures or calculations as were used by earlier decision-makers, and it was both reasonable and rational for the panel to use the petitioner's actual

projected wages rather than the industry-average hourly wages that were used by the decision-makers at the eligibility stage of the exercise.

The Court found that it was not patently unreasonable for the panel to interpret the reference in policy item #40.12 (RSCM II) to "long term" earning potential to mean a timeframe of five years after the petitioner graduated and received certification in an alternative post-injury occupation.

The Court found that it was not patently unreasonable for the panel to decline to order reimbursement of the petitioner's expenses associated with attending the WCAT oral hearing because the expenses were due to the specific request of the petitioner's counsel to hold the hearing at a location other than the location nearest the petitioner's place of residence. The Court denied the petitioner's application for judicial review.

(j) *Shemilt v. Workers' Compensation Appeal Tribunal*, 2016 BCSC 2197 (November 24, 2016)

Decision under review: *WCAT-2015-01956*

WCAT confirmed that the worker's diagnosed thumb condition was not caused by a compensable work injury. WCAT found that the accident at work could not have plausibly caused the injury. It based this finding on its preference for one medical opinion over another. WCAT based its decision on the opinion that the accident did not conform to the usual mechanism of injury causing the diagnosed condition. The Court held that WCAT's finding was patently unreasonable because the medical opinion WCAT relied on had not considered the worker's doctor's opinion that the accident likely did cause the injury by plausible, but less usual means. The Court allowed the petition for judicial review.

(k) *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2016 BCCA 2447 (November 28, 2016)

Decision under review: *WCAT-2014-02909*

This appeal involved two interconnected issues:

1) the jurisdiction of the Board to make section 26.2 of the *Occupational Health and Safety Regulation*, which requires the owner of a forestry operation to ensure that all activities of the operation are both planned and conducted safely; and,

2) whether WCAT was patently unreasonable in confirming an administrative penalty levied against the appellant for violation of the Regulation.

The appellant operated a forest products business and contracted with an individual to fall some trees on a forest license owned by the appellant. The contractor hired another

faller to help him with the work and the faller was fatally injured while doing the work. The appellant argued that section 26.2 purports to impose obligations on an owner independent of the obligations imposed on owners under section 119 of the Act and, therefore, the Board lacked the jurisdiction to make it. The appellant also objected to WCAT's confirmation of the administrative penalty on the basis that such penalties can only be imposed upon employers and it was not acting in its capacity as an employer when it was found to have contravened the Regulation.

In dismissing the appeal on both issues, the Court concluded that the Board's regulation-making authority should be interpreted broadly in light of the purposes of occupational health and safety provisions of the Act. The Court characterized the impugned regulation as manifestly one "respecting standards and requirements for the protection of the health and safety of workers and other persons present at a workplace and for the well-being of workers in their occupational environment" and therefore one authorized by the Board's regulation making authority conferred by section 225 of the Act. The Court also found that WCAT's interpretation that the Act's administrative penalty provision could apply to an employer that had failed in the responsibilities imposed upon it as an owner was not patently unreasonable. The Court observed that while the potential for treating an employer that is also an owner differently from a non-employer owner was "mildly curious" it was not absurd. The Court said that there were contextual arguments in favour of WCAT's finding and others in favour of the interpretation urged by the appellant but, because the statute is capable of supporting WCAT's interpretation, the Court cannot interfere with it.

(l) *Lockyer-Kash v. Workers' Compensation Appeal Tribunal*, 2016 BCSC 2435 (December 30, 2016)

The Court found that it was reasonable for the board of directors of the Board to determine that the former item #50.00 of the RSCM I and II was not so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Between 2001 and 2013, policy item #50.00 provided that interest was payable by the Board retroactive compensation benefits if a "blatant Board error" necessitated the retroactive payment. The policy provided criteria for the discretionary payment of interest in situations other than those expressly provided by the Act.

The petitioner was granted a retroactive loss of earnings permanent disability award. The issue of interest on that award was delayed until the litigation surrounding the lawfulness of the policy was resolved in *Johnson v. Workers' Compensation Board*. That proceeding ended without the matter being resolved (see 2011 BCCA 255). The petitioner then challenged the lawfulness of the policy before WCAT pursuant to section 251 of the Act, which resulted in a decision by the WCAT chair that the policy was patently unreasonable. The board of directors then determined that the policy was not patently unreasonable and that WCAT must apply it. WCAT subsequently issued a decision in the petitioner's appeal finding that it had no reasonable prospect for success as it was bound by the board of directors' determination and the petitioner was not

arguing that there had been a blatant Board error that necessitated the retroactive payment.

The Court found that the correct question to ask in this case is whether, in confirming the policy, the board of directors exercised its discretion in a manner consistent with the purposes and objects of the Act. The question was not, as the WCAT chair had posed, whether the policy was consistent with the purpose of interest. The Court found that because the board of directors determined that the blatant Board error test was rational when considered in light of the objectives and purposes of the Act, it was neither arbitrary nor discriminatory.

The Court found that the board of directors' determination was reasonable because:

a) the test provides an exception to the general rule that interest is only awarded on retroactive compensation payments in the circumstances set out in sections 19(2)(c) and 258(5) of the Act;

b) where the delay in payment has been occasioned by an egregious error not contemplated by the Legislature in designing the system, the worker who was the victim of the error receives interest on their retroactive payment. This results in a tangible monetary acknowledgment by the Board of its blatant or egregious conduct; and,

c) payment of interest in these circumstances also acts as an incentive to lessen egregious internal errors.

The Court also found that it is a reasonable interpretation of the Act to provide a policy that does not pay interest in typical cases that go through the appellate system. In that regard, the Court noted that an appeal system exists and the Act provides no direction to pay interest in typical cases.

The petitioner has filed an appeal of this decision.

(m) *Bodman v. Workers' Compensation Appeal Tribunal*, 2016 BCSC 2436 (December 30, 2016)

Decision under review: *WCAT-2012-01908*

Pursuant to section 23(1) of the Act, WCAT determined that the petitioner's benefits would end when he reached the age of 65, as that is the age at which the panel determined that the petitioner would have retired had he not been injured at work. The panel concluded that there was insufficient evidence to conclude that he would have retired later. The petitioner had provided evidence that he had had conversations with his employer and others prior to the accident in which he expressed an intention to retire later than 65. The panel also determined that item #41.00 of the RSCM II (the version in effect prior to June 1, 2014) was not patently unreasonable.

On judicial review, the Court determined that the panel's interpretation of the policy was not patently unreasonable and so dismissed the relief sought regarding the policy. The Court agreed with all of the parties that the policy does not create a presumption that a worker will retire at the age of 65 but rather sets age 65 as the minimum retirement age. The Court found that it was not patently unreasonable for the panel to interpret the policy such that in most circumstances the relevant date for considering the worker's intentions regarding retirement was the date of injury.

It was also not patently unreasonable for the panel to interpret the policy as requiring that a worker's subjective statements be verified by an independent source if that evidence is available. As the Act does not prescribe the type of evidence necessary to make a finding of fact, the Legislature left it open to the Board to determine what type of evidence is necessary in its fact finding investigation. The Court found that the use of the words "would retire" in section 23.1 as opposed to words such as "might," "may," or "intended" indicate that there must be positive evidence to establish when in fact the worker would actually have retired. The section requires more than the mere possibility, or simply the capacity, to continue working beyond age 65. A subjective intention is not the only consideration.

The Court did find however, that the WCAT panel acted unfairly when it did not contact the petitioner's employer for information before issuing the decision.

During the appeal process the petitioner told the panel that he had attempted to obtain a written statement from his employer regarding discussions that they had about the petitioner's plans to retire after the age of 65 and that the employer had changed his mind and was no longer prepared to make a statement. The panel had extended the statutory time limit for making a decision on the basis that the panel needed to write to the employer to obtain further information but then issued the decision without doing so.

The Court found that the panel was unfair because it ought to have exercised its discretionary investigative powers. The Court noted that not doing so meant that the petitioner gave second hand evidence as to the prospects of his employment post age 65 with this employer. It was unfair for the panel not to have taken the steps that it identified as being required and to then conclude that the petitioner's evidence was insufficient to permit it to conclude that he would have worked beyond age 65. The petitioner would have a legitimate expectation that the panel would have taken the necessary steps to garner the evidence. The Court found that the petitioner was unaware of the panel's thought processes at the point that the time was extended was irrelevant as in the circumstances of this case investigation was required. It is reasonable to conclude that the employer may have been more prepared to provide a statement if that request came from WCAT. The Court remitted the decision to WCAT and directed WCAT to make reasonable attempts to determine from the employer whether he has independent verifiable evidence to give as to the petitioner's intentions to work past age 65 as at the date of injury.