

## TABLE OF CONTENTS

	<b>PAGE</b>
<b>1.00 THE WORKERS' COMPENSATION APPEAL TRIBUNAL</b>	<b>6</b>
1.10 Introduction	6
1.20 Role of WCAT	6
1.30 Guiding Principles	7
1.40 Composition of WCAT	7
<b>2.00 JURISDICTION</b>	<b>9</b>
2.10 WCB Review Division	9
2.20 WCAT Jurisdiction	11
2.21 General	11
2.22 Regulations	12
2.23 Compensation issues affecting workers on which a review officer's decision is appealable to WCAT include	13
2.24 Employer issues concerning assessments or monetary penalties on which a review officer's decision is appealable to WCAT include	13
2.25 Occupational health and safety issues or monetary penalties on which a review officer's decision is appealable to WCAT include	14
2.30 Other Matters within WCAT's Jurisdiction	14
2.31 Certification to Court	14
2.32 Extension of Time to Appeal	14
2.33 Application for Reconsideration	15
2.40 Matters which are Not Appealable to WCAT	15
2.41 Preliminary or Procedural Decisions by a Review Officer Not Appealable to WCAT	15
2.42 Orders under Part 3 (Occupational Health and Safety) Not Appealable to WCAT	16
2.43 Other Substantive or Merit Decisions of a Review Officer which are Not Appealable to WCAT	17
<b>3.00 INITIATING THE APPEAL OR APPLICATION</b>	<b>17</b>
3.10 Who May Appeal	17
3.20 Deceased Worker - Standing of Estate	19
3.30 Federally Regulated Workers	19
3.40 How to Appeal	19
3.50 Incomplete Notice of Appeal	20
3.60 Canadian Charter of Rights and Freedoms	20
<b>4.00 REGISTRATION OF APPEALS OR APPLICATIONS: SCREENING AND STREAMING</b>	<b>21</b>
4.10 Registration	21
4.20 Representatives	21
4.30 Respondents and Other Participants	22
4.31 Successor Employers	23
4.32 Prevention and Assessment Appeals	23
4.33 Employer Cost Transfer Appeals - Section 10(8)	24
4.34 Employer Relief of Claim Costs Appeals	24
4.35 Unregistered Employer Charged with Claim Costs - Section 47(2)	24
4.36 Other Participants	25
4.37 Deemed Employers	25
4.40 Streaming: Regular, Complex or Specialty	26
4.50 Panel's Authority	27

<b>5.00</b>	<b>PROCEDURAL OR SUMMARY DECISIONS</b>	<b>28</b>
5.10	General	28
5.20	Service of Decisions or Orders	29
5.30	Extension of Time to Appeal	30
5.31	Special Circumstances Precluded	31
5.32	Injustice	32
5.33	Exercise of Discretion	32
5.40	Stay of Decision under Appeal	32
5.50	Suspension of an Appeal	33
5.51	General	33
5.52	Suspension for WCAT Referral of an Undetermined Matter Back to the Board	33
5.53	Suspension re Independent Health Professional Advice	34
5.54	Suspension re Lawfulness of Policy	34
5.55	Suspension Pending a Board Decision on a Related Matter	34
5.60	Withdrawals	35
<b>6.00</b>	<b>ALTERNATIVE DISPUTE RESOLUTION (ADR)</b>	<b>35</b>
<b>7.00</b>	<b>TIME FRAME FOR WCAT DECISION-MAKING</b>	<b>37</b>
7.10	General	37
7.20	120-Day Fast Track	38
<b>8.00</b>	<b>DECISION-MAKING PROCESS</b>	<b>39</b>
8.10	Panels	39
8.20	Precedent Panels	39
8.30	Consolidation or Joining Together of Related Appeals	40
8.40	Pre-Hearing Conferences	41
8.50	Expert Evidence	41
8.51	Rules for Expert Evidence	42
8.60	Subpoenas	43
8.70	Method of Hearing	44
<b>9.00</b>	<b>ORAL HEARINGS</b>	<b>45</b>
9.10	General	45
9.20	Scheduling	45
9.21	Postponements	45
9.22	Communication of the Postponement Decision	46
9.23	Late Appearance	47
9.24	Failure to Appear for a Hearing	47
9.25	Continuations	49
9.30	Who May Attend	50
9.31	Representatives	50
9.32	Witnesses	50
9.33	Affirmation or Oath	51
9.34	Interpreters	51
9.35	Security	51
9.36	Written Pre-Hearing Submissions	51
9.40	Record of the Hearing	51
9.41	Responsibilities of the Presiding Member	52
9.42	Procedure at the Hearing	52
9.43	Site Visit	53
9.50	New Appeals / Issues Raised at Hearing	53
9.60	New Documentary Evidence	53
9.70	Post-Hearing Submissions	54

9.71	Disclosure of Post-Hearing Submissions	54
9.72	Late Submissions	54
<b>10.00</b>	<b>APPEALS PROCEEDING BY WRITTEN SUBMISSIONS</b>	<b>55</b>
10.10	Time Frames for Written Submissions	55
10.20	Provision of New Evidence	57
10.30	Avoidance of Third Party Identifiers	58
<b>11.00</b>	<b>INDEPENDENT MEDICAL ASSISTANCE OR ADVICE</b>	<b>58</b>
11.10	General	58
11.11	Other Medical Advice or Clarification	58
11.12	Time Frame	59
11.20	Who May Serve	59
11.21	Remuneration	59
11.22	Form of Panel	59
11.23	Exclusions	60
11.30	Terms of Reference	60
11.40	Medical Examination	61
11.41	Failure to Attend the Examination, or Obstruction of the Examination	61
11.50	Written Report	61
11.60	Decision	61
<b>12.00</b>	<b>WCAT DECISION-MAKING</b>	<b>62</b>
12.10	Prior Decisions	62
12.20	WCAT Precedent Decisions	62
12.30	Application of Policy	62
12.40	Lawfulness of Policy	63
<b>13.00</b>	<b>COSTS AND EXPENSES</b>	<b>65</b>
13.10	Costs	65
13.20	Expenses	65
13.21	General	66
13.22	Party's Attendance at an Oral Hearing (Section 7(1)(a))	66
13.23	Expense of Obtaining or Producing Evidence (Section 7(1)(b))	67
13.24	Representatives	69
13.25	Employers	69
13.26	Independent Health Professional Examination	69
<b>14.00</b>	<b>DECISION - GENERAL</b>	<b>69</b>
14.10	Hallmarks of Quality Decision Making	69
14.20	Standardized Format	71
14.30	Scope of Decision	72
14.40	Outcome	73
<b>15.00</b>	<b>POST-DECISION</b>	<b>75</b>
15.10	Publication of WCAT Decisions	75
15.20	Reconsideration or Completion of WCAT Decisions	75
15.21	Correction	75
15.22	Incomplete Decision	75
15.23	New Evidence Not Previously Available (Section 256)	75
15.24	Incomplete or Void Decisions	76
<b>16.00</b>	<b>PREVENTION APPEALS</b>	<b>77</b>
<b>17.00</b>	<b>DISCRIMINATORY ACTION APPEALS (Section 153)</b>	<b>78</b>

<b>18.00</b>	<b>CERTIFICATE APPEALS</b>	<b>78</b>
<b>19.00</b>	<b>ASSESSMENT APPEALS</b>	<b>79</b>
<b>20.00</b>	<b>CERTIFICATION TO COURT - SECTION 257</b>	<b>79</b>
20.10	General	79
20.20	Standing to Make Application	80
20.21	Timing of Application	80
20.22	Pleading a Defence under Section 10	80
20.23	Application for Compensation (Form 6)	81
20.24	Initiating the Application for Certification	81
20.30	Standing of Other Persons Affected by the Decision	82
20.40	Oral Hearing	82
20.50	Submissions	82
20.51	Requesting Party Provides First Submission	82
20.52	Evidence	82
20.53	Legal Argument and Submissions	82
20.54	Exchange of Submissions	83
20.55	Use of Existing WCB files	83
20.56	Scope of Authority under Section 257	83
20.60	Decision	84
20.61	Effect on the Legal Action	84
20.70	Other Matters	84
<b>21.00</b>	<b>PUBLIC ACCESS TO WCAT DECISIONS</b>	<b>85</b>
21.10	General	85
21.20	Guidelines for Writing Decisions without Identifiers	85
21.21	Confidentiality and Privacy	85
21.22	Names	85
21.23	File Copy of Decision and Covering Pages	86
21.24	Names of Representatives	86
21.25	File or Appeal Numbers	87
21.26	Payroll, Revenue Data, and Salary Information	87
21.27	Geographic Locations	87
21.30	Second Level of Editing in Exceptional Circumstances	87
21.40	Audience	88
21.50	Quotations	88
21.60	Corrections or Revisions – Inadvertent Error	88
21.70	Section 257 Certification to Court	88
21.80	Exception	88
<b>22.00</b>	<b>CODE OF CONDUCT FOR WCAT EMPLOYEES</b>	<b>89</b>
<b>23.00</b>	<b>CODE OF CONDUCT FOR WCAT MEMBERS</b>	<b>89</b>
23.10	Objective	89
23.20	General	89
23.30	Conflict of Interest / Reasonable Apprehension of Bias	89
23.40	Procedure	90
23.50	Conduct of WCAT members	92
23.51	Collegial Responsibilities	92
23.52	Legal Proceedings	93
23.53	Working Relationships	93
23.54	Outside Remunerative and Volunteer Work	93
23.55	Skills and Training	94
23.56	Oral Hearings	94

23.60	Confidentiality	94
23.70	Personal Interests	95
23.80	Decision-Making Responsibilities	95
23.90	Compliance	96
23.95	Obligations after Ceasing to be a WCAT Member	97
<b>24.00</b>	<b>CODE OF CONDUCT FOR REPRESENTATIVES</b>	<b>97</b>
24.10	General	97
24.20	Duties of a Representative	97
<b>25.00</b>	<b>DELEGATION BY THE WCAT CHAIR</b>	<b>99</b>
<b>26.00</b>	<b>TRANSITIONAL PROVISIONS</b>	<b>99</b>
26.10	General	99
26.20	Review Board Proceedings	100
26.25	Unexercised Appeal Rights to Review Board	101
26.30	Part 3 - Division 13 - Prevention Reviews	101
26.40	Appeal Division Proceedings	101
26.45	Prior Appeal Division Decisions	102
26.48	Unexercised Appeal Rights to Appeal Division	103
26.50	Medical Review Panel Proceedings	103
26.60	Backlog Cases (Parking Lot)	104
26.61	Introduction	104
26.62	Backlog Strategy	104
26.63	Voluntary "Parking Lot"	105
26.64	Respondents	106
26.65	Re-activation of "Parked" Appeals	106
26.66	Time Frames for Written Submissions	107
26.67	Time for Filing a Part 2, and Suspensions	108
26.68	Abandonment of Appeal	108
26.69	Scope of Decision	109
<b>27.00</b>	<b>DISCLOSURE OF RECORDS / CONFIDENTIALITY</b>	<b>109</b>
27.10	Confidentiality Obligation	109
27.20	Natural Justice	109
27.30	Freedom of Information and Protection of Privacy Act	109
27.40	Disclosure to Third Parties	111
<b>28.00</b>	<b>GLOSSARY</b>	<b>111</b>

## **1.00 THE WORKERS' COMPENSATION APPEAL TRIBUNAL**

### **1.10 Introduction**

The *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) amended the *Workers Compensation Act* (Act) to establish two levels for review or appeal of decisions by officers of the Workers' Compensation Board (Board). The first level is internal, involving a review by a review officer in the WCB Review Division. The second level is external, involving an appeal to the Workers' Compensation Appeal Tribunal (WCAT). WCAT is headed by a chair appointed by the Lieutenant Governor in Council. The Review Division and WCAT were established effective March 3, 2003.

The WCAT chair is responsible for the general operation of WCAT [s. 234(1)]. The chair's responsibilities include [s. 234(2)(d) to (f)]:

- (d) establishing any rules, forms, practices and procedures required for the efficient and cost effective conduct of appeals to the appeal tribunal, including
  - (i) establishing time periods within which steps must be taken,
  - (ii) requiring pre-hearing conferences, and
  - (iii) employing voluntary alternate dispute resolution processes;
- (e) making accessible to the public any rules, forms, practices and procedures established under paragraph (d);
- (f) establishing administrative practices and procedures for the effective operation of the appeal tribunal;

WCAT's *Manual of Rules, Practices and Procedures* (MRPP) contains rules, practices and procedures established by the chair. References to the chair will generally mean the chair, or delegate. References to an appeal may include other proceedings, such as an application for reconsideration, or an application for a certificate in a court action under s. 257. Statements based on specific provisions of the Act are generally followed by the relevant statutory reference in the following fashion: [s. x]. The transitional provisions (sections 34 to 44) which were set out in Part 2 of Bill 63 are cited as: [Bill 63 s. x]. A glossary of defined terms is provided at item 28.00.

The MRPP is subject to review and amendment by the chair, as the chair considers necessary. A current copy of the MRPP is accessible on WCAT's internet website at: [www.wcat.bc.ca](http://www.wcat.bc.ca). Notice of proposed revisions to the MRPP will generally be provided on the "what's new" page of the WCAT website, with an opportunity for input from the community.

### **1.20 Role of WCAT**

WCAT is established under s. 232(1) of the Act. WCAT is an external appeal body, independent of the Board. For example, the legislature has specified that the list of

health professionals from which WCAT may seek independent medical advice must not include any person employed by the Board [s. 249(3)].

While independent, WCAT is part of the workers' compensation system. For example, the WCAT chair is required to attend at least four meetings of the board of directors each year, to share information on matters of common interest and importance to the workers' compensation system [s. 234(7)]. Applicable policies of the board of directors are binding on WCAT, subject to the process set out in s. 251 for determining the lawfulness of a policy.

### **1.30 Guiding Principles**

WCAT will strive to provide or apply:

- (a) predictable, consistent, and efficient decision making;
- (b) independent and impartial decision making;
- (c) succinct, understandable, and high quality decisions;
- (d) consistency with the Act, policy, and WCAT precedent decisions;
- (e) transparent and accountable management;
- (f) integration and communication within the workers' compensation system;
- (g) accountability through performance management;
- (h) appropriate balance between efficiency (timeliness and stewardship of scarce resources) and effectiveness (quality decision making);
- (i) prompt, knowledgeable and responsive client service;
- (j) interpretive guidance for the workers' compensation system.

### **1.40 Composition of WCAT**

WCAT consists of the chair, appointed by the Lieutenant Governor in Council (the Cabinet), together with vice chairs and extraordinary members (and any temporary substitute members) [s. 231]. The chair of WCAT holds office for an initial term of three to five years, and may be reappointed for one or more successive terms of up to five years each [s. 232(3)].

If the chair is absent or incapacitated, the Lieutenant Governor in Council may appoint a temporary substitute member to act during the absence or incapacity. The chair may appoint a temporary substitute member, if a vice chair or extraordinary member of WCAT is absent or incapacitated [s. 232(10)]. A temporary substitute member must be a person who would otherwise be qualified for appointment as a member.

The first vice chairs were appointed by the minister, after consultation with the first chair of WCAT [Bill 63 s. 35(1)]. Reappointments are made by the chair.

Appointments of vice chairs are now made by the chair, after consultation with the minister, using a merit-based selection process established or approved by the chair [s. 232(6), Bill 63 s. 35(2)].

The chair may only appoint a person as a WCAT vice chair if the person demonstrates the following [*Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02, s. 2(a) to (i)]:

- (a) a knowledge of the workers' compensation system;
- (b) a knowledge of the principles and practice of administrative law;
- (c) the capacity to apply the knowledge under subsection (b) so as to be able to work effectively as a vice chair of the appeal tribunal;
- (d) the ability to analyze relevant information;
- (e) the ability to make difficult decisions within an established framework of law and policy, including good judgment and decisiveness;
- (f) effective communication skills;
- (g) the ability to work with others;
- (h) the ability to work effectively;
- (i) good character and proven integrity.

Vice chairs hold office for an initial term of two to four years, and may be reappointed for additional terms of up to five years.

WCAT appointments may be terminated without notice on payment of the lesser of 12 months' compensation or remuneration owing to the end of a member's term. This change is deemed to be included in all contracts of employment related to appointments that are commenced, changed or renewed on or after May 28, 2003 (*Administrative Tribunals Appointment and Administration Act*, 2003 (Bill 68), sections 54, 55 and 67).

Extraordinary members may be appointed by the chair, after consultation with the minister. Extraordinary members are appointed with representation from individuals with experience in workers' interests and from individuals with experience in employers' interests [s. 232(2)(c)]. An extraordinary member holds office for the period of time required to discharge his or her duties as a member of a panel appointed by the chair under s. 238(5)(b) or (6)(b) [s. 232(5)].

WCAT members must take an oath of office, by oath or solemn affirmation, and must perform their duties and functions in a fair, impartial and expeditious manner [s. 232(7) and (8)]. The oath of office must take the following form [*Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02, s. 3]:

I ..... swear (solemnly affirm) that I will faithfully, truly and impartially, to the best of my judgment, skill and ability, carry out my duties as a member of the Workers' Compensation Appeal Tribunal; I will conduct myself with integrity, and I will discharge my duties in accordance with the laws of the Province.



The chair also has authority to appoint officers of WCAT [s. 234(2)(n)]. The *Labour Relations Code* and the *Public Service Labour Relations Act* do not apply to members or officers of WCAT [s. 232(9)].

The WCAT chair has many powers and duties under the Act. The chair may delegate in writing to another member of WCAT, or to an officer of WCAT, a power or duty of the chair and may impose limitations or conditions on the exercise of that power or performance of that duty [s. 234(4)].

## **2.00 JURISDICTION**

### **2.10 WCB Review Division**

NOTE: This limited material concerning the Review Division is provided for information purposes only. Detailed information on the Practices and Procedures of the Review Division is accessible at: [www.worksafebc.com](http://www.worksafebc.com)

Most decisions by Board officers are subject to review by a review officer in the Review Division. There is a 90-day time limit for requesting a review [s. 96.2(3)]. The chief review officer may extend the time to request a review, where the chief review officer is satisfied that special circumstances existed which precluded the filing of a request for review within 90 days, and an injustice would otherwise result.

There are only two types of decisions by Board officers which are appealable directly to WCAT (with a 90-day time limit). These concern:

- (a) a discriminatory action complaint under s. 153
  - (b) an “application” for reopening of a claim under s. 96(2) (see item 2.21(c))
- Note: The right of direct appeal to WCAT from a decision under s. 96(2) is limited to situations where the decision concerned an “application” by the party rather than being made on the Board’s own initiative. In order to be considered an “application”, the party must refer specifically to s. 96(2) or must use language substantially similar to that section (see *WCAT Decision #2003-04322*). In considering such an appeal, WCAT determines whether the matter must be reopened, or may not be reopened [s. 253(2)(a) and (b)]. Once a claim has been reopened, an ensuing decision by a Board officer concerning entitlement is one which is subject to review by the Review Division.

In general, the Review Division has jurisdiction to review a Board decision in a specific case concerning [s. 96.2(1)]:

- (a) compensation (including a decision, on the Board’s own initiative, to reopen or not to reopen a claim under s. 96(2), (see *Review Decision #2523*));
- (b) vocational rehabilitation;
- (c) an assessment or classification matter, including an employer’s assessment classification unit;

- (d) a monetary levy on an employer of costs of compensation involving:
  - an unregistered employer at time of injury [s. 47(2)]
  - compensation paid pending employer's late notification to WCB [s. 54(8)]
  - an injury, death or disablement due to gross negligence of employer [s. 73(1)];
- (e) a Board order concerning an occupational health and safety matter, including an administrative penalty (or a refusal to make a variation, or a cancellation, of an order);
- (f) a transfer of claim costs to an employer in another class or subclass [s. 10(8), s. 96.2(2)(e)(i)];
- (g) relief of claim costs for a disaster [s. 39(1)(d), s. 96.2(2)(e)(i)];
- (h) relief of claim costs for a pre-existing disease, condition or disability [s. 39(1)(e), s. 96.2(2)(e)(i)];
- (i) the reserve in aid of industries or classes which may become depleted or extinguished [s. 39(1)(b), s. 96.2(2)(e)(i)];
- (j) an employer's experience rating [s. 42, s. 96.2(2)(f)].

The filing of a request for a review of a decision or order does not operate as a stay or suspension of a decision or order under review. However, the chief review officer has authority to grant a stay or suspension [s. 96.2(5)].

No review can be requested respecting the following [s. 96.2(2)]:

- (a) collection by assessment or certificate judgment of an amount owed to the Board under Part 3 (Occupational Health and Safety) of the Act [s. 223(1)(a)];
- (b) the Board's action or decision on a discriminatory action complaint [s. 153];
- (c) an employer's rate group or industry group (for assessment classification purposes) [s. 96.2(2)(c) and (d)];
- (d) the allocation of amounts to or from classes, subclasses or reserves, except as specified above [s. 96.2(2)(e)];
- (e) a decision to reopen, or not to reopen, a matter on an "application" under s. 96(2) [s. 96.2(2)(g)].

If the employer has ceased to be an employer within the meaning of Part 1 of the Act, the chief review officer may deem an employers' adviser or an organized group of employers to be the employer [s. 96.2(7) and (8)]. Where this is done, the deemed employer is also deemed to be the employer for the purpose of appealing the review officer's decision to WCAT and for participating in an appeal before WCAT [s. 248(3)].

As soon as practicable after a request for a review has been filed, the Board must provide the parties to the review with a copy of its records respecting the matter under review [s. 96.2(6)].

The review officer must make a decision within 150 days after the Board receives the request for review [s. 96.4(6)(a)]. This is subject to any suspension, extension, or shortening of this time frame, as set out below:

- (a) on application or on the chief review officer's own initiative, the chief review officer may suspend a review in a specific case in order to allow a review officer to deal with related matters at the same time [s. 96.4(5)].
- (b) the chief review officer may extend the time for the review officer's decision making, if:
  - the complexity of the proceedings in a review, or
  - the complexity of the matter under review, makes the time period impractical [s. 96.4(7)].
- (c) the board of directors may by policy shorten the 150-day time frame for decision making by a review officer [s. 96.4(6)(b)].

The review officer may make a decision [s. 96.4(8)]:

- (a) confirming, varying or cancelling the decision or order under review, or
- (b) referring the matter or order under review back to the Board, with or without directions.

Subject to reconsideration, or appeal to WCAT within 30 days, the review officer's decision is final [s. 96.4(9)]. Reconsideration of a review officer's decision may be directed on the chief review officer's own initiative [s. 96.5(1)(a)]. However, the review officer's authority to reconsider on this basis ends with the earlier of [s. 96.5(3)]:

- (a) the passage of 23 days following the review officer's decision, or
- (b) the filing of an appeal to WCAT.

A party to a completed review of a decision may apply to the chief review officer for reconsideration of the review officer's decision on the basis of new evidence. However, this route is only available if the review officer's decision is one which may not be appealed to WCAT under s. 239 [s. 96.5(1)(b)]. The chief review officer may direct reconsideration if he or she is satisfied that new evidence has become available or been discovered that [s. 96.5(1)(b)(i) and (ii)]:

- (a) is substantial and material to the decision, and,
- (b) did not exist at the time of the review or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

Each party to a completed review may apply for reconsideration on the basis of new evidence, on one occasion only [s. 96.5(2)].

## **2.20 WCAT Jurisdiction**

### **2.21 General**

- (a) A final decision by a review officer respecting compensation, assessment or an occupational health and safety matter is appealable to WCAT within 30 days

- [s. 239(1), s. 243(1)]. This includes a decision to decline to conduct a review under s. 96.2.
- (b) A determination, an order, a refusal to make an order or a cancellation of an order by a Board officer under s. 153 concerning a discriminatory action complaint is appealable directly to WCAT [s. 240(1)]. The time limit for appealing a Board decision under s. 153 to WCAT is 90 days [s. 243(2)].
- (c) A decision to reopen or not to reopen a matter on an application under s. 96(2) is appealable directly to WCAT [s. 240(2)]. A claim may be reopened by the Board on its own initiative, or on application, if, since the previous decision by the Board:
- there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or,
  - there has been a recurrence of a worker's injury.
- The time limit for appealing a Board decision under s. 96(2) to WCAT is 90 days [s. 243(2)]. Where the Board makes a reopening decision under s. 96(2) on its own initiative, a review may be requested by the Review Division within 90 days (see item 2.10).
- (d) An application under s. 257 for a certificate to the court in a legal action is made directly to WCAT. There is no time limit for initiating such an application. However, WCAT requires that the application be brought at least 180 days prior to the date by which the applicant seeks to have the certificate filed in the legal action, in order to allow sufficient time for WCAT to collect evidence and submissions and to make a decision.

## **2.22 Regulations**

The Lieutenant Governor in Council (Cabinet) may make regulations:

- (a) prescribing any decisions or orders under the Act or the regulations that may be appealed to WCAT under Part 4, prescribing who may appeal those decisions or orders, and prescribing classes of decisions for purposes of s. 239(2)(a) as being decisions concerned with the conduct of a review which are not appealable [s. 224(2)(j)];
- (b) respecting the awarding of costs by WCAT in an appeal under Part 4 [s. 224(2)(k.1)], to be paid by one party to another party;
- (c) prescribing qualifications of health professionals to provide independent assistance or advice [s. 224(2)(k.2), s. 249];
- (d) prescribing the circumstances under which WCAT may order the Board to reimburse the expenses incurred by a party to an appeal under Part 4 [s. 224(2)(k.3)];
- (e) prescribing an oath of office to be taken by WCAT members before beginning their duties [section 232(8)];
- (f) prescribing any procedures or requirements governing the chair's appointments of vice chairs and extraordinary members [s. 234(2)(a)];
- (g) respecting any matters that are insufficiently provided for, or not provided for, in the transitional provisions (Part 2 of Bill 63) and that are necessary

- for the orderly transition to WCAT of proceedings before the Review Board and the Appeal Division, and
- for the orderly completion of proceedings before the Medical Review Panel on November 30, 2002, including the delegation to WCAT of all or any of the functions or responsibilities of the Board under sections 58 to 64 of the Act.

Regulations were approved and ordered on November 28, 2002 (Orders in Council Nos. 1038 to 1041). Order in Council No. 1150, was subsequently issued to replace No. 1041, to provide an effective date of March 3, 2003.

**2.23 Compensation issues affecting workers on which a review officer's decision is appealable to WCAT include:**

- (a) coverage as a worker under the Act;
- (b) a decision to accept or deny a claim for a personal injury or occupational disease;
- (c) wage loss;
- (d) health care, including clothing allowances, personal care expenses or allowances, independence and home maintenance allowances, transportation allowances, subsistence allowances, and homemakers' services (except where such services relate to a vocational rehabilitation program), eyeglasses, prostheses, wheelchairs, hearing aids, crutches;
- (e) a decision concerning the percentage of a permanent partial disability award based on the application of the Board's rating schedule [s. 23(2)], where the specified percentage of impairment in the schedule has a range that exceeds 5% [s. 239(2)(c)];
- (f) the effective date and average earnings calculation of any pension award;
- (g) pension awards which are not based on the application of the Board's rating schedule (non-scheduled awards);
- (h) loss of earnings pension [s. 23(3)];
- (i) disfigurement award [s. 23(5)];
- (j) dependant's benefits [s. 17];
- (k) average earnings for short- and long-term wage loss purposes;
- (l) diversion, cancellation, withholding, or suspension of compensation under s. 98.

**2.24 Employer issues concerning assessments or monetary penalties on which a review officer's decision is appealable to WCAT include:**

- (a) relief of costs under s. 39(1)(d) - disaster fund;
- (b) relief of costs under s. 39(1)(e) - pre-existing disease, condition or disability;
- (c) relief of costs for experience rating purposes - s. 42;
- (d) charging of costs to an unregistered employer - s. 47(2);
- (e) charging of costs to an employer due to delayed notification of injury - s. 54(8);
- (f) transfer of claim costs - s. 10(8);
- (g) assessment premiums;
- (h) personal optional protection premiums;

- (i) employer classification unit;
- (j) allocations to or from the reserve in aid of industries or classes which may become depleted or extinguished - s. 39(1)(b);
- (k) a decision to levy on an employer, all or part of the compensation (to a statutory maximum of \$40,000.00) payable to a worker for an injury, death, or disablement from occupational disease, where the Board considers this was due substantially to [s. 73(1), s. 96.2(1)(b), s. 239(1), s. 241(2)]:
  - the gross negligence of an employer,
  - the failure of an employer to adopt reasonable means for the prevention of injuries, deaths or occupational diseases, or
  - the failure of an employer to comply with the orders or directions of the Board, or with the regulations made under Part 3 of this Act.

**2.25 Occupational health and safety issues or monetary penalties on which a review officer's decision or order is appealable to WCAT include:**

- (a) a decision to confirm, vary or cancel a decision regarding an administrative penalty;
- (b) an order [s. 239(2)(e)(i) and (ii)] which imposed, or was relied upon to impose, an administrative penalty under s. 196(1);
- (c) an order by a review officer under s. 195 to cancel or suspend a certificate under Part 3 - i.e. of an occupational first aid attendant or instructor [s. 159], or a medical certificate of a worker's fitness for a specific type of work such as diving [s. 162, Section 24.10 of the Occupational Health and Safety Regulation], or a certificate of a blaster or blasting instructor [s. 163].

**2.30 Other Matters within WCAT's Jurisdiction:**

**2.31 Certification to Court** (see items 20.00 to 20.70)

Section 257 obliges WCAT to make determinations and provide a certificate to the court in certain matters which are relevant to a legal action.

There is no time limit for initiating such an application, but WCAT requires that the application be brought at least 180 days prior to the date by which the applicant seeks to have the certificate filed in the legal action. This rule applies so as to ensure that there is sufficient time for the provision of evidence and submissions, and for making the WCAT decision, in advance of any trial date (or earlier date by which the parties seek to obtain the certificate in order to be ready for trial).

**2.32 Extension of Time to Appeal** (see item 5.30)

On application, the chair has authority to grant an extension of the time limit for appealing to WCAT, where the chair is satisfied that [s. 243(3)]:

- (a) special circumstances existed which precluded the filing of a notice of appeal within the time period required in subsection (1) or (2), and
- (b) an injustice would otherwise result.

### **2.33 Application for Reconsideration (see items 15.00 to 15.24)**

An Appeal Division or WCAT decision may be reconsidered by the chair on the basis of new evidence under s. 256. An application may also be brought to void a WCAT decision on the basis of the common law grounds.

WCAT has no authority to reconsider a decision by the former commissioners of the Board (i.e. issued before June 3, 1991).

A request for reconsideration of a prior Review Board finding, for which the 30-day appeal period has expired, will be treated as a request for an extension of time to appeal. The chair has authority to grant an extension of time to appeal a prior Review Board finding, where the chair is satisfied that [s. 243(3), *Workers Compensation Act Transitional Review and Appeal Regulation*, B.C. Reg. 322/02, s. 2(2)]:

- (a) special circumstances existed which precluded the filing of a notice of appeal within the time period required in subsection (1) or (2), and
- (b) an injustice would otherwise result.

### **2.40 Matters which are Not Appealable to WCAT**

#### **2.41 Preliminary or Procedural Decisions by a Review Officer Not Appealable to WCAT**

The following classes of decisions respecting the conduct of a review by the Review Division are specified by regulation as not being appealable to WCAT [s. 224(2)(j), s. 239(2)(a), *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02, s. 4(a) to (e)]:

- (a) a decision applying a time period specified by the Board under s. 96(8) (under which the Board may establish practices and procedures for carrying out its responsibilities, including specifying time periods within which certain steps must be taken and the consequences for failing to comply with those time periods);
- (b) a decision by the chief review officer on an application for an extension of time to file a request for a review under s. 96.2(4);
- (c) a decision by the chief review officer to deem an employers' advisor or an organized group of employers to be the employer, where the employer has ceased to be an employer, under s. 96.2(7);

- (d) a decision concerning the conduct of a review under s. 96.4(2) (subject to any Board practices and procedures for the conduct of a review, a review officer may conduct a review as the officer considers appropriate to the nature and circumstances of the decision or order being reviewed);
- (e) a decision under s. 96.4(3) to proceed to complete a review and make a decision on the basis of the information before the review officer, or to determine that the request for review is abandoned, where a party to the review does not make a submission within the time required by any Board practices and procedures for the conduct of the review;
- (f) a decision under section 96.4(4) to require an employer who is a party to a review respecting a Board order, a refusal to make an order, a variation of a Board order, or a cancellation of a Board order respecting an occupational health or safety matter under Part 3, to post a notice in a specified form and manner to bring the review to the attention of the employees of the employer;
- (g) a decision by the chief review officer under s. 96.4(5), on application or on his or her own initiative, to suspend a review in a specific case in order to allow a review officer to deal with related matters at the same time;
- (h) a decision by the chief review officer under s. 96.4(7) to extend the time period for the making of the Review Division decision, on the basis that the complexity of the proceedings, or of the matter under review, makes the time period impractical;
- (i) an order by the chief review officer under s. 96.2(5) concerning a request for a stay or suspension of the operation of the decision or order under review;
- (j) a decision by a review officer under s. 96.4(8)(b) to refer a decision or order under review back to the Board, with or without directions;
- (k) a decision respecting the conduct of a review if the review is in respect of any matter that is not appealable to WCAT under s. 239(2)(b) to (e) of the Act (i.e. such as vocational rehabilitation issues, commutations, certain pension awards involving a range that does not exceed 5%, and certain prevention orders).

## **2.42 Orders under Part 3 (Occupational Health and Safety) Not Appealable to WCAT**

Decisions by review officers concerning the following types of order are appealable to WCAT [s. 239(2)(e)]:

- (a) an order relied upon to impose an administrative penalty under s. 196(1)
- (b) an order imposing an administrative penalty under s. 196(1), or
- (c) an order made under s. 195 to cancel or suspend a certificate.



Any other decision respecting an order under Part 3 of the Act is not appealable to WCAT. (A decision to levy claim costs on an employer under s. 73(1) of the Act is a decision under Part 1 which is appealable to WCAT).

An order concerning the placement of a condition on the use of a certificate under s. 195(1)(b) of Part 3 is not appealable to WCAT.

#### **2.43 Other Substantive or Merit Decisions of a Review Officer which are Not Appealable to WCAT**

- (a) to grant or deny a vocational rehabilitation benefit, or the amount of any such assistance [s. 16; s. 239(2)(b)];
- (b) in connection with a pension award for permanent partial disability, the amount of the percentage award where this involves the application of a rating schedule compiled by the Board where the specified percentage of impairment in the schedule has no range or has a range that does not exceed 5%. (For example, if the range in the WCB's schedule is from 20-30%, the decision as to the percentage would be appealable as the range in the schedule is 10%. Where the percentage is not appealable, the pension decision is still appealable in relation to its effective date, the average earnings on which the pension was calculated, and loss of earnings if that issue was addressed in the decision under appeal.) [s. 239(2)(c)];
- (c) to grant or deny a commutation request [s. 35, s. 239(2)(d)].

A review officer has authority to review an employer's classification unit, but not the rate group or industry group. The review officer's decision concerning the employer's classification unit may be appealed to WCAT. As the rate group or industry group is not addressed by a review officer, it follows that these may not be appealed to WCAT.

### **3.00 INITIATING THE APPEAL OR APPLICATION**

#### **3.10 Who May Appeal**

Only persons directly affected by a decision have standing to appeal [s. 241].

If the employer has ceased to be an employer within the meaning of Part 1, WCAT may deem an employers' adviser [s. 94] or an organized group of employers to be the employer [s. 248(1)]. For this purpose, an organized group of employers must include among its members employers in the subclass of industry to which the employer who has ceased to be an employer belonged [s. 248(2)].

An organized group of employers or employers' adviser may apply to WCAT for standing to appeal as a deemed employer [s. 248(1)].

Where an organized group of employers or employers' adviser [s. 94] was recognized by the Review Division as a "deemed employer", the group or employers' adviser is

deemed to be the employer for the purposes of appealing the review officer's decision and participating in an appeal [s. 248(3)].

A decision by a review officer concerning compensation may be appealed by [s. 241(1)]:

- (a) a worker
- (b) a deceased worker's dependant
- (c) an employer

An employer or an independent operator who is directly affected by a decision of the review officer may appeal a decision respecting [s. 241(2)]:

- (a) an assessment or classification matter (including personal optional protection coverage),
- (b) a monetary penalty or order to make a payment to the Board concerning the costs of a claim where:
  - the employer was not registered with the Board at the time of a worker's injury or disease, s. 47(2),
  - the employer was late in reporting the injury or disease to the Board, s. 54(8), or
  - the injury, death or disablement was due substantially to the fault of the employer as defined in s. 73(1).

A decision by a review officer respecting an occupational health and safety matter under Part 3 may be appealed by [s. 241(3)]:

- (a) a worker
- (b) an employer
- (c) an owner [s. 106]
- (d) a supplier [s. 106]
- (e) a union [s. 106]
- (f) a member of a deceased worker's family

A Board determination, order, refusal to make an order, or cancellation of an order made under s. 153 on a discriminatory action complaint may be appealed to WCAT by [s. 241(4)]:

- (a) a worker
- (b) an employer
- (c) a union [s. 106]

A decision to reopen or not to reopen a claim on an application under s. 96(2) may be appealed by a worker or an employer [s. 241(5)].

### **3.20 Deceased Worker - Standing of Estate**

The estate of a deceased worker has the right both to initiate an appeal to WCAT, and to continue an appeal on behalf of a deceased worker, concerning a claim for arrears of compensation up to the date of the worker's death. Documentation is required to establish the identity of the estate's representative. This may include the Letters of Administration or Letters Probate, or a copy of the will if the estate is small and probate is not required, or a statutory declaration or other form of evidence where there is no will and the estate is small or substantially held in joint tenancy.

### **3.30 Federally Regulated Workers**

The *Government Employees Compensation Act* (GECA) does not contain any appeal provision. However, s. 4(2) of the GECA provides that federally regulated workers are entitled to receive compensation under the same provisions as are provided by provincial law. Accordingly, federally regulated workers and their employers have the same appeal rights as provincially regulated workers and employers.

### **3.40 How to Appeal**

An appeal may be initiated by filing a notice of appeal with WCAT. A notice of appeal must [s. 242(2)]:

- (a) be made in writing or in another form acceptable to WCAT,
  - (b) identify the decision or order that is being appealed,
  - (c) state why the decision or order is incorrect or why it should be changed, and
  - (d) state the outcome requested.
- (also see items 9.50 and 14.30 concerning issues identified in the appeal).

Completion of a notice of appeal will generally satisfy these requirements — brief reasons are sufficient for the purpose of completing a notice of appeal.

A notice of appeal, signed by an appellant, also:

- (a) authorizes WCAT to obtain additional medical records or other evidence, and,
- (b) identifies any representative of the appellant (constitutes a current authorization for the representative).

WCAT will accept a notice of appeal, signed by an authorized representative, without requiring the appellant's signature. However, WCAT may at any time require an appellant to provide WCAT with a current authorization to obtain additional medical records or other evidence. Where an appellant fails to comply with such a request within the time specified, WCAT may deem the appeal to be abandoned.

An appeal may be initiated in any form which produces a written record with WCAT of the appeal, within the time limit. This may be accomplished by delivering, mailing or

sending by facsimile transmission (fax) a completed notice of appeal to WCAT, or by providing the required information in a letter. WCAT notice of appeal forms may be downloaded from the WCAT website at: [www.wcat.bc.ca](http://www.wcat.bc.ca) WCAT will treat receipt of a written notice of appeal (or request for review) by the Review Division or any office of the WCB as receipt by WCAT (i.e. where the appellant files the notice to the wrong address).

Telephone notice of intent to appeal will also be accepted, for the purpose of meeting the 30-day time limit. In such circumstances, the WCAT registration clerk will provide the appellant with the WCAT number for the appeal for future reference. The registration clerk will also write to the appellant to confirm receipt of the telephone notification, and request that a written notice of appeal be completed and returned within 21 days.

**Where the appeal is initiated by telephone or by letter, WCAT will require the appellant or authorized representative to sign a Notice of Appeal and provide it to WCAT within a further 21 days or the appeal will be deemed abandoned.**

WCAT will promptly send written confirmation of all appeals, and will provide a WCAT appeal reference number. This number provides confirmation the appeal has been received and recorded by WCAT. If an appellant does not receive such confirmation, they should contact WCAT promptly to verify that the appeal was received.

### **3.50 Incomplete Notice of Appeal**

Where the notice, letter or other method of initiating the appeal does not contain all the necessary information, the appellant will be required to complete a notice of appeal within 21 days. The appeal will be deemed abandoned if the completed form is not received by WCAT within 21 days. If the appellant subsequently seeks to pursue the appeal, they will require an extension of time to appeal.

### **3.60 Canadian Charter of Rights and Freedoms**

Where an appellant alleges a contravention or violation of the *Canadian Charter of Rights and Freedoms*, the appellant must provide notices to the Attorneys General of British Columbia and Canada pursuant to s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, Chapter 68. The appellant must provide WCAT with proof, such as a letter of acknowledgment from the federal and provincial Attorneys General or their representatives, that such notice was provided. Such proof must be received by WCAT at least 30 days in advance of the hearing. In the absence of such proof, the WCAT panel will normally proceed to issue its decision without considering the Charter argument(s).

## **4.00 REGISTRATION OF APPEALS OR APPLICATIONS: SCREENING AND STREAMING**

### **4.10 Registration**

The registrar's office will register appeals and other applications and screen them for compliance with preliminary requirements. This includes receiving telephone notifications of appeal (see item 3.40). The registrar's office will determine whether:

- (a) the appeal or other matter should be handled in the "fast track", "regular", "complex", or "specialty" stream (see item 4.40). The registrar's office will normally provide a preliminary determination as to whether the case should proceed by way of written submissions or an oral hearing. In specialty stream cases, the appeal will be assigned to a WCAT panel at the outset to provide direction concerning the preliminary handling of the case (see item 4.40), including whether the case should proceed by way of written submissions or an oral hearing.
- (b) sufficient information has been provided to proceed with the appeal, or whether additional information is required to perfect the application (such as in telephone notifications, or where the notice of appeal is incomplete);
- (c) the appeal or application is within WCAT's jurisdiction (i.e. whether the decision is appealable to WCAT);
- (d) an extension of time to appeal is required;
- (e) a valid authorization has been provided by the appellant;
- (f) there is a respondent, other person or representative group, or deemed employer to be notified of the appeal;
- (g) the appeal should be deemed abandoned - i.e. where the appellant fails to provide further additional information as requested within 21 days;
- (h) the appeal or other matter should be handled in the "fast track", "regular", or "specialty" stream. If the case is directed to the regular stream, the registrar's office will also determine whether the case should proceed by way of written submissions or an oral hearing (see item 4.40).

As soon as practicable, WCAT must notify the Board of an appeal [s. 245(2)]. Following screening to determine that there is a valid appeal, and to identify any respondents that are participating, the registrar's office will notify the Board of the appeal. After receiving the notice from WCAT, the Board must, as soon as practicable, provide WCAT and the participating parties to the appeal with a copy of its records respecting the matter under appeal [s. 245(3)]. WCAT's 180-day time frame for issuing its decision commences upon receipt from the Board of its records under s. 245(3), following WCAT's notice to the Board under s. 245(2) [s. 253(4)(a)].

### **4.20 Representatives**

Where a party had an authorized representative acting for them in connection with the decision now being appealed to WCAT, WCAT will normally assume, unless the party indicates otherwise, that the representative continues to act for them. For example,

if the decision by the review officer is copied to a representative, WCAT will similarly provide copies of correspondence to the same representative.

However, if more than two years has elapsed since the party provided a direction of authorization to the representative, it will be considered invalid, and a current authorization will be required.

Where the appeal is being initiated by a new representative, the appellant must provide a current authorization, such as a notice of appeal signed by the appellant naming the representative. Similarly, if the respondent has a new representative, the respondent must provide a current authorization such as a notice of participation signed by the respondent naming the representative. Alternatively, the appellant or respondent may provide a separate authorization of representative.

#### **4.30 Respondents and Other Participants**

Section 245(2) provides that WCAT, as soon as practicable, must notify the Board of an appeal. Section 245(3) provides that the Board, as soon as practicable, must provide the parties to the appeal with a copy of its records respecting the matter under appeal. WCAT has concurrent obligations under s. 260 of the *Workers Compensation Act*, and the *Freedom of Information and Protection of Privacy Act*, to respect the confidentiality of records. Accordingly, prior to providing formal notification to the WCB of an appeal, WCAT will review the notice of appeal to ensure that the basic requirements for initiating an appeal have been met, and invite the respondent(s) to complete a notice of participation. When WCAT requests disclosure or updated disclosure be provided by the WCB under s. 245(3), WCAT will advise the WCB of the identities of the appellant and any participating respondent. This is not intended as a constraint on the respondent's right to receive such records for the purposes of participating in an appeal. Rather, it is intended to ensure that confidential records are not sent out automatically to parties who are not participating, or are participating but have no wish to receive such documents.

Respondent(s) will be notified of the appeal or other application, and asked to complete and return a notice of participation if they wish to participate. The respondent will also be advised of their right to be provided with disclosure (or updated disclosure) of the Board's records respecting the matter under appeal, if they are participating. The respondent will be asked to select whether they wish the Board's records to be sent to them, or to their representative. Alternatively, the respondent has the option to expressly waive or decline to receive a copy of the Board's records. Failure to complete this portion of the form will result in the Board's records being sent to the respondent [s. 245(3)], so long as they otherwise complete the notice of participation.

A participating respondent will also be provided with copies of all further written documentation provided or obtained during the appeal process related to the appeal. A participating respondent will be invited to attend any oral hearing (if one is held), or to provide written submissions. If the respondent fails to complete and return a notice of

participation, no further information or notices will be provided to the respondent concerning the appeal, apart from a copy of the final decision.

Failure to complete a notice of participation would not preclude a WCAT panel from hearing from the respondent. For example, if the respondent appeared at an oral hearing, they would have the right to be heard. However, WCAT will not notify respondent(s) of the oral hearing date unless the respondent completed the notice of participation.

More than one employer may be entitled to participate in an appeal by a worker. This might occur, for example, where the worker asserts that his or her disability is due to work injuries under two or more different claims with different employers. It might also occur where the worker asserts that he or she is suffering from an occupational disease due to work exposures in multiple places of employment with different employers. Deemed employers may also participate as respondents in such situations.

#### **4.31 Successor Employers**

Where the employer is no longer registered with the Board, and the review officer has identified a successor employer, WCAT will treat the successor employer as the employer for the purposes of the appeal.

#### **4.32 Prevention and Assessment Appeals**

Section 246(2)(d) provides that WCAT may request the Board to investigate further into a matter relating to a specific appeal and report in writing to WCAT. Section 246(2)(i) provides that WCAT may request any person or representative group to participate in an appeal if WCAT considers that this participation will assist it to fully consider the merits of the appeal. Section 247(3) provides that WCAT may compel an officer of the Board to give evidence or produce documents that relate to the issues in a specific appeal and that are necessary for WCAT to address those issues and to make a decision in the appeal.

On particular types of employer appeals, the Board may be invited or required to participate under s. 246(2)(i), or s. 247(3), at the discretion of the WCAT panel. There are three ways in which the Board may be invited to participate:

- (a) a Board officer may be called to give evidence as a witness, such as a prevention officer describing what he or she observed during a worksite inspection;
- (b) a Board officer may be invited to provide information to assist the panel in its inquiry, such as an Assessment Department representative providing information concerning the Assessment Department's practices;
- (c) the Board may be invited to comment on new information or issues raised by the parties to the appeal.

WCAT may invite the Prevention or Finance Divisions to participate in any or all of the three ways outlined above. Where the appeal is proceeding on the basis of written submissions, the parties will be provided with copies of any information or comments received from the WCB, and the parties will be invited to respond. Where an oral hearing is being held, the parties will have the opportunity to question any Board witness giving evidence at the hearing and to respond to any comments provided by a WCB representative.

Where another employer or group of employers may be directly and substantially affected by the outcome of an assessment classification appeal, these persons may also be invited to participate as interested persons or respondents in the appeal.

Similarly, where an assessment appeal concerns whether a putative employer is liable for assessments for its “workers”, or whether the alleged workers are independent operators, the workers/independent operators may be invited to participate as interested persons or respondents. WCAT may determine the appropriate means to invite participation, whether by letter, posting of a notice in the workplace, or other public notice. WCAT may also determine the manner in which such persons may participate, such as by limiting their input to written submissions, or requiring that they select one representative to speak on their behalf at an oral hearing.

#### **4.33 Employer Cost Transfer Appeals - Section 10(8)**

Where an employer appeals a review officer’s decision under s. 10(8), the other employer will be a respondent. The injured worker will also be invited to participate as an interested person, as the worker may have relevant information to provide.

#### **4.34 Employer Relief of Claim Costs Appeals**

On employer appeals concerning relief of claim costs under s. 39(1)(e), on the basis of a worker’s pre-existing disease, condition or disability, the worker will be invited to participate as an interested person. The worker’s evidence as to their prior medical and employment history may be relevant to such an appeal.

If the employer has appealed a decision or decisions by a review officer(s) concerning a worker’s entitlement to compensation, and concerning relief of claim costs under s. 39(1)(e), these appeals may be considered together by a WCAT panel. The worker will be invited to participate as a respondent if the appeal concerns the application of section 5(5) of the Act, dealing with proportionate entitlement.

#### **4.35 Unregistered Employer Charged with Claim Costs - Section 47(2)**

No respondent will normally be notified of an employer’s appeal concerning the charging of claim costs to the employer due to lack of registration at the time of a worker’s injury or disease.



#### **4.36 Other Participants**

Section 246(2)(i) provides that WCAT may request any person or representative group to participate in an appeal if WCAT considers that this participation will assist WCAT to fully consider the merits of the appeal.

WCAT may notify an organized group of workers or employers where a case involves an important issue of policy or a significant financial value; or the input of the organized group of workers or employers would be of assistance to the panel.

On an appeal or s. 257 application which raises the question as to whether an organization's representatives are workers or independent operators, WCAT may invite participation by the putative employer and all the workers/independent operators as the decision could affect their status (see item 4.32).

WCAT may determine the extent to which such persons may be permitted to participate in a proceeding.

#### **4.37 Deemed Employers**

Where the employer has ceased to be an employer within the meaning of Part 1 of the Act, WCAT may deem an employers' adviser [s. 94], or an organized group of employers, to be the employer [s. 248(1)]. In the latter case, the organized group of employers must include employers in the subclass of industry to which the employer who has ceased to be an employer belonged [s. 248(2)].

Where the chief review officer deemed an organized group of employers or the employers' adviser to be the employer for the purposes of a review under s. 96.2, that person is deemed to be the employer for the purposes of appealing the review officer's decision to WCAT and participating in the appeal. Accordingly, an employer's right of appeal to WCAT may be exercised by a "deemed employer" [s. 248(3)].

Where the employer has ceased to be an employer, but the chief review officer did not deem any person to be the employer, WCAT will consider deeming an employers' adviser or an organized group of employers to be the employer in the following situations:

- (a) an employers' adviser or an organized group of employers seeks to appeal a decision to WCAT;
- (b) there are issues which could be best resolved with the addition of an employer submission;
- (c) there is evidence which is best tested with the participation of a representative of the employer;
- (d) an employer representative could provide helpful factual information about circumstances affecting the issue in a case;
- (e) the appeal or application involves a significant issue concerning the interpretation of law or policy; or,

- (f) the appeal or application may involve an issue having a significant financial value.

Organized groups of employers (industry associations) wanting to be placed on WCAT's list of associations in order to receive notice and/or participate in claims appeals where the employer has ceased to be an employer within the meaning of Part 1 of the Act, should apply to WCAT, in writing, and identify:

- (a) the employer classifications or sectors which are involved with the organized group of employers and for which they would like to participate;
- (b) the individual authorized to represent the organized group of employers;
- (c) their commitment to comply with s. 95 and 260 of the Act, concerning the privacy of information on claim files.

Where the employers' adviser, or organized group of employers, is deemed to be the employer under s. 248, they have the same standing to participate in the appeal as an employer. A deemed employer may initiate an appeal, obtain disclosure, and provide evidence and submissions as either an appellant or respondent.

#### **4.40 Streaming: Regular, Complex or Specialty**

The registrar's office will review each appeal or application and designate whether it should be in the regular, complex, or specialty stream. The complex and specialty streams will be used for cases which are likely to involve more complex preliminary handling.

- In the regular stream, an appeal liaison will provide ongoing contact with the parties. An appeal assessor will make a preliminary determination as to whether the matter should proceed on the basis of written submissions or an oral hearing, and the panel assignment will occur when written submissions are complete or an oral hearing is being scheduled.
- In the complex stream, an appeal coordinator will provide ongoing contact with the parties. An appeal assessor will normally make a preliminary determination as to whether the matter should proceed on the basis of written submissions or an oral hearing, and the panel assignment will occur when written submissions are complete or an oral hearing is being scheduled.
- In the specialty stream, the appeal will be assigned to a WCAT panel at the outset, and the panel will determine whether the appeal should be by way of written submissions or an oral hearing. Such early assignment of cases to panels to facilitate the panel's direct involvement in the preliminary handling of the case will normally be done in prevention and assessment appeals, and in applications for a certificate under s. 257. It may also be done in any other case where the registrar's office considers this to be required by the procedural complexities of the case.

In determining whether a case should be assigned to the complex and specialty streams, the registrar's office may consider:

- (a) the nature of the dispute;
- (b) whether the issues are new or unusual;
- (c) the complexity of the issues, facts and evidence;
- (d) the likelihood of settlement by means of alternative dispute resolution;
- (e) the number of participants involved (parties and witnesses);
- (f) whether a pre-hearing conference may be appropriate;
- (g) the estimated duration of the hearing;
- (h) the remedies being sought;
- (i) the potential for a jurisdictional challenge;
- (j) the potential for a constitutional challenge;
- (k) whether there are multiple appeals with common or similar subject matter;
- (l) whether the appeal raises an issue of special interest or significance to the workers' compensation system as a whole;
- (m) whether the appeal raises a significant issue concerning the interpretation of the Act or policy,
- (n) whether the appeal raises a significant issue as to the lawfulness of policy under the Act;
- (o) whether the appeal concerns occupational disease causation;
- (p) whether the appeal involves a discriminatory action matter under s. 153;
- (q) whether the appeal involves an administrative penalty;
- (r) whether the appeal concerns an employer's assessment classification unit;
- (s) whether the appeal involves a sexual assault of a worker;
- (t) whether the appeal concerns a claim for compensation for mental stress, under s. 5.1 of the Act;
- (u) whether the application concerns a request for a certificate to the court under s. 257, in a legal action; or,
- (v) whether the application involves a request for reconsideration of an Appeal Division or WCAT decision on the basis of new evidence, or seeks to have a WCAT decision voided on the basis of an error of law going to jurisdiction.

#### **4.50 Panel's Authority**

WCAT panels have the same authority, whether in the fast track, regular, complex, or specialty stream. Panels have authority to consider:

- (a) whether the appeal should proceed by written submissions or an oral hearing, and whether teleconference or videoconference facilities should be used;
- (b) whether ADR is appropriate;
- (c) whether to convene a pre-hearing conference [s. 246(2)(e)];
- (d) whether to request medical advice under s. 249 and if so, whether findings of non-medical fact are required;
- (e) whether to require pre-hearing disclosure of evidence [s. 246(2)(f)];

- (f) who should participate [s. 246(2)(i)];
- (g) the requirements for any oral hearing (date, location, duration, interpreter);
- (h) whether other evidence should be requested [s. 246(2)(a), (b) and (c), s. 247];
- (i) whether the Board should be requested to investigate a matter further and report in writing to WCAT [s. 246(2)(d)];
- (j) whether there should be a pre-hearing examination of a party on oath or affirmation or by affidavit [s. 246(2)(f)];
- (k) whether to require an employer to post a notice to bring the prevention appeal to the attention of the employees [s. 246(2)(h)];
- (l) whether to deem the employers' adviser or an organized group of employers to be the employer [s. 248];
- (m) whether a matter should be referred back to the Board for determination with a suspension of the appeal pending the Board's determination [s. 246(3), s. 252];
- (n) whether a request should be made to the Board as to the policy of the board of directors that is applicable to the matter under appeal [s. 245(4)];
- (o) any other preliminary matters which would normally be addressed by the registrar's office.

## **5.00 PROCEDURAL OR SUMMARY DECISIONS**

### **5.10 General**

WCAT decisions are of two types. "Merits" decisions are those which involve the weighing of evidence and argument, and provide a final outcome. "Procedural" or "summary" decisions are concerned with the steps or processes in the appeal, including the termination of an appeal process without a decision on its merits.

Procedural or summary decisions may be provided by a formal numbered WCAT decision (to be posted on the internet as part of the body of WCAT decisions without identifiers), or by a letter. Such decisions may be issued by the registrar's office or by a WCAT panel. They may concern:

- (a) an application for an extension of time to appeal to WCAT;
- (b) a request for a stay of a Board decision pending the outcome of the appeal;
- (c) jurisdictional issues, such as whether a party has standing to initiate the appeal, or whether the issue is one within WCAT's jurisdiction;
- (d) a deemed abandonment of an appeal;
- (e) a suspension of an appeal;
- (f) a request by a party for additional time for submissions;
- (g) a request by a WCAT panel for additional time to make its decision; or,
- (h) an appellant's request to withdraw an appeal.

If, in an appeal, a party fails to comply with WCAT procedures, including any time limits specified for taking any actions, WCAT may, after giving notice to that party [s. 246(5)]:

- (a) continue with the proceedings and make a decision based upon the evidence before it, or,

- (b) determine that the appeal has been abandoned.

## **5.20 Service of Decisions or Orders**

Parties have a responsibility to keep WCAT informed of their current address. Under s. 221:

- (a) a document that must be served on or sent to a person under the Act may be:
- personally served on the person, or
  - sent by mail to the person's last known address,
  - transmitted electronically, by facsimile transmission (fax) or otherwise (e.g. e-mail), to the address or number requested by the person.
- (b) If a document is sent by mail, the document is deemed to have been received on the 8<sup>th</sup> day after it was mailed.
- (c) A document transmitted electronically is deemed to have been received when the person transmitting the document receives an electronic acknowledgement of the transmission.

Where the decision by the Board officer or review officer, or WCAT notice, is only sent by mail, in calculating the time period for appealing an additional eight days are permitted for mailing of the decision [s. 221]. For this purpose, a decision or WCAT notice may be served by being sent by regular mail to the person's last known address. Accordingly, it is a party's responsibility to ensure that WCAT is promptly informed of any change of address.

Where the party fails to notify the Board or WCAT of the party's change of address, evidence that a decision or notice did not reach a party because it was mailed to their last known address will not rebut its deemed delivery under s. 221(2). The consequences of a failure to attend an oral hearing, or to provide a written submission, are set out in items 9.24 and 10.10.

A decision may also be served or sent to a person by personal service (delivery to the affected person), or by electronic transmission. In such cases, the time limit runs from the date service was effected. The eight days for mailing does not apply to such cases.

Service by fax transmission or by e-mail is only used where requested by the person ["to the address or number requested by the person", s. 221(1)(c)]. If a document is transmitted electronically, the document is deemed to have been received when the person transmitting the document receives an electronic acknowledgement of the transmission [s. 221(3)]. The page produced by the fax machine that shows the number dialed and that the fax was successfully sent, or a printout of an e-mail which was sent will suffice for this purpose. It is not a requirement that the party acknowledge receipt.

If the last day for filing an appeal falls on a weekend or public holiday, time for filing the appeal is extended to the first business day when WCAT's offices are open [s. 25, *Interpretation Act*].

If mail to the appellant is returned to WCAT as undeliverable, WCAT will make some limited inquiries to attempt to contact the appellant. Where WCAT is unable to locate the appellant, the following will apply:

- (a) If the matter has been scheduled for an oral hearing, the oral hearing will be cancelled;
- (b) If the appeal involves a transitional matter, the appeal will be transferred to the "parking lot" (see item 26.60) to await contact from the appellant until such time as WCAT is ready to proceed with the appeal;
- (c) If the appeal involves a statutory time frame for decision making, or is one from the "parking lot" on which WCAT is ready to proceed, WCAT will send a final notice to the appellant's last known address, advising that in the absence of a response within 21 days WCAT will:
  - continue with the proceedings and make a decision based upon the evidence before it; or,
  - determine that the appeal has been abandoned.

In such circumstances, WCAT will normally consider the appeal based on the evidence on file, the notice of appeal and any submissions on file. Where the panel considers an oral hearing is necessary, the panel may determine that the appeal has been abandoned.

### **5.30 Extension of Time to Appeal**

There is a 30-day time limit for appealing a decision by a review officer to WCAT. There is a 90-day time limit for appealing a decision by a Board officer concerning a discriminatory action complaint (under s. 153), or concerning a reopening application (under s. 96(2)) to WCAT.

An application for an extension of time to appeal will normally be considered on the basis of written submissions. WCAT will invite the respondent to participate. Applicants should provide reasons for not appealing within the statutory time period, and also reasons for any further delay after the expiry of that period.

The chair has discretion to extend the time to appeal under s. 243(3). There are three requirements for an application under s. 243(3) to be successful:

- (a) the chair must be satisfied that special circumstances precluded the filing of the appeal on time;
- (b) the chair must be satisfied that an injustice would result if the extension were not granted; and
- (c) the chair must exercise the discretion to extend time in favour of the applicant.

### **5.31 Special Circumstances Precluded**

Special circumstances must preclude the filing of the appeal on time. The definition of “special” includes “unusual”, “uncommon”, “exceptional” and “extraordinary”. In the context of s. 243(3), “preclude” does not mean “absolutely prevent”. It may include “prevent”, “hinder”, “impede”, or “delay” (see *WCAT Decision #2003-01810*). It is not possible to define in advance all the situations that might be recognized as special circumstances which precluded the filing of an application. In the context of this requirement, no consideration will be given to the merits of the appeal.

The following factors may be considered in deciding whether special circumstances precluded the filing of an appeal on time:

- (a) the date on which the applicant actually received the decision under appeal,
- (b) if the decision was not received in a timely fashion, the reason for the delay (e.g. the fact that the envelope was inaccurately addressed by the Board),
- (c) whether the applicant was away when the decision was issued and did not return until after the appeal period had expired,
- (d) whether the decision that the applicant seeks to appeal advised the applicant of the right of appeal and the time limit for initiating the appeal,
- (e) whether, at the time the decision was issued, evidence to support the appeal either did not exist or existed but was not discovered and could not through the exercise of reasonable diligence have been discovered (see *WCAT Decision #2004-00433*), and,
- (f) whether the applicant took all reasonable steps to ensure a timely appeal.

Additionally, in considering whether acts and omissions of representatives constitute special circumstances that precluded the filing of the appeal on time, WCAT will take into account the following factors (see *WCAT Decision #2003-04175*):

- (a) whether there is evidence that the party intended to request a review within the 90-day time limit through instructing the representative to do so;
- (b) whether there is evidence that the party gave instructions promptly (early in the 90-day period);
- (c) whether the party followed up with the representative within the 90-day time limit to ensure that the representative acted in accordance with the party’s instructions;
- (d) whether the failure to comply was somehow the responsibility of the party, for example failure to provide the necessary information to file a request for review such as the date of the decision in dispute;
- (e) whether the representative acted as quickly as possible to remedy the error as soon as it was identified;
- (f) if the representative is no longer representing the party, whether the party acted as quickly as possible to remedy the error as soon as it was identified;
- (g) whether the failure to comply was the result of a failure in the representative’s normal business practices or something more;

- (h) whether the failure to comply resulted from a reasonable choice on the part of the representative in dealing with the party's case that was "superseded" by subsequent developments beyond the representative's control; and
- (i) any other relevant circumstances particular to the case.

### **5.32 Injustice**

In order to extend the time to appeal, an injustice must result from the refusal to grant the extension. "Injustice" means "unfairness", "lack of justice", "wrong". In determining whether "an injustice would otherwise result", the chair will consider the significance of the matter under appeal (i.e. the magnitude or importance of the issues under appeal). In future decisions, WCAT will consider other factors which may be relevant to this requirement, including whether a refusal to extend the time where there is a clear error of law on the face of the decision would constitute an injustice.

### **5.33 Exercise of Discretion**

If the two criteria in s. 243(3) are met, the chair must then decide whether to exercise the discretion to extend the time to appeal. The following factors will be considered in this context:

- (a) the length of the delay,
- (b) the reasons for any delay beyond the expiry of the appeal period,
- (c) whether the applicant acted promptly to initiate an appeal when he or she became aware of the decision, the time limit for appealing, or the significant new evidence that would support the appeal,
- (d) whether there is prejudice to the respondent resulting from the delay.

### **5.40 Stay of Decision under Appeal**

Unless the chair directs otherwise, an appeal to WCAT does not operate as a stay or affect the operation of that decision or order [s. 244]. The chair has the authority to grant a stay of a decision by a review officer concerning compensation, assessment or classification, or an occupational safety and health matter which is appealable to WCAT. The chair has authority to stay a decision by the Board on a discriminatory action complaint under s. 153, or on a reopening application under s. 96(2).

General direction concerning the effect of a review officer's decision is provided by s. 258 (concerning payment of compensation to a worker, or dependant of a deceased worker), and s. 259 (concerning payments owed by an employer to the Board).

The chair will consider the following factors in determining whether to issue a stay:

- (a) whether the appeal, on its face, appears to have merit (to ensure the appeal is not frivolous; that is, there is a serious question to be heard);



- (b) whether the applicant would suffer serious irreparable harm if the stay were not granted (for example, loss of a business);
- (c) which party would suffer greater harm or prejudice from granting or denying a stay; and,
- (d) in the context of occupational health and safety, whether the granting of a stay would endanger worker safety.

This list is not exhaustive, and other factors may be taken into account. An application for a stay will generally be dealt with as a preliminary matter on the basis of written submissions. If no particulars or reasons are provided with the request, the request for a stay will be summarily dismissed.

The applicant will normally be required to provide written submissions in support of a stay application together with the notice of appeal or within a further seven days. WCAT will send the submissions to the other parties who will be given seven days to respond. The requesting party will then have five days to provide rebuttal. The chair will issue a written decision on the stay request as soon as practicable once submissions are complete.

#### **5.50           Suspension of an Appeal**

#### **5.51           General**

There are four grounds on which the Act authorizes the chair to suspend an appeal (i.e. to interrupt the statutory time frame for issuing the WCAT decision). Apart from these four situations, the WCAT decision-making process must be completed within 180 days or the further time extended by the chair on the limited statutory grounds set out in s. 253. The four situations in which an appeal may be suspended under the Act are set out below.

NOTE: Suspensions in the first three categories result in the matter being automatically returned to WCAT for further action. However, for a suspension in the fourth category (item 5.55), the appellant must ask WCAT to proceed within 30 days of the issuance of the further Board decision or the WCAT appeal will be deemed abandoned.

#### **5.52           Suspension for WCAT Referral of an Undetermined Matter Back to the Board**

If, in an appeal, WCAT considers there to be a matter that should have been determined but that was not determined by the Board, WCAT may refer that matter back to the Board for determination and suspend the appeal until such time as the Board makes that determination [s. 246(3)]. For example, this may apply where a Board officer failed to consider whether the worker suffered a new injury or a recurrence of a prior injury, in circumstances where either may be possible. Similarly, WCAT may request that the Board provide a decision as to whether a worker's disability is due to a related work injury, or two work injuries in combination. Such consideration may make the appeal unnecessary.

If WCAT refers a matter back to the Board for determination under s. 246(3), WCAT must take the Board's determination into account in the appeal and no review may be requested of that determination by a review officer [s. 246(4)]. WCAT then has jurisdiction to deal with the whole matter, including the Board's further determination.

### **5.53 Suspension re Independent Health Professional Advice**

Where WCAT retains an independent health professional to provide advice in respect of a specific appeal under s. 249, the appeal may be suspended during the period commencing with the provision of terms of reference for the health professional, until their report is provided to WCAT [s. 249(12)]. See items 11.00 to 11.60.

### **5.54 Suspension re Lawfulness of Policy**

If a WCAT panel considers that a policy of the board of directors should not be applied on the ground that the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations [s. 251(1)], that issue must be referred to the chair and the appeal must be suspended until the chair or the board of directors, as the case may be, makes a determination. If the chair refers the issue to the board of directors, the chair must also suspend any other appeal proceedings that are pending before WCAT and that the chair considers to be affected by the same policy until the board of directors makes a determination [s. 251(5)(b)]. See item 12.40.

### **5.55 Suspension Pending a Board Decision on a Related Matter**

On application by the appellant, or on the chair's own initiative, the chair may suspend an appeal if a Board's decision respecting a matter that is related to the appeal is pending [s. 252(1)]. That may involve a matter pending before the Board, or a review officer.

At any time before the further Board decision is issued, the appellant may ask WCAT to continue the appeal proceedings without waiting for the Board decision. The chair may grant the request or may continue the suspension [s. 252(3)].

Where an appeal remains under suspension at the time of the further Board decision, the appellant may, within 30 days after the Board's decision, request that WCAT continue the appeal proceedings [s. 252(2)]. On receipt of such a request, WCAT must continue the proceedings. If the appellant fails to make such a request within 30 days after the Board's decision, the appeal is deemed abandoned, and any subsequent request to proceed with the appeal would be considered as a request for an extension of time to appeal [s. 252(4)].

Where compensation payable under a review officer's decision has been deferred under s. 258 pending completion of an appeal, this deferral remains in place while an appeal is suspended, pending completion of the appeal.

Where there are related matters before WCAT and the Review Division, WCAT will consider suspending the matter before it until the Review Division decision has been issued. The decision of the Review Division on the related matter may make the appeal to WCAT unnecessary. Alternatively, where the Review Division decision is also appealed to WCAT, WCAT could then consider the related matters together.

Examples of situations in which an appeal might be suspended pending further adjudication by the Board (or review by a review officer) include:

- the effect of a review officer's decision is not clear or requires a further adjudicative decision before its effect will be apparent. The party is uncertain whether it is necessary to appeal a review officer's decision to WCAT. The party may file an appeal to WCAT, but request that the appeal be suspended pending a decision by a Board officer implementing the review officer's decision. (This would not apply where the issue concerns the payment of retroactive benefits, which must be deferred under s. 258(3)(b) until WCAT has made a final decision or the appeal has been withdrawn);
- the Board may provide a decision as to whether a worker's problems are due to a new work injury, or provide grounds for reopening a prior claim. The decision as to whether or not a new claim should be established is subject to review by the Review Division, while the decision as to whether or not a prior claim should be reopened may be appealed directly to WCAT. In such cases, WCAT will normally suspend an appeal pending the Review Division decision.

## **5.60 Withdrawals**

An appellant may withdraw the appeal by right at any time before the appeal has been assigned to a WCAT panel. After the appeal has been assigned to a WCAT panel, any request for withdrawal of the appeal will be considered by the panel. The request for a withdrawal will normally be granted. However, once the panel has begun its consideration of the evidence, the WCAT panel has a discretion to decline to grant a withdrawal.

For example, where there is evidence of fraud or misrepresentation by the appellant, the panel may refuse to accept a request for withdrawal. Similarly, where the evidence under consideration by the panel indicates that there was an error of law or policy in the decision under appeal in favour of the appellant, the WCAT panel may refuse a request for a withdrawal.

## **6.00 ALTERNATIVE DISPUTE RESOLUTION (ADR)**

The chair may establish any rules, forms, practices and procedures required for the efficient and cost effective conduct of appeals to the appeal tribunal, including employing voluntary alternate dispute resolution processes [s. 234(2)(d)(iii)].

A WCAT panel may recommend to the parties to the appeal that an alternate dispute resolution process be used to assist in the resolution of an appeal [s. 246(2)(g)].

The purpose of ADR is to seek a consensual resolution to a dispute, between or among the parties to an appeal. Representatives from the Board will also be involved in the ADR process, although the Board is not a party. Any consensual agreement reached through ADR at WCAT must still be implemented by the Board, and should therefore be acceptable to the appropriate WCB representative(s).

ADR is used by WCAT on a limited basis. When ADR will be appropriate will be determined by WCAT based on the particular circumstances of the issue under appeal, and the willingness of the parties of interest to attempt to achieve a consensual resolution. ADR may be requested by a party, or recommended by a WCAT panel.

If ADR is undertaken but does not result in a consensual resolution, WCAT will proceed to adjudicate the appeal. Evidence or records from an ADR process which does not produce a consensual resolution will be destroyed and will not be placed on file. The appeal will be assigned to a WCAT panel which did not have any involvement in the ADR process in the particular case. The WCAT panel assigned to hear the appeal may know that ADR was attempted and did not succeed, but will otherwise have no information or knowledge concerning the ADR process.

Where a consensual resolution is achieved by the parties, a settlement agreement will be drafted by the parties' representatives, or the mediator may assist in preparing the written agreement after the parties have reached settlement.

The settlement agreement will be reviewed by a WCAT panel, to ensure it is not inconsistent with the Act. The panel will dispose of the case through a final order, confirming that a consensual settlement was reached which is lawful under the Act. The terms of the settlement will be recorded on the WCB file, but need not be contained in the WCAT decision to be published on the internet.

The final consensual settlement and the WCAT decision will both be placed on the Board file. Records concerning the process used to reach the agreement will be destroyed and will not be placed on file.

Where ADR is attempted but is unsuccessful, the chair may, where necessary, extend the time for the making of a WCAT decision on the basis of the complexity of the proceedings in the appeal [s. 253(5)(a)], by a period of time equivalent to that expended in the ADR process.

## **7.00 TIME FRAME FOR WCAT DECISION-MAKING**

### **7.10 General**

On receipt of an appeal, WCAT must, as soon as practicable, notify the Board of an appeal [s. 245(2)]. Upon receipt of this notice, the Board must, as soon as practicable, provide WCAT and the parties to the appeal with a copy of its records respecting the matter under appeal [s. 245(3)]. WCAT must make its decision within 180 days after receiving a copy of these records from the Board [s. 253(4)(a)]. The 180-day time frame is subject to:

- (a) a shorter time period being prescribed by the Lieutenant Governor in Council [s. 253(4)(b), (Note: No regulation has been provided to shorten this time.)];
- (b) a suspension of the appeal proceedings on the grounds provided in the Act;
- (c) an extension of time by the chair if the complexity of the proceedings in the appeal or the matter under appeal makes the time period impracticable [s. 253(5)(a)];
- (d) an extension where the appellant requests a delay in the proceedings to submit new evidence or make additional submissions [s. 253(5)(b)]. The chair may extend time to the appellant on this basis for not more than 45 days [s. 253(6)]. On application by the respondent or other parties, the chair must also extend time for an additional period not exceeding that granted to the appellant, to allow the respondent or other parties to submit new evidence or to make additional submissions [s. 253(7)].

The chair may extend the time under s. 253 even if the applicable time period has expired [s. 253(8)].

Section 234(2)(d)(i) confers authority on the chair for “establishing time periods within which steps must be taken”. Section 246(5) further provides that if, in an appeal, a party fails to comply with the WCAT procedures, including any time limits specified for taking any actions, WCAT may, after giving notice to that party:

- (a) continue with the proceedings and make a decision based upon the evidence before it, or,
- (b) determine that the appeal has been abandoned.

In order to apply the 180-day time frame effectively, WCAT will apply mandatory time frames for steps in the appeal process.

The 180-day time frame for decision making applies to all appeals. It does not apply to applications for an extension of time to appeal, for reconsideration, or for certification to the court under s. 257.

The 180-day time period encompasses both the initial period for the parties to provide or respond to written submissions, or for scheduling and holding an oral hearing, and the period for the panel’s deliberations and decision writing. In general terms, this means that all written submissions must be complete, or the oral hearing held, within

the first 90 days. The panel must then complete its deliberations and issue its decision within the remaining 90 days (subject to additional time being granted by the chair).

Where WCAT grants additional time (not exceeding 45 days) at the request of an appellant, the respondent is, upon request, entitled to obtain additional time, not exceeding that granted to the appellant, without the necessity to provide reasons. A respondent cannot be granted additional time unless the appellant requested and was granted additional time [s. 253(6)].

The chair may extend the time period, where the complexity of:

- (a) the proceedings in the appeal, or
- (b) the matter under appeal,

makes the time period impractical. The first ground concerns the procedural steps in the appeal, and the second ground concerns the issues or subject matter of the appeal. An extension on the ground of complexity will normally only be considered at the request of a WCAT panel, after preliminary consideration of written submissions or after an oral hearing.

## **7.20 120-Day Fast Track**

An expedited fast track is available to appellants upon request. The requirements for selecting a fast track process are:

- (a) the appellant is not requesting an oral hearing; and,
- (b) the appellant provides their written evidence and submissions together with the notice of appeal.

Where the appellant selects the fast track process and provides their appeal submissions together with the notice of appeal, the respondent will be asked to provide their submission within 21 days. The appellant will then be granted seven days for rebuttal. As the appellant has not requested additional time for submissions, the respondent will not be granted additional time for submissions.

The WCAT panel will, in such cases, endeavour to issue its decision within 120 days or less. However, the panel retains the discretion to request additional time, in the event that additional inquiry (either in writing or by way of an oral hearing) is necessary or the complexity of the case otherwise requires this.

## **8.00 DECISION-MAKING PROCESS**

### **8.10 Panels**

Appeals or applications to WCAT will be determined by panels. The chair must establish the panels of WCAT. A panel has the power and authority of WCAT in considering an appeal [s. 238(8)].

Appeals will normally be heard by a single member panel, consisting of the chair or a vice chair sitting alone [s. 238(4)].

The chair may also appoint a three-member panel. There are two types of three-member panels:

- (a) a non-representational panel, consisting of the chair or a vice chair, acting as the presiding member, plus two vice chairs [s. 238(5)(a)];
- (b) a representational panel, consisting of the chair or a vice chair acting as the presiding member, plus one extraordinary member with experience in employers' interests and one extraordinary member with experience in workers' interests [s. 238(5)(b)].

As most appeals will be heard by single member panels, the parties will not be asked to express a preference as to the composition of the panel. The chair will appoint three-member panels based on the complexity and significance of the issues raised in an appeal.

The chair may [s. 238(3)]:

- (a) terminate an appointment to a panel,
- (b) fill a vacancy on a panel, and
- (c) refer an appeal that is before one panel to another panel.

If a member of a precedent panel is unable to complete an appeal, the chair may direct the remaining members of the panel to complete the appeal and make the decision [s. 238(10)].

### **8.20 Precedent Panels**

The chair may appoint a precedent panel, where the chair determines that the matters in an appeal are of special interest or significance to the workers' compensation system as a whole [s. 238(6)].

A precedent panel will consist of three to seven members. A precedent panel which does not include an extraordinary member will consist of the chair or a vice chair as the presiding member, plus two to six vice chairs.

A precedent panel may also consist of the chair or a vice chair acting as the presiding member, plus one extraordinary member with experience in employers' interests and one extraordinary member with experience in workers' interests, plus two to four vice chairs. The extraordinary members must not constitute a majority of the membership of the panel [s. 238(7)(b)]. When extraordinary members are included on the panel, the precedent panel will consist of five to seven members in total.

If a member of a precedent panel is unable to complete the appeal, the chair may direct the remaining members of the panel (a "quorum") to complete the appeal and make the precedent decision [s. 238(10)].

A decision by a panel appointed under s. 238(6) sets a precedent which is binding on future WCAT panels, unless [s. 250(3)]:

- (a) the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances in the panel's decision, or
- (b) subsequent to the panel's decision, a policy of the board of directors relied upon in the panel's decision was repealed, replaced or revised.

### **8.30 Consolidation or Joining Together of Related Appeals**

The chair may order the consideration of related matters in one hearing before WCAT [s. 234(2)(k)].

WCAT may have multiple appeals before it (from different appellants) which involve the same general issue. In such circumstances, the joining or consolidation of these appeals may assist in resolving them in a cost effective, timely and consistent manner. Where the opportunity arises, and the chair considers it appropriate to do so, the chair may assign a group of appeals to a particular panel to be considered in one hearing.

If an oral hearing is required, a common issue raised by all of the appeals may be dealt with at one time. The WCAT panel will consider what steps, if any, it may need to take to protect the privacy of information which is particular to one of the parties before it.

Depending on the circumstances, the panel may issue:

- (a) a "generic" decision, addressing all of the joined appeals;
- (b) a "generic" decision dealing with a common issue raised by the joined appeals, together with individualized decisions on each particular appeal; or,
- (c) an individual decision on each appeal, which takes into account the common evidence or submissions.



## **8.40 Pre-Hearing Conferences**

WCAT may require the parties to attend or participate in a pre-hearing conference to discuss procedural and substantive issues relating to the conduct of the appeal [s. 246(2)(e)]. A pre-hearing conference may assist the panel to:

- (a) identify the issues;
- (b) determine what additional evidence, including any new medical or other expert evidence, will be required, and the time frame for the production of such evidence;
- (c) resolve any procedural issues which may be of concern, such as whether an oral hearing will be convened and if so, when and for how long the hearing would be scheduled;
- (d) determine whether an issue should be referred for ADR;
- (e) consider whether the panel should seek advice from a health professional under s. 249.

The panel will decide whether a pre-hearing conference should be held. Pre-hearing conferences will generally not be recorded.

## **8.50 Expert Evidence**

The rules for admitting expert evidence in court proceedings, quasi-judicial or administrative hearings do not apply where the tribunal makes its own rules. While sections 10 and 11 of the *Evidence Act*, R.S.B.C. 1996, c. 124, set out the court rules, s. 10(2) states:

This section and section 11 do not apply where a tribunal, commission, board or other similar body enacts or makes its own rules for the introduction of expert evidence and the testimony of experts, and where there is a conflict between any such rules and this section or section 11, those rules apply.

WCAT has made its own rules for the introduction of expert evidence and the testimony of experts. These rules are intended to ensure that no party is taken by surprise by expert evidence submitted at a hearing. They are also intended to ensure that the procedures followed by WCAT are informal in nature, to facilitate workers and employers acting on their own behalf.

These rules concern the provision of opinion evidence by any person whom the panel finds to be an expert, based on the person's training or qualifications. This could include a physician, vocational rehabilitation consultant, occupational therapist, engineer, accountant, physiotherapist, or occupational hygienist. These rules do not apply to the provision of evidence by lay or non-expert witnesses, who simply report what they saw or heard without giving an "expert" opinion.

These rules set out below govern the provision of expert evidence where an oral hearing will be held by WCAT. The principles upon which these rules are based

are also generally applicable to the provision of expert opinion evidence where no oral hearing is being held. In particular, rules (a) to (d) are applicable to a matter being considered on the basis of written evidence and submissions. In such cases, however, the existing procedures of WCAT which govern the time frames for the provision of written evidence and submissions, and for notice to other parties, continue to apply.

#### **8.51 Rules for Expert Evidence** (see 13.23 concerning expenses)

- (a) Opinion evidence will generally only be accepted from a person the panel recognizes as being qualified by education, training or experience as an expert.
- (b) The qualifications of the expert should be stated in or with their report. The assertion of qualifications in that manner will generally be considered as sufficient evidence of such qualifications. A job title (such as WCB medical advisor, or vocational rehabilitation consultant) or professional designation will generally be accepted as evidence of the person's qualifications to hold the position.
- (c) Objections to a person's qualifications as an expert will not generally cause a panel to exclude evidence. Such argument will be considered by the panel relative to the weight to be given to the evidence received.
- (d) The evidence of an expert is admissible in the form of a written report by the expert, without the necessity of the expert attending an oral hearing before WCAT. The correspondence requesting the written report of the expert must also be submitted. An expert's oral evidence will be admissible in a hearing, however, even if a written report has not been provided by them. At least 21 days' advance notice must be given to WCAT of any expert who will be attending the oral hearing.
- (e) Where an oral hearing is granted, the parties should provide written reports to WCAT promptly after receipt by the party so that they may be disclosed to all participants. Any expert's report must be provided to WCAT a minimum of 21 days prior to an oral hearing.
- (f) A WCAT panel has the discretion to receive a previously undisclosed expert's report at an oral hearing, in which case the panel will determine what steps are necessary to ensure the other party is given an adequate opportunity to respond. In determining whether to receive the report, the panel will consider the reasons for the failure to submit the report to WCAT at least 21 days in advance of the hearing, as well as the impact of late evidence on the time limit for issuing the decision. Where the other party would be prejudiced by not having had sufficient opportunity to respond to significant new expert evidence, the panel may:
  - allow an extension of time after the oral hearing for submission of a response;
  - postpone the oral hearing; or,
  - provide such other relief as the panel considers appropriate.

- (g) WCAT will not require an expert to attend an oral hearing unless the panel believes the attendance is necessary to a fair hearing of the issues or a failure to do so would prejudice a party to the proceeding.
- (h) The application of these rules may in any case be varied at the discretion of a WCAT panel.

## **8.60 Subpoenas**

Section 247 provides that WCAT:

- (a) has the same powers as the Supreme Court to compel the attendance of witnesses and examine them under oath or affirmation, and to compel the production and inspection of books, papers, documents and things;
- (b) may cause depositions of witnesses residing in or out of the Province to be taken before a person appointed by WCAT in a similar manner to that prescribed by the Rules of Court for the taking of like depositions in the Supreme Court before a commissioner.

An officer, employee or contractor of the Board may only be compelled to give evidence or produce books, papers, documents and things that [s. 247(3)]:

- (a) relate to the issues in a specific appeal, and
- (b) are necessary for the appeal tribunal to address those issues and to make a decision in the appeal.

A member of the board of directors or an officer, an employee, or a contractor of the Board may not be compelled to give evidence or produce books, papers, documents and things respecting the development or adoption of the policies of the board of directors [s. 247(4)].

A subpoena for the production of documents or things may be issued together with a subpoena compelling the attendance of a witness or it may be issued separately. A subpoena may be issued by the panel on its own initiative, or at the request of a party. Parties requesting a subpoena will be asked to provide the following information in writing:

- (a) the name and address of the witness or person in possession of the documents or things, and the exact documents or things requested;
- (b) the relevance of the evidence to the issue under appeal;
- (c) whether the witness is willing to attend, or the person is willing to produce the documents or things and, if not, why not.

The panel assigned to an appeal will decide whether to issue a subpoena. The panel will consider whether there are other means for obtaining the same evidence, the relevance of the evidence, and, if applicable, the reason for the unwillingness of

a witness to attend or to provide evidence voluntarily. A subpoena will be drafted in consultation with tribunal counsel or the registrar, and will be signed by the panel and forwarded to the requesting party for service where appropriate. Alternatively, WCAT may arrange for service.

A person served with a subpoena is entitled to conduct money payable by the requesting party at the time of service (*British Columbia Supreme Court Rule 40(38)*). A witness is not obligated to attend if the conduct money is not paid.

The decision as to whether or not to issue a subpoena rests with the WCAT panel. However, where the panel decides to grant a party's request that WCAT issue a subpoena, the panel may direct that the party requesting the subpoena be responsible for arranging for service of the subpoena, and for providing conduct money to the witness. In that event, the party may request reimbursement of these expenses in the appeal. Alternatively, WCAT may undertake service of the subpoena.

If the witness fails to attend, the onus is on the requesting party to take the necessary steps to enforce the subpoena through the Supreme Court. Alternatively, WCAT may take such steps. The panel may adjourn the hearing to allow for this.

## **8.70 Method of Hearing**

WCAT may conduct an appeal in the manner it considers necessary, including conducting hearings in writing, or orally with the parties present in person or by means of teleconference or videoconference facilities [s. 246(1)].

A request for an oral hearing will normally be granted where the appeal or application involves a significant issue of credibility. An oral hearing may also be granted where there are:

- (a) significant factual issues to be determined;
- (b) multiple appeals of a complex nature;
- (c) complex issues with important implications for the compensation system;
- (d) other compelling reasons for convening an oral hearing (e.g. where an unrepresented appellant has difficulty communicating in writing).

An oral hearing may be conducted with the parties present in person, or by means of teleconference or videoconference facilities.

A case may be considered on a read and review basis where the issues are largely medical, legal or policy based and credibility is not at issue.

For cases in the regular and complex streams, the registrar's office will determine at the outset whether the case will proceed by way of written submissions or an oral hearing. If the registrar's office refers the case to the specialty stream, the WCAT panel will determine the method of hearing.

A WCAT panel has the discretion to change the method of hearing. A panel may decide to convene an oral hearing if the panel considers this necessary or helpful to its decision. If an oral hearing has been scheduled, the panel may conclude that an oral hearing is not necessary to its decision and proceed by way of written submissions.

## **9.00 ORAL HEARINGS**

### **9.10 General**

Oral hearings are held at WCAT offices in Richmond and in various locations throughout British Columbia. One hour is generally scheduled for a hearing in the regular oral hearing stream. Additional time may be scheduled if considered necessary by WCAT. For cases in the specialty stream, the panel will determine the length of time to be scheduled for any oral hearing.

Where practical, oral hearings as well as hearings conducted by teleconference or videoconference facilities will be recorded. The location and method of hearing will be determined by WCAT, according to what makes the most sense in the circumstances.

### **9.20 Scheduling**

If an oral hearing is requested, the appellant must be prepared to proceed with the hearing within one to three months of the request being granted. The parties will normally be given at least four weeks' notice of the hearing date. Due to the large volume of appeals, the initial scheduling of oral hearings (regular and complex streams) will be done without consultation with the parties. However, the parties will be advised that they have 14 days to request a change of date. Oral hearings in the specialty stream (in which the case is assigned to the panel at the outset) will normally be scheduled on an individual basis, rather than as part of a block of hearings, and may involve consultation with the parties as to the date to be scheduled.

Where the oral hearing is rescheduled at the request of the parties (regular or complex streams), or where the parties were consulted in the initial scheduling of the hearing (specialty stream), a further change to the date will not be granted unless exceptional reasons are provided as to why this is necessary. Factors such as a representative's schedule, vacation dates, and convenience to the parties will normally only be considered in the initial rescheduling, and will generally not provide sufficient basis for granting a later postponement of a hearing date.

### **9.21 Postponements**

After the 14-day period for automatic date changes expires, postponements of oral hearings will not be permitted unless there are exceptional circumstances. Documentation should be provided for the request.

The person requesting a postponement will be advised of alternative procedures such as a written appeal (read and review), a telephone or videoconference hearing or submitting additional evidence in written form after a partial oral hearing.

Postponement requests are decided by the registrar's office, up to 21 days before the hearing. Later requests are directed to the vice chair of the panel for a decision. Where the registrar's office has previously denied a postponement request, the panel will consult with the registrar's office before granting the postponement. Where a postponement has previously been denied by the registrar's office, a panel will generally not grant a postponement without new and exceptional reasons.

In considering a postponement request, WCAT may consider a variety of factors including:

- (a) whether the request is made far enough in advance (i.e. at least three weeks in advance of the hearing date) that the hearing can be rescheduled with a minimum of cost and disruption of schedules and/or the hearing date may be made available for another appeal;
- (b) whether a prior postponement was granted (further requests will generally not be granted);
- (c) the effect of the adjournment on the statutory time period for completing the appeal;
- (d) any prejudice to the other parties balanced against the prejudice to the appellant if the postponement is not granted;
- (e) personal emergencies such as serious medical problems or hospitalization, family crisis, bereavement, and motor vehicle accidents (recognizing that such events may not permit timely notice to WCAT);
- (f) the unforeseeable unavailability of an essential witness.

WCAT may take other factors into account on a discretionary basis.

Where a hearing is postponed, WCAT will proceed to reschedule the date for the hearing having regard to the statutory time frame for WCAT decision making. An open-ended postponement of an oral hearing will not be granted.

## **9.22 Communication of the Postponement Decision**

If the postponement request is granted, the decision is communicated to all parties by telephone or other effective means. When a new hearing date is set, a new notice of hearing will be sent to participating parties.

If a postponement request is granted directly by a panel (particularly out of town), the panel is responsible for ensuring all participating parties are notified of the postponement.

If the request is denied, the registrar's office (or, if necessary, a member of the panel) will inform the party making the request of the following options:

- (a) attend the hearing, possibly with time for post-hearing submissions;
- (b) participate by telephone or videoconferencing;
- (c) proceed by way of written appeal (read and review); or
- (d) in the case of an appellant, withdraw the appeal.

### **9.23 Late Appearance**

An oral hearing will generally not proceed in the absence of the appellant unless the panel agreed to do so in advance of the hearing. If the appellant's representative appears at the hearing, with instructions from the appellant to proceed in the appellant's absence, the panel has the discretion to proceed or not proceed with the hearing.

If the appellant appears within 15 minutes of the scheduled hearing time, the panel will proceed with the hearing. If the appellant appears after 15 minutes, the panel may proceed with the hearing depending on availability, whether other hearings will be delayed, and whether any respondent or witnesses have left.

Where a respondent has filed a notice of participation but is not present at the scheduled time, the panel will wait five minutes before proceeding. A respondent (or the respondent's representative) will be allowed to participate if he or she arrives late.

### **9.24 Failure to Appear for a Hearing**

#### **Respondent**

If a respondent fails to attend an oral hearing, they will be deemed to have waived their right to participate in the hearing. However, this may be rebutted by evidence that the respondent was unavoidably delayed or otherwise prevented from attending the hearing. In that case, WCAT will consider whether the respondent's right to participation may be met by means of disclosure of the voice recording of the hearing (if there is one, see item 9.40), and an opportunity to file a written submission and new evidence, or whether the hearing needs to be rescheduled with a new panel.

#### **Appellant**

Section 246(5) states that, if a party fails to comply with a procedure, WCAT may, after giving notice to that party, either:

- (a) continue with the proceedings and make a decision based upon the evidence before it, or
- (b) determine that the appeal has been abandoned.

If an appellant fails to appear for an oral hearing, the registrar's office will invite the appellant to provide written reasons, within 14 days, for the failure to appear. Whether or not a response is provided by the appellant, comments will be invited from any participating respondent who appeared at the hearing. Any submission by the respondent will be disclosed to the appellant for rebuttal.

Once submissions are complete, or the time for submissions has passed, the panel will decide whether to:

- (a) reschedule the oral hearing;
- (b) proceed by telephone or videoconference hearing;
- (c) proceed by read and review after providing an opportunity for submissions;
- (d) proceed by read and review based on the information currently before the panel, without providing an opportunity for further submissions; or,
- (e) determine that the appeal has been abandoned.

The panel may investigate the appellant's reasons by reviewing relevant records (e.g. when did the appellant first contact WCAT to explain why they could not attend the hearing; was a postponement requested for the same reason and refused); or by requesting documentary verification (e.g. medical letter, towing bill, letter from employer).

Under s. 246(5)(b), the panel may determine, based on all the information before it, that the appeal has been abandoned despite a request from the appellant to proceed with the appeal.

The panel may issue a "no show" decision in letter or memo form where there is no apparent dispute about the outcome (e.g. the parties have not taken any position on the disposition of the appeal). In all other cases, panels will issue a numbered decision, which may or may not also include a decision on the merits of the appeal.

### **Valid Reasons**

A failure to appear at an oral hearing without prior notice to WCAT would normally only be justified by a personal emergency or other serious and unforeseen circumstance which prevented the appellant both:

- (a) from attending the hearing, and
- (b) from providing advance notification to WCAT of the appellant's inability to attend the hearing.

Acceptable reasons would include a personal or family emergency situation that could not have been predicted, or other compelling, unpredictable situations, which made it difficult or impossible for the appellant to notify WCAT in advance. Examples could include:

- (a) a motor vehicle accident on the way to the hearing,



- (b) admission to hospital for emergency health care,
- (c) acute physical or mental disability,
- (d) death of a family member on or immediately before the day of the hearing; or,
- (e) failure to receive notice of the hearing where the appellant had previously provided WCAT with their current address.

### **Inadequate Reasons**

A variety of other reasons may be offered for failure to attend an oral hearing. These may include:

- (a) concern about jeopardizing current employment by taking time off for the hearing;
- (b) a non-emergency medical situation, such as a cold or flu;
- (c) misunderstanding the hearing letter;
- (d) forgetting about the hearing, or oversleeping on the day of hearing;
- (e) failure to receive the hearing notice, where this resulted from the appellant's failure to notify WCAT of their change of address;
- (f) being engaged in important personal activities (preparations for a wedding, divorce or funeral, care of sick family members, administering an estate, etc.); or,
- (g) vacation.

These factors will generally not be acceptable explanations of an appellant's failure to notify WCAT that they could not attend the hearing.

### **Panel Discretion**

Despite the inadequacy of the reasons for not appearing or not notifying WCAT in advance, panels have the discretion to reschedule the hearing where the panel considers that:

- (a) the appeal should be addressed on the merits despite the appellant's failure to appear at the oral hearing, and
- (b) an oral hearing is essential to consideration of the appeal.

A panel may exercise this discretion where, for example, the issue under appeal is very significant, and credibility is a central issue. In that case, the appellant will be notified that a failure to attend the rescheduled hearing would likely result in the appeal being declared abandoned.

## **9.25 Continuations**

Where a WCAT panel finds that the time scheduled for an oral hearing is insufficient, and it is not possible to continue the hearing to completion, the panel may adjourn the hearing and continue it at a later date.

### **9.30 Who May Attend**

Oral hearings are not open to the public, as WCAT must maintain confidentiality [s. 260]. The following persons have a right to attend a hearing: the appellant (and the appellant's representative) and the respondent and respondent's representative. Some cases may involve more than one respondent. The panel has the discretion to permit members of the public, including the media, to attend an oral hearing with the consent of all participating parties. Witnesses are permitted to give evidence which is relevant to the issues under appeal, but will usually be excluded from the hearing room until the panel is ready to hear their evidence.

Observers such as family members, friends, trainee advocates, WCAT or Board staff wishing to observe for training purposes are generally allowed to attend with the consent of the parties and the panel. Any observers must be identified as such at the outset of the hearing.

Observers are not expected to participate in the hearing. Observers or participants who disrupt the hearing may, after appropriate warning, be expelled from the hearing room.

### **9.31 Representatives**

A party has a right to attend, and to be represented at a hearing. A representative may be a lay representative, union representative, human resources representative, lawyer, workers' adviser, employers' adviser, etc.

Where there is more than one person attending the hearing on behalf of a party to the appeal, panels should ascertain which person is acting as the representative. Where the employer is a limited company, one person may be designated as the representative and one as the employer. Other persons would normally be witnesses (in which case they may be excluded during part of the hearing) or observers (who are not permitted to participate).

### **9.32 Witnesses**

Panels will normally exclude witnesses in order to avoid the witness being influenced (either intentionally or inadvertently) by hearing the evidence of other witnesses during the hearing. In deciding whether to exclude witnesses, the panel may consider whether there is an actual risk of this occurring, whether the evidence is relevant to a contentious issue, and whether there are good grounds for allowing the witness to remain in attendance (i.e. moral support for the appellant).

WCAT panels have the discretion to hear evidence from persons who were originally identified as observers or representatives. If the person was present in the hearing while another witness(es) gave evidence, this would be taken into account by the panel in determining the weight to be given to the evidence subsequently provided by that person.

If a party is not participating in an appeal, another party may ask the panel to subpoena him or her as a witness. Where the employer is a limited company, an officer or representative of the company may be required to give evidence on behalf of the company. If any person (including the worker or an employer representative) attends an oral hearing as an observer, the panel may require them to answer questions if the panel considers this necessary or helpful to the panel's inquiry.

### **9.33 Affirmation or Oath**

Witnesses, including the parties to an appeal, will usually be required to give evidence under affirmation or oath. This involves a solemn promise, in a form binding on the conscience of the witness, to tell the truth.

### **9.34 Interpreters**

WCAT provides independent interpreters when required. WCAT should be notified of the need for an interpreter when the oral hearing is requested. Friends or relatives are generally not permitted to act as interpreters, although the panel has discretion to allow this in appropriate circumstances such as where the party needs assistance with only a few words. Where it is apparent to the panel that an interpreter is necessary and none is present, the hearing should be rescheduled.

Interpreters are normally affirmed or sworn in at the start of the hearing.

### **9.35 Security**

Where there are security concerns relating to a hearing, WCAT may arrange for the attendance of security personnel at the oral hearing. If a party or his or her representative has a security concern, he or she should contact the registrar's office who will decide whether to arrange for security at the hearing in consultation with the panel.

### **9.36 Written Pre-Hearing Submissions**

Where WCAT receives a submission or evidence before the date of hearing, WCAT will provide this to all participating parties.

### **9.40 Record of the Hearing**

WCAT hearings will be recorded where practicable. If recording equipment is unavailable or malfunctions, a WCAT panel may proceed with an oral hearing and the absence of a recording does not affect the validity of the hearing. The WCAT recording of a hearing becomes part of the evidence on the Board file. Where an oral hearing is adjourned for a lengthy time, on request, WCAT will ask the Board to provide a copy of the recording to the parties. Written transcripts are not provided, except where the panel determines that a transcript of specific evidence is necessary. If a transcript is

prepared, a copy will be provided to the parties. After the decision has been issued, WCAT will forward the voice recording to the Board for storage as part of the Board's file.

#### **9.41 Responsibilities of the Presiding Member**

Where the panel has three or more members, the chair or a vice chair will be designated as the presiding member. It is the responsibility of the presiding member to maintain order during the hearing. The presiding member marks and lists new pieces of evidence submitted at the oral hearing as exhibits and ensures that other parties present at the hearing are provided with copies.

#### **9.42 Procedure at the Hearing**

The procedures to be followed in an oral hearing may vary depending on the circumstances of a particular case. The presiding member will usually receive the affirmation or oath of each witness immediately before the witness gives their evidence. The following sequence will generally be followed in an appeal involving an appellant and a respondent:

- (a) The presiding member will begin the hearing by introducing the panel, explaining the role of WCAT, and requesting other persons in attendance to introduce themselves and explain their role in the hearing.
- (b) The parties' addresses will be confirmed, and the worker and other witnesses will be asked whether they are seeking reimbursement of lost wages incurred in connection with their attendance at the hearing.
- (c) The presiding member will exclude witnesses, where appropriate, until they are called upon to give their evidence at which time they will be asked to provide an affirmation or oath.
- (d) The presiding member will identify the decision under appeal, and, where necessary, clarify with the parties the precise issues under appeal. Where there is disagreement, the parties will be given an opportunity to comment before the panel decides what issues they will consider.
- (e) The appellant or appellant's representative will present their case, including a brief statement of the remedy sought (including expenses) and grounds for the appeal, followed by the evidence.
- (f) The respondent may question the appellant's witnesses on any relevant matter.
- (g) The panel may question the appellant's witnesses on any relevant matter.
- (h) The respondent or the respondent's representative may present evidence.
- (i) The appellant may question the respondent's witnesses on any relevant matter.
- (j) The panel may question the respondent's witnesses on any relevant matter.
- (k) The appellant will make submissions based on the evidence before the panel. Submissions may include reference to relevant policies (such as those contained in the Board's policy manuals) or to prior WCAT decisions.
- (l) The respondent will make submissions.
- (m) The appellant may respond to the respondent's submissions.

- (n) The presiding member will close the hearing and state that a written decision will be sent to the parties. The presiding member will confirm the statutory due date for the panel's decision, subject to an extension of time being granted by the chair due to complexity.

#### **9.43 Site Visit**

Where the panel concludes that a site visit is necessary, participating parties and their representatives must be invited to attend. The panel may receive comments and submissions from the parties during the site visit, or may reconvene to a hearing room to receive submissions concerning the relevance or significance of the matters observed during the site visit.

#### **9.50 New Appeals/Issues Raised at Hearing** (also see items 3.40 and 14.30)

Occasionally an appellant will attempt to argue issues at an oral hearing relating to a decision that has not been appealed. WCAT panels only have authority to render a decision on the appeal which has been assigned to the particular panel. The panel does not have authority to hear new issues beyond the scope of the decision under appeal. In particular, if the appellant attempts to raise concerns about an unappealed decision for which the 30 or 90-day appeal period has expired, the panel will advise the appellant that it would be necessary to make an application to the WCAT chair for an extension of time to appeal the other decision.

Where objections are raised concerning a decision by a Board officer, and the appellant has not previously applied for review by a review officer of that decision (other than issues outside the jurisdiction of a review officer, such as a discriminatory action complaint or a reopening application), the panel will advise the appellant of the 90-day time limit for obtaining such a review.

#### **9.60 New Documentary Evidence**

New documentary evidence must be submitted at least 21 days in advance of the oral hearing so that it may be disclosed to other participating parties. Any expert's report, or other documentary evidence, must be provided to WCAT a minimum of 21 days in advance of an oral hearing.

However, a WCAT panel has the discretion to receive new evidence at an oral hearing, in which case the panel will determine what steps are necessary to ensure the other party is given an adequate opportunity to respond. The panel will consider the impact of late evidence on the time limit for issuing the decision.

A respondent who fails to attend an oral hearing is deemed to have waived the right to receive and respond to any evidence or argument presented at the hearing or obtained by the panel after the hearing. It remains open to a WCAT panel to invite the

respondent's comments if the panel considers this to be necessary or helpful to its consideration.

### **9.70 Post-Hearing Submissions**

Where an oral hearing is held, additional evidence or written submissions will generally not be accepted by WCAT subsequent to the hearing unless the provision of such materials was requested or agreed to by the panel.

Parties occasionally request time to submit new evidence that is not available at the time of the hearing. The panel may decide the request immediately, and set a time for submission of new material, or may consider the request after the hearing. In deciding the request, the panel will consider why the evidence was not available earlier, its relevance to the appeal, and the impact of the delay on the 180-day period for deciding the appeal.

### **9.71 Disclosure of Post-Hearing Submissions**

Where WCAT obtains or agrees to receive any new evidence or submissions following a hearing, this must be disclosed to all participating parties who attended the oral hearing. The other party will generally have an opportunity to respond. However, submissions received from the parties that do not include new and relevant evidence may be disclosed for information purposes only.

Where the panel obtains further evidence on its own initiative, such evidence will be disclosed to the parties for comment. The panel will determine the procedure and time frame to be set for obtaining comments. For example, the evidence may first be disclosed to the appellant and his or her representative with time to respond. The new evidence together with the appellant's response will then be disclosed to the respondent and his or her representative with time to respond. The respondent's submission will then be forwarded to the appellant for final response. Alternatively, the panel may disclose the new evidence to both parties, and invite responses from both parties, at the same time, followed by an opportunity for each party to respond to the other.

### **9.72 Late Submissions**

Where material is submitted after the designated period for written submissions has passed or where the panel has not granted time for submissions subsequent to an oral hearing, the material may be excluded from consideration. Unsolicited late evidence or submissions may be marked as having been excluded from consideration and kept separate from the appeal documentation until after the panel's decision has been issued, and then placed on the Board file. A panel has the discretion to receive such late material, upon consideration of the reasons as to why it could not be provided earlier and the impact of the delay on the statutory time frame for deciding the appeal. The panel will advise the parties if late evidence or submissions have been excluded from consideration. This may be communicated by WCAT staff in a letter, or may

simply be documented in the WCAT decision. If late material is received by the panel, the panel will determine the steps necessary to ensure procedural fairness for any other participating party (i.e. such as allowing further time for a response).

## **10.00 APPEALS PROCEEDING BY WRITTEN SUBMISSIONS**

### **10.10 Time Frames for Written Submissions**

The chair may extend the 180-day time frame for not more than 45 days if the appellant requests a delay in the proceedings to submit new evidence or make additional submissions [s. 253(6)].

In order for WCAT to issue its decision within 180 days, written submissions must be completed within 90 days. Accordingly, the following guidelines apply:

- (a) The 180-day time frame commences from the date WCAT receives from the Board a copy of its records respecting the appeal [s. 253(4)(a)]. The Board sends these records to WCAT and to the parties to the appeal at the same time under s. 245(3). WCAT must make its decision within 180 days after that date, subject to time being extended by the chair on the basis of complexity or on the basis of a request from the parties as set out below.
- (b) The appellant will be granted three weeks (21 days) to provide a submission and will be advised that, if their submission is received on or before this deadline, the 180-day time frame will apply to their appeal (subject to a decision by the chair to extend time due to complexity).
- (c) The appellant will be advised that it is open to them to request additional time to submit new evidence or make additional submissions [s. 253(5)]. Their request must be provided within this 21 day period, with reasons. If they do not do so, the appellant will lose the right to provide a submission and their notice of appeal will be considered as their submission. A request for up to 14 days' additional time may be made by telephone or in writing to the appeal liaison or appeal coordinator. Requests for additional time in excess of 14 days must be made in writing.
- (d) The maximum further time for submissions that may be granted in response to an appellant's request is 45 days [s. 253(6)]. Any additional time granted will run from the initial 21-day deadline for submissions. If the appellant's request is granted, the respondent will be advised that they have the right to request an equivalent period of additional time.
- (e) The respondent will be granted three weeks (21 days) to provide a submission. However, if the appellant requested and was granted additional time, the respondent is entitled, upon request, to receive an equivalent additional period of time, without a requirement to provide reasons. The respondent must specify the length of any additional time being requested. A respondent cannot be granted

additional time unless the appellant requested and was granted additional time [s. 253(6)]. A respondent's request for additional time of up to 14 days may be made orally or in writing; a request for additional time exceeding 14 days must be made in writing.

- (f) Whether or not a submission was provided by the appellant, any submission by the respondent will be disclosed to the appellant who will be granted 14 days for rebuttal. (Note: The time for rebuttal will not be extended at the request of the appellant, as this would be inconsistent with the legislative intent that the respondent have the opportunity to obtain equivalent additional time. No further extension at the rebuttal stage is contemplated by sections 253(6) and (7).)
- (g) When written submissions are complete, the case will be assigned to a panel for a decision. Submissions will be considered complete where:
  - no submission is received by the appellant by the most recent deadline, and there is no respondent participating;
  - whether or not any submission was provided by the appellant, a submission was invited from the respondent, but none was received by the due date set for the respondent;
  - a submission was provided by the respondent, and the deadline for the appellant's rebuttal has expired (with or without a rebuttal submission being provided by the appellant).
- (h) Where no submissions are provided by the appellant or respondent, the WCAT panel will proceed to consider the appeal on the basis of the appellant's notice of appeal.

These guidelines are intended to be applied in a consistent fashion. However, WCAT may vary their application if this will not affect the 180-day time frame and it makes sense to do so. For example, if a late submission is received by WCAT, and WCAT has not yet written to the other party concerning the next step in the process, WCAT may receive the submission.

Appeal coordinators have delegated authority from the chair to make decisions concerning requests for additional time of up to 45 days, within the guidelines set out above as (a) to (h). An appeal liaison will complete an additional time request form for consideration by a deputy registrar.

Reasons for which additional time (up to 45 days) may be granted to an appellant include:

- (a) complexity of the issues under appeal;
- (b) appellant is seeking additional medical or other evidence;
- (c) appellant needs to interview witnesses and provides adequate reasons for requiring more time to do so;



- (d) need to seek representation;
- (e) personal or family health problems, bereavement, or other emergencies;
- (f) pre-arranged vacation; or,
- (g) current labour relations dispute which severely limits opportunity of a person to participate.

Such reasons may involve the appellant, the representative or a key witness.

Where material is submitted after the designated period for written submissions has passed, the material may be excluded from consideration. Unsolicited late evidence or submissions may be marked as having been excluded from consideration and kept separate from the appeal documentation until after the panel's decision has been issued, and then placed on the Board file. A panel has the discretion to receive such late material, upon consideration of the reasons as to why it could not be provided earlier and the impact of the delay on the statutory time frame for deciding the appeal. The panel will advise the parties if late evidence or submissions have been excluded from consideration. This may be communicated by WCAT staff in a letter, or may simply be documented in the WCAT decision. If late material is received by the panel, the panel will determine the steps necessary to ensure procedural fairness for any other participating party (i.e. such as allowing further time for a response).

## **10.20 Provision of New Evidence**

The appellant should provide any new evidence (such as new medical reports, witness statements, or other documents), together with any argument, at the time they provide their initial submission. This allows the other party an opportunity to respond to the new evidence. Following the respondent's submissions, the appellant is given the right of final reply or rebuttal. This is intended as an opportunity for the appellant to provide any final arguments in reply to the evidence and argument provided by the respondent, rather than to provide further new evidence. Otherwise, the respondent would not have the opportunity to comment on this new evidence.

Accordingly, an appellant should always provide any new evidence with their initial submissions, and should not attempt to provide new evidence when they are later asked for their rebuttal to the submissions by the other party. If an appellant submits new evidence as part of their rebuttal, the matter will be referred to a WCAT panel for consideration. The WCAT panel may:

- (a) receive the new evidence, and allow the other party a further opportunity to comment; or,
- (b) direct that the material be marked as excluded from consideration, to be kept separate from the appeal documentation until after the panel's decision has been issued and then placed on the claim file (marked as excluded).

If the panel receives the new evidence and obtains additional comments from the respondent, the appellant will normally not be given a final opportunity to respond.

In such circumstances, the panel could request additional time for its decision due to the complexity of the proceedings in the appeal.

### **10.30            Avoidance of Third Party Identifiers**

To protect workers' privacy, submissions should not contain identifying information such as names or file numbers concerning the workers' compensation claims of other workers (unless written consents from those other workers are attached). It is appropriate to cite decision numbers which are accessible on the internet.

If a submission is provided with identifiers, the appeal liaison or appeal coordinator may accept the submission but remove the identifiers and advise the parties this has been done. The edited copy would be disclosed to the parties. Alternatively, the appeal liaison or appeal coordinator may ask the party to provide written consents from the other workers or provide an edited copy of the submission which does not contain personal identifiers concerning other workers. In that event, the submission will be marked as having been excluded and kept separate from the appeal documentation pending receipt of any necessary consents or an edited copy. Upon receipt of an edited copy, the original submission will be destroyed or returned to the party.

If consents or an edited copy are not provided, the panel will determine the appropriate disposition of the submission containing identifiers (which was marked as excluded). Whether or not an excluded submission is received by the WCAT panel, the identifiers must be removed before the submission is added to the Board file. If the submission is not received by the panel and it is not practicable to remove the identifying information, the submission will be returned to the party.

## **11.00            INDEPENDENT MEDICAL ASSISTANCE OR ADVICE**

### **11.10            General**

If a panel determines that independent medical assistance or advice would assist in reaching a decision on an appeal, the panel may seek that assistance or advice from one or more health professionals from a list established by the chair [s. 249(1) and (2)]. This is the process which will normally be used by panels requiring medical assistance or advice on a central issue raised in an appeal.

### **11.11            Other Medical Advice or Clarification**

The process or authority for seeking independent medical assistance or advice from a health professional does not prevent a panel from asking other health professionals to provide medical evidence or to clarify or interpret medical evidence previously provided by the health professional. Such advice may be requested, for example, from a treating physician, a physician employed by the Board, or a physician who is not on the list established by the chair under s. 249(2). However, such evidence or advice is not "independent assistance or advice" within the meaning of s. 249 [s. 249(13) and (14)].

## **11.12 Time Frame**

WCAT may suspend an appeal until a health professional's report is received by WCAT [s. 249(12)].

## **11.20 Who May Serve**

The term "health professional" means a medical practitioner, a person entitled to practice medicine under the laws of another jurisdiction or any other person with prescribed qualifications [s. 249(1)].

Cabinet may prescribe the qualifications of health professionals by regulation [s. 224(2)(k.2)]. *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02, s. 5 defines health professionals to include:

- (a) a person who is entitled to practice dentistry or dental surgery under the *Dentists Act*;
- (b) a person who is entitled to practise dentistry under the laws of another province;
- (c) a person who is registered as a member of the College of Psychologists of British Columbia established under section 15 (1) of the *Health Professions Act*, R.S.B.C. 1996, c.183;
- (d) a person who is entitled to practise as a psychologist under the laws of another province.

The list of health professionals must be established by the chair [s. 249(2)]. The list cannot include any person employed by the Board [s. 249(3)].

The presiding member of the panel may retain a health professional from this list [s. 249(6)].

## **11.21 Remuneration**

The chair may determine the terms and conditions, including remuneration and reimbursement of expenses, under which a health professional may be retained under s. 249. In so doing, the chair will take into account any fee schedule established by the Board for services provided by health professionals [s. 249(4)].

## **11.22 Form of Panel**

The panel may seek independent medical assistance or advice from one or more health professionals, whether individually or as a panel of health professionals, and whether from the same or different medical specialties. Where different specialties are used, the advice may be requested concurrently or sequentially.

### **11.23 Exclusions**

A health professional will normally be disqualified from providing assistance or advice in relation to a specific appeal who [s. 249(5)(a) to (f)]:

- (a) has previously examined the worker whose claim is the subject of the appeal;
- (b) is treating or has previously treated the worker or a member of the worker's family;
- (c) has been consulted in the treatment of the worker;
- (d) has acted as a consultant to the employer;
- (e) is a partner or practices with such a health professional; or,
- (f) is otherwise in circumstances that could result in a reasonable apprehension of bias. For example, the health professional should not serve on a case involving a relative or personal friend of the health professional.

The panel may seek assistance or advice from a health professional who would otherwise be disqualified on the grounds set out above, with the written consent of the parties to the appeal. For this purpose, written consent must be obtained from all parties participating in the appeal. In the absence of strong reasons for doing so, WCAT will generally avoid retaining a health professional who comes within the terms of these exclusions.

### **11.30 Terms of Reference**

The presiding member of the WCAT panel must set the terms of reference for the health professional, including [s. 249(7)]:

- (a) requiring a written report;
- (b) setting any time periods for providing the report; and,
- (c) specifying any questions to be answered in the report. For example, the panel may seek a medical opinion or explanation as to the cause of a worker's condition on either an organic or psychological basis, or on one basis only.

The terms of reference provided by the panel for the health professional will include determinations of non-medical facts. The opinion of the health professional will be requested based upon the background facts as determined by the WCAT panel. The WCAT panel may invite submissions from the parties before making its determinations of non-medical facts. These will generally involve concise factual details of the incident or accident giving rise to the claim for personal injury, or factual details with respect to the nature of the worker's employment activities and exposure(s). They may also include any other specific points relevant to establishing the factual basis for the IHP's medical opinion, such as incidents, accidents, activities or exposures outside the worker's employment.

#### **11.40 Medical Examination**

A medical examination is not legally required in order for a health professional to provide independent assistance or advice under s. 249. Such assistance or advice may be provided on a review of the medical records alone.

If the health professional considers it necessary to examine the worker in order to provide the assistance or advice, the health professional may give written notice to the worker to attend for an examination [s. 249(8)]. (See item 13.26 concerning expenses.)

#### **11.41 Failure to Attend the Examination, or Obstruction of the Examination**

Where a medical examination is conducted, the health professional may determine the form and nature of the examination.

If a worker fails to present himself or herself for the examination required, or obstructs that examination without reasonable cause, the health professional will return the matter to the WCAT panel for direction. The panel may, after giving notice to the worker, do one or more of the following [s. 249(9)]:

- (a) direct the health professional to reschedule the examination of the worker and give the worker notice of the rescheduled examination;
- (b) direct the health professional to provide a report without examining the worker; or,
- (c) make a determination that the worker has abandoned the appeal.

#### **11.50 Written Report**

A health professional retained to provide independent medical assistance or advice must provide the panel with a written report consistent with the terms of reference.

WCAT will disclose the report to the parties to the appeal, and invite submissions in respect of the report [s. 249(10) and (11)].

The panel may seek clarification of the report from the health professional without notice to the parties. Where the panel seeks clarification, both the question(s) and the response must be provided in writing and disclosed to the parties for submissions, before the panel proceeds to make a final decision.

#### **11.60 Decision**

After receiving any submissions by the parties concerning the report, the panel will decide the appeal. The report of the health professional is not binding on the panel. Where conflicting assistance or advice is provided by the health professionals, this is a matter to be weighed and assessed by the panel.

## **12.00 WCAT DECISION MAKING**

### **12.10 Prior Decisions**

WCAT panels, in making their decisions, may refer to past Review Board, Appeal Division, WCAT, or former commissioners' decisions accessible on an internet website or published in the *Workers' Compensation Reporter*, without first disclosing such decisions to the parties and inviting further submissions. If a WCAT panel wishes to cite a decision which was not publicly accessible at the time the parties were providing their submissions, the panel will normally disclose the prior decision (without identifiers) for comment. While not required, it remains open to a panel to invite comments concerning a publicly accessible decision, if the panel considers this helpful to the submissions process.

### **12.20 WCAT Precedent Decisions**

The following statutory provisions apply to the deliberations of a WCAT panel [s. 250]:

- (a) the panel may consider all questions of fact and law arising in the appeal [s. 250(1)];
- (b) the panel is not bound by legal precedent (decisions of the courts, or prior WCAT decisions unless provided by a precedent panel under s. 238(6)) [s. 250(1)];
- (c) the panel must make its decision based on the merits and justice of the case, but in so doing must apply a policy of the board of directors that is applicable in that case (subject to s. 251) [s. 250(2)];
- (d) the panel is bound by a prior precedent panel decision (under s. 238(6)) unless [s. 250(3)]:
  - the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the panel's decision, or
  - subsequent to the precedent panel's decision, a policy of the board of directors relied upon in the panel's decision was repealed, replaced or revised.
- (e) If the panel is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the panel must resolve that issue in a manner that favours the worker [s. 250(4)].

### **12.30 Application of Policy**

Under s. 82(1) of the Act, the board of directors must set, and revise as necessary, policies respecting compensation, assessment, rehabilitation and occupational health and safety.

Section 250(2) states that WCAT must apply a policy of the board of directors that is applicable in that case. It is up to the panel to determine if the policy is applicable in that case.

WCAT panels have a discretion to ask the Board to advise, as soon as practicable, of a policy of the board of directors that is applicable to the matter under appeal [s. 245(4)]. A request for such advice may be made at the discretion of a WCAT panel, where the panel considers this necessary or appropriate in relation to the hearing of an appeal. A request of this nature will be sent to the Policy and Research Division of the Board. As soon as practicable after receiving such advice, WCAT must advise the parties to the appeal of a policy of the board of directors that the Board has advised is applicable to the matter under appeal [s. 245(5)].

## **12.40 Lawfulness of Policy**

Section 251 of the Act codifies the manner in which WCAT will address issues of lawfulness of a policy. WCAT may refuse to apply an applicable policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations [s. 251(1)].

If a WCAT panel considers that an applicable policy of the board of directors should not be applied on this basis, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair or the board of directors, as the case may be, makes a determination as to whether the policy should be applied [s. 251(2)].

As soon as practicable after such an issue is referred to the chair, the chair will determine whether the policy should be applied [s. 251(3)]. If the chair determines that the policy should be applied, the chair will refer the matter back to the panel and the panel is bound by the chair's determination [s. 251(4)]. If the chair determines that the policy should not be applied, the chair will [s. 251(5)]:

- (a) send a notice of this determination, including the chair's written reasons, to the board of directors, and
- (b) suspend any other appeal proceedings that are pending before WCAT and that the chair considers to be affected by the same policy until the board of directors makes a determination.

Where the chair believes there may be a reasonable apprehension of bias, the chair's authority under s. 251(3),(4), and (5) may be delegated to a vice chair or to a panel for the purposes of a specific appeal [s. 251(9)]. The chair cannot make a general delegation of his or her authority under s. 251(3), (4) and (5).

The following additional rules, practice or procedure applies to the application of s. 251:

- (a) a panel must provide written reasons, in a memorandum, to explain the basis for a panel's concern that a policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

- (b) the memorandum by the panel will be disclosed to the parties for submissions, and the chair will then determine whether the policy must be applied or whether the issue should be referred to the board of directors.
- (c) When the chair issues a determination that a policy should not be applied, the chair will defer sending notice of this determination to the board of directors for a period of time, to enable the chair to identify any other appeal proceedings that are pending before WCAT and that the chair considers to be affected by the same policy. Due to the large volume of cases before WCAT, it will normally be necessary to take a variety of steps to attempt to identify such other cases. This may include:
  - sending a notice to all WCAT members, officers and staff;
  - conducting a computer search of the issues under appeal for all matters before WCAT;
  - posting a notice on the WCAT website for a period of time, such as 30 days, and,such other measures as the chair may determine.
- (d) WCAT will advise the WCB's Policy and Research Division of the chair's notice at the same time as it is posted on the WCAT website. Formal notification to the board of directors pursuant to s. 251(5)(a) will be deferred until the chair has taken such measures as the chair considers necessary to comply with s. 251(5)(b), to identify other cases pending before WCAT which are affected by the same policy so that those parties may be notified and have the opportunity to make submissions to the board of directors.
- (e) The chair's decision, with written reasons, will be provided to the parties in all suspended appeal proceedings pending before WCAT, which the chair considers to be affected by the same policy.
- (f) When WCAT sends the notice to the board of directors, a list of all suspended cases, with names and addresses of the parties, will be provided to the board of directors. A copy of the notice will be provided to the Board's Policy and Research Division and Legal Services Division at the same time.
- (g) WCAT will make reasonable efforts to identify other cases affected by the same policy, but will not delay sending the chair's notice to the board of directors for the purpose of conducting an exhaustive review of matters before WCAT.

A referral by a panel to the chair under s. 251 suspends the particular appeal or application [s. 251(2)]. When the chair refers the matter to the board of directors, the chair must suspend any other proceedings before WCAT that the chair considers to be affected by the same policy, until the board of directors makes a determination [s. 251(5)(b)].



Within 90 days after receipt of such a notice from the chair, the board of directors must review the policy and determine whether WCAT may refuse to apply it [s. 251(6)].

The board of directors must provide the parties to the appeal, and the parties to any other suspended appeal affected by the same policy, with the opportunity to make written submissions on this review [s. 251(7)].

After the board of directors makes its determination, the board of directors must refer the matter back to WCAT and WCAT is bound by that determination.

## **13.00 COSTS AND EXPENSES**

### **13.10 Costs**

The Lieutenant Governor in Council may make regulations respecting the awarding of costs by WCAT in an appeal under Part 4 [s. 224(2)(k.1)]. Section 6 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02 [the Appeal Regulation], provides that WCAT may only order one party to pay the costs of another party if:

- (a) another party caused costs to be incurred without reasonable cause, or caused costs to be wasted through delay, neglect or some other fault,
- (b) the conduct of another party has been vexatious, frivolous or abusive, or
- (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

The provisions in items 13.20 to 13.25 below relate to WCAT's authority to order the Board to reimburse the expenses incurred by a party to an appeal. An order for the payment of costs by one party to another under section 6 of the Appeal Regulation is an alternative that may be considered in an appropriate case. An award of costs under section 6 will only be made in an unusual case.

### **13.20 Expenses**

The Lieutenant Governor in Council may make regulations prescribing the circumstances under which WCAT may order the Board to reimburse the expenses incurred by a party to an appeal [s. 224(2)(k.3)]. Section 7(1) of the Appeal Regulation provides that WCAT may order the Board to reimburse a party to an appeal for any of the following kinds of expenses incurred by that party:

- (a) the expenses associated with attending an oral hearing or otherwise participating in a proceeding, if the party is required by WCAT to travel to the hearing or other proceeding;
- (b) the expenses associated with obtaining or producing evidence submitted to WCAT;
- (c) the expenses associated with attending an examination required by an independent health professional under section 249(8).

### **13.21 General**

Any request for reimbursement of expenses should be made in the party's submissions to the panel. However, WCAT will normally address this question even in the absence of a request. In an oral hearing, the appellant and any respondent present at the hearing will normally be asked whether they are seeking reimbursement of expenses.

In considering a party's claim for reimbursement of expenses, WCAT may order reimbursement both where the party or the party's representative has actually paid the account or where the party has incurred liability for the account but it remains outstanding. WCAT may order reimbursement of expenses for a witness, to be paid directly to the witness, even where this expense has not yet been paid by the party. Parties should submit receipts for amounts for which they are seeking direct reimbursement.

Consistent with Board policy at #100.14 of the RSCM, the amount of expenses to be paid by the Board is calculated in accordance with the rules set out in RSCM #82.20 (transportation), #83.20 (meals and accommodation) and #83.13 (lost time from work where the worker is not already in receipt of temporary disability or vocational rehabilitation benefits from the Board).

### **13.22 Party's Attendance at an Oral Hearing (Section 7(1)(a))**

Where a party has requested an oral hearing, WCAT will generally order reimbursement of expenses for a party's own attendance at a hearing if that party was successful on the appeal. This is consistent with Board policy at #100.12 of the RSCM. If the appellant does not request an oral hearing, but WCAT decides that an oral hearing is necessary, WCAT will generally order reimbursement of expenses regardless of the outcome of the appeal (unless the party is found to have engaged in fraud or misrepresentation). Such reimbursement may be limited if the appellant requests the hearing be scheduled in another location to accommodate a representative.

To ensure that parties are able to appear before WCAT where an oral hearing is granted, an oral hearing will normally be scheduled in a hearing location in the Province of British Columbia closest to the community where the appellant resides. If WCAT chooses (i.e. not at the request of the appellant) to schedule a hearing at a location that is not the nearest hearing location to the appellant, WCAT will order reimbursement of the appellant's expenses regardless of the outcome of the appeal (unless the party is found to have engaged in fraud or misrepresentation). Similarly, WCAT will normally grant a respondent's request for reimbursement of travel expenses where the hearing location is not in the area in which the respondent is located.

WCAT will normally award reimbursement of expenses to a party or witness who incurred expenses to attend an oral hearing that did not proceed due to an administrative error. For example, where a party had not been informed of a

postponement, and incurs travel expenses to attend the hearing, expenses will generally be awarded regardless of the outcome of the appeal. A respondent's expenses for attending a hearing will generally be awarded, where the appellant fails to attend the hearing without adequate notice.

Reimbursement of a party's travel expenses from outside the province will generally be limited to the portion of travel within British Columbia. However, if WCAT specifically asks the party or witness to attend a hearing, WCAT will order reimbursement for the full amount of the trip. This is consistent with Board policy at #100.15 of the RSCM.

A party will be considered to have been required by WCAT to travel to an oral hearing or other proceeding, even in the absence of a specific request from WCAT, where the nearest hearing location requires travel in excess of 24 kilometres. Transportation expenses are not normally paid for the portion of any journey which takes place within a distance of 24 kilometres of the destination. This is consistent with Board policy at #82.10 of the RSCM.

### **13.23 Expense of Obtaining or Producing Evidence (Section 7(1)(b))**

WCAT will generally order reimbursement of expenses for attendance of witnesses or obtaining written evidence, regardless of the result in the appeal, where:

- (a) the evidence was useful or helpful to the consideration of the appeal, or,
- (b) it was reasonable for the party to have sought such evidence in connection with the appeal.

As the workers' compensation system functions on an inquiry basis (rather than on an adversarial basis as in the court system), reimbursement of expenses is not dependent upon the result in the appeal. However, WCAT will generally limit the amount of reimbursement of expenses to the rates or tariff established by the Board for this purpose.

WCAT may direct reimbursement for different types of expert evidence (see items 8.50 and 8.51). Most commonly, this involves additional medical evidence obtained for an appeal. Current tariff items for medical legal matters include (effective until March 31, 2006):

<b>Fee Code</b>	<b>Description</b>	<b>Rate</b>
<b>19932</b>	Medical-Legal Report: a report which will recite symptoms, history and records and give diagnosis, treatment, results and present condition. This is a factual summary of all the information about when the injured worker will be able to return to work and might mention whether there will be a permanent disability.	765.00
<b>19933</b>	Medical-Legal Opinion: an opinion will usually include the information contained in the Medical-Legal Report and will differ from it primarily in the field of expert opinion. This may be an opinion as to the course of events when these cannot be known for sure. It can include an opinion as to long-term consequences and	1275.00

	possible complications in the further development of the condition. All the known facts will probably be mentioned, but in addition there will be the extensive exercise of expert knowledge and judgment with respect to those facts with a detailed prognosis.	
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The requirements for reimbursement based on fee items 19932 and 19933 are as follows:

- (a) medical-legal report is applicable to all medical physicians,
- (b) medical-legal opinion is applicable only to specialists with relevant qualifications, or other physicians with recognized expert knowledge; and,
- (c) these fees include examination, review of records, and other processes leading to completion of the written opinion/report.

WCAT may authorize reimbursement of expenses associated with obtaining or producing evidence submitted to WCAT, even if the evidence was previously submitted to the Board. If, for example, reimbursement is denied by the Review Division, but the WCAT panel finds that the report was useful or helpful to consideration of the appeal or that it was reasonable for the party to have sought such evidence in connection with the review and appeal proceedings, WCAT may order reimbursement (if not previously provided by the Board).

Other tariff items which may apply include the following:

<b>Fee Code</b>	<b>Description</b>	<b>Rate</b>
<b>19904</b>	WCB request for copy of a consultation, operative, chart notes or other existing report – first five (5) pages, received within three (3) business days of request. Not to be paid in addition to other Fee Codes except 19906.	22.36
<b>19905</b>	WCB requested copy of consultation, operative, or other existing report – first five (5) pages or less sent by mail.	21.36
<b>19906</b>	Continuation of 19904 – over five (5) pages additional per page.	1.15
<b>19907</b>	A factual written summary or reasoned medical opinion upon written request from WCB (19904 may not be billed in addition). If extractions included over five (5) pages – may bill 19906.	255.00
<b>19953</b>	WCB Request For Existing Report or Chart Notes - ISOLATING SPECIFIC INFORMATION When the WCB requests a copy of an existing report or chart notes and where complying with that request requires the Physician to review the chart or report for the purpose of severing identified personal information not relevant to the claim prior to submission of photocopied material, or identifying previous injury or illness relevant to the current claim, or area of injury in question from prior records and separating that information from other clinical information prior to submission to the WCB, the Physician may bill Fee Code 19953. Fee Codes 19904, 19905 or 19906 may not be billed in addition to this Fee Code. Must be received within ten (10) business days of request of service and includes all courier charges.	115.00

### **13.24 Representatives**

If a party retains a representative, they do so at their own expense. Section 7(2) of the Appeal Regulation provides that WCAT may not order the Board to reimburse a party's expenses arising from a person representing the party, or the attendance of a representative of the party at a hearing or other proceeding related to the appeal. If the appellant requests that the oral hearing be held at a location near the representative, rather than in the appellant's community, the appellant's travel expenses will generally not be reimbursed.

### **13.25 Employers**

The information set out above concerning the eligibility of parties for reimbursement of expenses applies to both workers and employers.

As set out at item 9.31, where the employer is a limited company, one person may be designated as the employer and one as the representative. Other persons would normally be witnesses or observers. The expenses of the employer and employer's witnesses may be reimbursed. Consistent with the policy at #100.20 of the RSCM, the expenses of an employer may be reimbursed on the same basis as for a worker except that benefits for lost time from work are not payable. Benefits for lost time from work may be reimbursed for an employer's witnesses. WCAT may not order the Board to reimburse any expenses arising from a person representing the employer (i.e. the expenses of the advocate for the employer).

### **13.26 Independent Health Professional Examination**

Where a worker is examined by an independent health professional [s. 249(8)], WCAT will direct the Board to reimburse the worker's expenses for attending the examination unless it is concluded that the worker was attempting to mislead the Board or WCAT. A direction for reimbursement of such expenses will be automatically provided on an administrative basis, subject to any specific direction by the WCAT panel. This reimbursement will be consistent with items #100.13, 100.14 and 100.15 of the RSCM. Where a worker resides outside of British Columbia, reimbursement of travel costs is not limited to the portion attributable to travel in this province.

## **14.00 DECISION - GENERAL**

### **14.10 Hallmarks of Quality Decision Making**

A good decision:

- (a) clearly identifies the issues at the outset;
- (b) identifies a clear set of relevant findings of fact fairly drawn from the evidence;
- (c) where there is conflicting relevant evidence, explicitly identifies the findings of fact on which the conclusion is based and the reasons for the findings of fact;

- (d) responds to the relevant submissions and arguments;
- (e) identifies and applies relevant law, policy, and WCAT precedent panel decisions;
- (f) is consistent with previous (non-precedent) WCAT decisions published in the *Workers' Compensation Reporter* unless the inconsistency is identified and the reasons for the departure clearly articulated.
- (g) uses plain language where possible and uses technical and legal terminology in a manner consistent with other decisions;
- (h) makes the panel's reasoning clear and understandable and leads to a logical conclusion that resolves the issues; and,
- (i) supports established positions on law, medicine, science, and the interpretation of legislation, regulations and policy unless the inconsistency is identified and the reasons for the departure clearly articulated.

WCAT seeks to provide a decision-making process which is demonstrably fair, efficient, and accessible. WCAT aims to provide well-reasoned and high quality decisions which clearly explain the basis for the conclusion reached. Clarity, consistency and predictability will be key values of WCAT.

It is important that both the procedures followed by a WCAT panel in hearing a case, and the reasons provided by the panel to explain its decision, are seen to be fair and independent. Even where a party does not obtain the result they sought, it should be evident to the party that the panel, in reaching its decision, followed a fair process in which the parties were heard, and that the panel provided reasons which explain the basis on which the decision was made (including reasons for any dissent).

WCAT decisions will be written in clear terms, using plain direct language where possible. Short and concise decisions will be provided when possible. A decision will focus on the issue(s) under appeal, and need not recite the background evidence in detail.

As an independent appellate body, and the final level of appeal for the workers' compensation system, WCAT also has a responsibility to provide guidance to the workers' compensation system on complex issues concerning the interpretation of law and policy which arise in cases coming before WCAT. Where necessary, lengthier reasons will be provided to address a complex issue involving the interpretation of law or policy, or evaluation of the evidence.

Where the decision under appeal is varied or cancelled, the reasons should clearly explain, particularly for the benefit of the respondent and the prior decision-maker(s), the basis for this result. Where the decision under appeal is confirmed, the reasons should clearly explain, particularly for the benefit of the appellant, why the appeal was unsuccessful. In the short term, such reasons will be of benefit to the parties or other persons with an interest in the appeal. In the long term, such reasons will also assist representatives, and other decision-makers, in dealing with other cases.

In taking into account individual circumstances, WCAT would err if it improperly fettered a discretion conferred on it under the Act and policy. However, providing a decision according to the merits and justice of the case under s. 250 does not mean that the panel's focus is solely on the individual case. A decision must also be consistent with the Act, policy and WCAT precedent decisions. As well, a good decision should be consistent with previous (non-precedent) WCAT decisions published in the *Workers' Compensation Reporter* unless the conflict is identified and the reasons for the departure articulated in a coherent manner.

An important component of "the merits and justice of the case" [s. 99(2), s. 250(2)] involves ensuring that like cases are decided in a like manner. If different panels render inconsistent decisions, without drawing meaningful distinctions or adequately explaining why the cases are being decided differently, it creates a sense that the decision-making process is arbitrary or unfair. The credibility of the tribunal is undermined by such a result. If appellate decision making is viewed as unpredictable, this also makes more difficult the task of a representative attempting to advise a client as to whether an appeal is warranted.

In the absence of a binding policy or WCAT precedent decision, panels may on occasion have good reasons which lead them to different conclusions on similar issues. These different approaches may both be viable under the Act. However, the reasons for such differences must be clearly articulated in a meaningful fashion. It must be made clear whether the circumstances are so different as to be distinguishable, or a different outcome was found to be otherwise warranted. Such tensions may be necessary and helpful in the initial development of the understanding of an issue, but cannot be left unresolved indefinitely. Although conflicts may occur during periods of development, over the long term WCAT decisions will support established positions on law, medicine, science, and the interpretation of legislation, regulations and policy.

The legislature has taken specific measures in Bill 63 to promote consistency and predictability. These include s. 250(2) and 251 concerning the binding nature of policies of the board of directors, and s. 250(3) concerning the binding nature of WCAT precedent panel decisions. Having regard to this legislative intent, WCAT will recognize consistency and predictability as important values in adjudication.

In sum, WCAT will make its decision based on the merits and justice of the case pursuant to s. 250(2) of the Act. Consistency and predictability, and respect for the policy of the board of directors, and for WCAT precedent panel decisions, will also be key to WCAT decision making.

#### **14.20 Standardized Format**

WCAT decisions will generally follow a standardized format using the following headings:

- Introduction
- Issue(s)

- Background and Evidence
- Reasons and Findings
- Conclusion

Additional headings may also be used, such as “Submissions” and “Law and Policy”. Where applicable, the decision may also include headings such as “Dissent”, “Minority Opinion”, or “Concurring Opinion”. There is flexibility in the use of headings and their sequence to meet specific appeal requirements. For example, where an appeal involves multiple issues, the panel may choose to review the evidence and provide a conclusion on each issue separately, with a concluding summary of findings at the end of the decision.

#### **14.30 Scope of Decision** (also see items 3.40, 5.52 and 9.50)

Where a decision of the Review Division is appealed to WCAT, WCAT has jurisdiction to address any issue determined in either the Review Division decision or the prior decision by the WCB officer which was the subject of the request for review by the Review Division. This is, of course, subject to the general limits on WCAT’s jurisdiction described in item 2.00.

However, WCAT will generally restrict its decision to the issues raised by the appellant in the appellant’s notice of appeal and submissions to WCAT. The appellant is entitled by right to a decision on the issues expressly raised in the appeal.

A WCAT panel has a discretion to address an issue raised by the respondent in relation to the decision under appeal. If a respondent wishes to ensure that any issue raised by the respondent will be addressed as a matter of right, rather than on a discretionary basis, the respondent should file a cross-appeal. This may require an extension of time to appeal.

The WCAT panel has a discretion to go beyond the issues expressly raised by the parties to the appeal which were contained in the lower decisions giving rise to the appeal. A WCAT panel will normally not proceed to address such other issues, but has a discretion to do so. For example, where the panel considers there may have been a contravention of law or policy in the lower decision, the panel may proceed to address that issue whether or not it was expressly raised by the appellant. However, to ensure that the parties have notice of the issues which are to be addressed by the WCAT panel, the panel will ensure that notice is given to the parties of the panel’s intention to address any issue which was not raised in the appellant’s notice of appeal or submissions to WCAT, or which was not raised in the respondent’s submissions.

An exception to the foregoing is where the subject of an appeal is a pension award. A WCAT panel may address any aspect of the pension decision (i.e. which was addressed in the Board decision letter which was the subject of review by the Review Division, or which was addressed in the Review Division decision) without the need to provide notice to the parties. For example, where an appeal is brought



concerning the percentage of impairment on which the pension was based, it is open to the panel to proceed to address the effective date and average earnings aspects of the pension decision, without notifying the parties of its intention to do so. If the loss of earnings decision was contained in a separate decision letter which was not the subject of review by the Review Division, the foregoing would not apply.

Where a WCAT panel considers there to be a matter that should have been determined but that was not determined by the Board, the panel may refer the matter back to the Board for determination and suspend the appeal proceedings until the Board provides WCAT with that determination [s. 246(3)].

In sum, the focus of an appeal is generally on the issues raised by the appellant. Panels are not precluded from considering other matters raised in the decision under appeal, either on their own initiative or raised by the respondent which, on review, appear to have been incorrectly decided. In addition, a panel may refer an undetermined matter back to the Board for determination, where the panel considers that the matter should have been determined by the Board. See item 5.52.

If the panel is contemplating making a decision on an issue which has not been raised by the appellant or respondent, the panel will notify the parties and invite submissions to ensure the parties are not taken by surprise by the panel's decision on that additional issue. Natural justice requires specific notice to the parties in such circumstances. Such notice will normally be given in writing. However, the notice may be given orally in an oral hearing, in which case the panel will consider whether any additional steps are required to allow the parties adequate opportunity to provide input on that issue.

WCAT will apply a similar approach in considering appeals of decisions by Board officers which are appealable directly to WCAT (concerning discriminatory action matters and applications for reopening).

#### **14.40 Outcome**

With respect to each issue addressed in a WCAT decision, the panel will normally state whether the appeal is allowed (in whole or in part) or denied. In the conclusion (at the end of the decision), the WCAT panel will also state whether the decision under appeal was confirmed, varied or cancelled and provide a summary of its determinations on each issue.

In deciding an appeal, the panel may confirm, vary or cancel the appealed decision or order [s. 253(1)]. The meaning of these terms is as follows:

Confirm: On every issue addressed in the WCAT decision, the WCAT panel agrees with the determinations made by the prior decision-maker in the decision or order under appeal, though not necessarily with the reasons for those determinations.

**Vary:** On one or more issues addressed in the WCAT decision, the WCAT panel reached a conclusion which differs, in whole or in part, from the conclusion or outcome provided by the prior decision-maker, and provides a changed decision.

**Cancel:** The WCAT panel disagrees with the determinations made on every issue covered by a decision under appeal and determines that the decision should be set aside without a new or changed decision being provided in its place. Cancellations will normally only be ordered with respect to prevention decisions.

On an appeal concerning a reopening application [s. 240(2)], the panel will determine that the matter that was the subject of the application under s. 96(2) [s. 253(2)]:

- (a) must be reopened; or,
- (b) may not be reopened.

A WCAT final decision on an appeal must be made in writing with reasons [s. 253(3)].

The decision will be signed by all members of the panel that made the decision. Written reasons will be provided for any dissent, signed by the panel member.

A panel member may authorize another WCAT member to sign on their behalf, where the panel member has approved the decision but will be absent when the decision is being mailed.

If a WCAT panel consists of more than one member, the decision of the majority is the panel's decision but, if there is no majority, the decision of the presiding member is the panel's decision [s. 238(9)].

If a member of a precedent panel is unable to complete an appeal, the chair may direct the remaining members of the panel to complete the appeal and make a decision [s. 238(10)].

Any decision or action of the chair or of a WCAT panel under Part 4 is final and conclusive and is not open to question or review in any court [s. 255(1)]. The Board must comply with a final WCAT decision on an appeal [s. 255(3)].

Given the final and conclusive nature of a WCAT decision, a panel cannot retain jurisdiction over the Board's implementation of the panel's decision.

WCAT decisions should clearly distinguish between the provision of a binding and conclusive finding on an issue under appeal, and a recommendation which is intended as a gratuitous comment with no legal status.

## **15.00 POST-DECISION**

### **15.10 Publication of WCAT Decisions**

WCAT decisions on appeals will be written without names or other information which could identify the parties [s. 234(2)(g)]. WCAT decisions will be posted on its internet site in a searchable form (see items 21.00 to 21.80).

WCAT precedent panel decisions will be submitted for publication in the *Workers' Compensation Reporter*. The WCAT internet site will also permit searching of all WCAT precedent panel decisions.

### **15.20 Reconsideration or Completion of WCAT Decisions**

#### **15.21 Correction**

A WCAT panel may, on request by a party or on the panel's own initiative, issue an addendum to correct a clerical or typographical error in a decision. This may be done where the text of the decision did not correctly reflect the intent of the panel. This process may not be used to engage in a reconsideration of the decision. This is similar to the process used by the courts to issue a "*corrigendum*" to correct a clerical or typographical error in a judgment. A correction will be issued in the form of an attachment or addendum to the original decision.

#### **15.22 Incomplete Decision**

Once a tribunal has issued its decision, it is considered "*functus*" and it has no further jurisdiction to address the matter. However, if a WCAT panel fails to address an issue which was before it, its decision is not complete. Accordingly, the panel is not "*functus*", and may proceed to complete its decision on the missed issue.

If the decision has not yet been completed, that is, a panel has failed to decide an issue that was properly before it, tribunal counsel may ask the panel to complete their adjudicative function. This will be issued by the panel in the form of an addendum to the original decision and will be sent to all persons who received copies of the original findings.

A correction or supplement to a decision will be issued in a form which may be appended to the original decision. Both the original decision, and the correction or supplement, will be posted to the internet.

#### **15.23 New Evidence Not Previously Available (Section 256)**

Any WCAT action or decision, whether a summary decision (such as one concerning an application for an extension of time to appeal or a deemed abandonment) or a decision on the merits, is final and conclusive and is not open to question or review in any court

[s. 255(1)]. There are two grounds on which a WCAT decision may be further considered or reconsidered.

A party to a completed appeal may apply to the chair for reconsideration of a decision if new evidence has become available or been discovered. The chair may refer the decision for reconsideration if the chair is satisfied that the new evidence referred to in the application [s. 256(3)(a) and (b)]:

- (a) is substantial and material to the decision, and
- (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

A party to a completed appeal may apply for reconsideration of a decision on the basis of new evidence on one occasion only [s. 256(4)]. Caution should be exercised in bringing an application for reconsideration on the basis of new evidence: if unsuccessful, it bars any further application on the basis of new evidence which might become available in the future.

## **15.24 Incomplete or Void Decisions**

WCAT may set aside or “void” one of its decisions on the basis of certain common law grounds or principles. These consist of clerical mistakes or omissions, fraud, or an error of law “going to jurisdiction” (including a breach of the rules of natural justice). Where an applicant is successful in impugning a WCAT decision, and the purported decision is found to be incomplete or void, WCAT has a responsibility to complete its task of providing a valid decision.

A tribunal’s authority at common law to void its own decision (and to then address the matter anew so as to complete its task of providing a valid decision) on the basis of an error of law going to jurisdiction, was confirmed in a decision of the British Columbia Supreme Court in *Duncan Leslie Atchison v. WCB*, Victoria Registry No. 01 2685, November 29, 2001. The Court rejected the argument that the Appeal Division’s authority to review its own decisions was limited to the new evidence grounds of s. 96.1. Mr. Justice Vickers reasoned:

[18] There is no doubt the courts have the power of review. However, this does not mean that administrative tribunals lack the power to reconsider a decision, particularly where the decision is made without jurisdiction. The doctrine of *functus officio* applies to administrative tribunals based, however, “on the policy ground which favours finality of proceedings, rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal.” *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at 849. The application of the principle is more flexible and tribunals are able to reopen decisions in order to discharge the function committed to them by the enabling legislation. **In particular, where a tribunal has made an**

**error of jurisdiction, it is entitled to correct such an error:** *Chandler, supra; Right to Rediscover [sic] Appeal Division Decisions* (1993), 10 W.C.[R]. 127 (A.D.); *Re Trizak Equities Ltd. v. Area Assessor Burnaby New Westminster* (1983) 147 D.L.R. (3d) 637 (B.C.S.C.).

[emphasis added]

An appeal from this decision was denied by the British Columbia Court of Appeal on August 27, 2003 (*Powell Estate v. Workers' Compensation Board*, 2003 BCCA 470). The BCCA reasoned:

[17] The first question is whether a panel of the Appeal Division has jurisdiction to determine that a decision of another panel of the Appeal Division was a nullity as being made beyond its jurisdiction: *Chandler v. Alta. Assoc. of Architects*, [1989] 2 S.C.R. 848, citing with approval *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (B.C.S.C.).

[18] On those authorities, the answer must be, in my view, as found by Mr. Justice Vickers. The Appeal Division was able to reconsider the matter and correct its own jurisdictional error.

An application for reconsideration of a WCAT decision should be addressed to the attention of WCAT's tribunal counsel office.

The authority to consider an application on the common law grounds is discretionary in nature. WCAT will hear an application for reconsideration on the basis of the common law grounds on one occasion only. WCAT will not hear a further application for reconsideration of a WCAT decision provided in response to an application for reconsideration on the common law grounds, unless a new breach of natural justice is alleged in relation to the second decision.

An application on the basis of the common law grounds concerns the validity of the initial decision. Accordingly, such applications are often made soon after the decision. However, new evidence to support an application under s. 256 may not arise until a few years after the decision. For that reason, separate applications may be made on the basis of the common law grounds, or on the basis of new evidence under s. 256, but each type of application is limited to one occasion only. It is also open to a party to seek reconsideration on both grounds at the same time.

## **16.00 PREVENTION APPEALS**

Except as stated below, where an appeal is made to WCAT by any party concerning an occupational health or safety matter under Part 3, WCAT requires that a participating employer (whether the appellant or the respondent) post a notice to bring the appeal to the attention of the employees of the employer [s. 246(2)(h)]. A copy of the posted notice must be provided to WCAT. Where the employer, as an appellant, fails to

comply with the posting requirements, WCAT may deem the employer's appeal to be abandoned [s. 246(5)].

No posting is required for appeals concerning a discriminatory action matter under s. 153, or concerning an order under s. 195 to cancel or suspend a certificate under Part 3 (i.e. of an occupational first aid attendant or instructor [s. 159], a medical certificate of a worker's fitness for a specific type of work such as diving [s. 162, Section 24.10 of the Occupational Health and Safety Regulation], or a certificate of a blaster or blasting instructor [s. 163]).

Potential respondents in an appeal of a review officer's decision on an occupational health and safety issue include all those with standing to appeal such a decision:

- (a) a worker
- (b) an employer
- (c) a supplier, union or owner, as defined in s. 106
- (d) a member of the deceased worker's family

A WCAT panel, at its discretion, may invite participation by the WCB as set out in item 4.32.

## **17.00 DISCRIMINATORY ACTION APPEALS (Section 153)**

A determination, an order, a refusal to make an order or a cancellation of an order by a Board officer under s. 153 concerning a discriminatory action complaint is appealable directly to WCAT [s. 240(1)]. Such issues are outside the jurisdiction of the Review Division.

The time limit for appealing a Board decision under s. 153 to WCAT is 90 days. The following persons may bring an appeal [s. 241(4)]:

- (a) a worker
- (b) an employer
- (c) a union as defined in s. 106.

The same parties may participate as respondents.

There is no requirement for posting notice of such an appeal in the workplace.

## **18.00 CERTIFICATE APPEALS**

These appeals concern an order under s. 195 to cancel or suspend a certificate under Part 3 of the Act, of:

- an occupational first aid attendant or instructor [s. 159],

- a medical certificate of a worker's fitness for a specific type of work such as diving [s. 162, Section 24.10 of the Occupational Health and Safety Regulation], or,
- a certificate of a blaster or blasting instructor [s. 163].

There is no respondent to a certificate appeal, although WCAT has a discretion to invite the employer to participate as an interested person. No posting in the workplace is required.

## **19.00 ASSESSMENT APPEALS**

An employer or an independent operator who is directly affected by a decision of the review officer may appeal a decision respecting an assessment or classification matter, including personal optional protection coverage [s. 241(2)].

An employer may request review by a review officer of their classification unit, but not their rate group or industry group [s. 96.2(2)(c) and (d)]. (The complex wording of s. 96.2(2)(c) stems from the different terminology used in the current assessment classification structure, as it relates to the framework in the Act involving classes and subclasses.) The decision by a review officer concerning an employer's classification unit is appealable to WCAT.

A WCAT panel, at its discretion, may invite participation by the WCB as set out in item 4.32.

## **20.00 CERTIFICATION TO COURT – SECTION 257**

### **20.10 General**

The power to provide a certificate in a legal action is granted to WCAT in s. 257 of the Act.

#### **Certification to court**

- 257 (1)** Where an action is commenced based on
- (a) a disability caused by occupational disease,
  - (b) a personal injury, or
  - (c) death,
- the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court.
- (2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether
- (a) a person was, at the time the cause of action arose, a worker within the meaning of Part 1,

- (b) the injury, disability or death of a worker arose out of, and in the course of, the worker's employment,
  - (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer, or
  - (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1.
- (3) This Part, except section 253(3), applies to a proceeding under this section as if the proceedings were an appeal under this Part.

## **20.20 Standing to Make Application**

The court or any party to a legal action may, any time after a legal action has been commenced, request a certificate under s. 257 of the Act.

WCAT may provide a certificate even though the plaintiff has not applied for workers' compensation benefits, and there has been no decision by a Board officer (or review officer). WCAT will, in considering a s. 257 application, consider all of the evidence and argument anew regardless of a prior decision by a Board officer.

## **20.21 Timing of Application**

There is no time limit for making a s. 257 application. However, the applicant must ensure that the application is made well in advance of any trial date so as to leave adequate time for submissions by the parties and consideration by WCAT. The requirement of s. 253 that WCAT issue a decision within 180 days does not apply to a s. 257 application. However, the 180-day time frame should be viewed as the minimum time frame required. Accordingly, WCAT generally requires that a s. 257 application be made at least six months in advance of any trial date, or the trial date may need to be adjourned. Similarly, if a request is being made that the certificate be provided by a specified date so that the parties will be ready for trial, the request for a certificate must precede that date by at least six months. These are minimum time frames, and are dependent on the parties providing their evidence and submissions on a timely basis. The evidence and submissions by all participating parties, and any responses or rebuttal, should be completed within a time frame which leaves 90 days remaining for decision making by the WCAT panel.

In establishing time frames for submissions by the parties, WCAT will take into account the requirements of the legal action, and, in particular, any trial date which has been scheduled.

## **20.22 Pleading a Defence under Section 10**

WCAT will consider an application for a certificate under s. 257, without requiring a defence under s. 10 of the Act to be plead in the Statement of Defence. (Pleading such a defence may still be necessary for the purposes of the legal action). It is a



requirement that the application come within the terms of s. 257(1) as involving an action based on a disability caused by occupational disease, a personal injury, or death, and that the matter sought to be determined be relevant to the action and within the Board's jurisdiction under the Act [s. 257(2)].

## **20.23            Application for Compensation (Form 6)**

It is prudent for the plaintiff to file a Form 6 *Application for Compensation & Report of Injury or Occupational Disease* on a provisional basis pending the outcome of any s. 257 application. This protects the plaintiff's right to proceed with a workers' compensation claim, should the legal action ultimately be barred. The general requirement of s. 55 of the Act is that an application for compensation be filed within one year of the date of injury. Reference may be made to s. 10 of the Act regarding subrogation and election.

## **20.24            Initiating the Application for Certification**

A request for a s. 257 certificate must be made in writing to WCAT.

WCAT must be advised of the trial date, if the matter has been set for trial. The following information should be provided:

- (a) the birth date(s), current address(es) and social insurance number(s) of the parties to the legal action;
- (b) any claim numbers for related Workers' Compensation Board claims;
- (c) names of the employer(s) of all plaintiffs, defendants and third parties, at the time the cause of action arose, and current addresses for these employers;
- (d) current or past Workers' Compensation Board Assessment Department registration numbers of any employer or person with personal optional protection coverage;
- (e) copies of the following documents:
  - Writ of Summons;
  - Statement of Claim and Statement of Defence, if filed;
  - any statements made to I.C.B.C. (in motor vehicle accident cases);
  - transcripts of Examinations for Discovery, if held;
  - any Third Party pleadings;
  - any relevant affidavits and motions filed in the legal action; and,
  - Notice of Trial (if scheduled).

All parties to the legal action are notified by WCAT and are given the opportunity to participate in the s. 257 application. The matter will generally proceed by way of written submissions, although a party may request an oral hearing. If counsel wish to postpone the provision of submissions pending the completion of discoveries, this will normally be approved by WCAT.

### **20.30 Standing of Other Persons Affected by the Decision**

Other persons who might be adversely affected by the s. 257 determination may be given standing to participate, even though they are not a party in the legal action. This would include, for example, the putative employer of a party who is alleged to have been a worker at the time of their injury. Natural justice requires that the alleged employer have the opportunity to participate, in view of the possibility that the s. 257 proceeding may lead to a claim for workers' compensation benefits being established.

### **20.40 Oral Hearing**

The matter may proceed by way of oral hearing. A preliminary request for an oral hearing should be made in writing, addressed to WCAT, and should provide reasons as to why an oral hearing is necessary. A request for an oral hearing will normally be granted by the panel if a significant issue of credibility is involved. A WCAT panel has the discretion to convene an oral hearing, whether or not one is requested, if the panel considers this necessary.

### **20.50 Submissions**

#### **20.51 Requesting Party Provides First Submission**

The party bringing the s. 257 application is asked to provide the first submission. This submission should identify the determinations requested, set out the factual background, and provide all the evidence and argument necessary to WCAT's consideration of the issues. Counsel should not assume that WCAT will carry out any further investigations, although the panel has the authority to undertake further inquiries if the panel considers this necessary.

### **20.52 Evidence**

Evidence may be submitted in any form, such as handwritten statements by witnesses, business records, sworn affidavits, transcripts of evidence given under oath at an Examination for Discovery, or *viva voce* evidence at an oral hearing before WCAT. While the strict rules of evidence do not apply, the form of the evidence may affect the weight given to the evidence.

### **20.53 Legal Argument and Submissions**

Part 4 of the Act (except the 180-day time frame for decision making) applies to proceedings under s. 257 as if the proceedings were an appeal.

Legal argument should include reference to the policies of the board of directors. Under s. 250(2) and 251(1), WCAT must apply a policy of the board of directors that is applicable in a case, unless the policy is so patently unreasonable that it is not capable of being supported by the Act and regulations.

Legal argument should also include reference to any applicable WCAT precedent panel decisions. A decision by a panel appointed under s. 238(6) constitutes a precedent. Such precedent decisions are binding on future WCAT panels, unless [s. 250(3)]:

- (a) the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the panel's decision, or
- (b) subsequent to the panel's decision, a policy of the board of directors relied upon in the panel's decision was repealed, replaced or revised.

WCAT is not otherwise bound to follow legal precedent [s. 250(1)], however, it does strive for consistency in its decision making. If WCAT is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the panel must resolve that issue in a manner that favours the worker [s. 250(4)].

All Appeal Division decisions since January 1, 2000, including s. 11 determinations since November 1992 which were filed in a British Columbia court registry, are available on the Board's internet web site located at <http://www.worksafebc.com>.

All WCAT decisions since March 3, 2003, are publicly accessible at [www.wcat.bc.ca](http://www.wcat.bc.ca). Precedent panel decisions are published in the WCR, and are searchable on the WCAT website.

## **20.54 Exchange of Submissions**

The first submission is provided to the participating parties, who are asked to provide their submissions in reply. Their responses are provided to the first party, who is given an opportunity to provide rebuttal argument. A three-week time frame is normally granted for the provision of each submission, which may be extended upon request. A shorter time frame may be required if a trial date is impending.

Counsel must provide a copy of their submissions to opposing counsel and to any other interested party at the same time as they send their submissions to WCAT.

## **20.55 Use of Existing WCB Files**

If a WCB claim file has been established, or if an employer assessment file or prevention file exists, it will be accessible by WCAT panel. Disclosure of a file, for the purposes of the legal action, may be obtained by writing to the legal disclosures clerk at the Board. A Court Order under Rule 26(11) of the British Columbia, *Rules of Court* or the written consent of the "worker" or employer, as the case may be, is required.

## **20.56 Scope of Authority under Section 257**

The parties should clearly identify the issues on which determinations are requested, and ensure that evidence and submissions are provided in connection with each issue.

WCAT can determine any matter that is relevant to the action and within its competence under the Act, including whether:

- (a) a plaintiff, defendant or third party was, at the time the cause of action arose, a worker or employer within the meaning of Part 1 of the Act;
- (b) injury, disability or death of a plaintiff arose out of, and in the course of, the plaintiff's employment;
- (c) any action or conduct of a defendant, third party, employer, the employer's servant or agent, which caused the alleged breach of duty of care, arose out of, and in the course of employment;
- (d) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer; and
- (e) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1 of the Act.

## **20.60            Decision**

Once written or oral submissions are complete, and the matter has been considered, the panel will issue both a certificate and written reasons for its decision. Both documents will be signed by the WCAT member(s) who made the decision. Unfiled copies will be provided to each party, followed by filed copies after they have been entered in the legal action with the Court Registry.

WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined under Part 4, including all matters that WCAT is requested to determine under s. 257 [s. 254(c)]. The WCAT decision is final and conclusive and is not open to question or review in any court [s. 255].

## **20.61            Effect on the Legal Action**

WCAT does not determine the effect of the certificate on the legal action. WCAT does not address whether a legal action is barred pursuant to s. 10 of the Act. Following a s. 257 certificate, a court application may be made in Chambers to determine whether the action should be dismissed based on s. 10 of the Act and the findings contained in the certificate.

## **20.70            Other Matters**

WCAT will deal only with the request for a certificate under s. 257. Inquiries concerning the filing of a claim for compensation should be made to the WCB.

Inquiries as to the Board's subrogated interest in a legal action under s. 10 of the Act on claims made to the WCB should be directed to the Legal Services Division of the Board.

## **21.00 PUBLIC ACCESS TO WCAT DECISIONS**

### **21.10 General**

Section 234(2)(g) provides that the WCAT chair is responsible for providing for public access to WCAT decisions in a manner that protects the privacy of the parties to the appeal. WCAT must also comply with the confidentiality and privacy provisions of both the *Workers Compensation Act* (s. 260) and the *Freedom of Information and Protection of Privacy Act*.

WCAT will establish an internet web site, with a search engine, which will permit public access to WCAT decisions without identifiers, and to unedited s. 257 certificates which have been filed in British Columbia court registries. As s. 257 certificates are publicly accessible after being filed in the legal action at a British Columbia court registry, identifiers are not removed in that category of decision.

In general, decisions will be written without parties' personal identifiers so that no severing of identifying information will be required apart from removal of the header, and covering page(s). Covering pages (to be removed before publication) include the front page of the decision which identifies the parties, the distribution list, and any listing of coded identifiers used in the decision (if applicable). Primary responsibility for ensuring that a decision does not contain identifiers, and is in a form which may be posted to the internet without violating privacy, rests with the panel that made the decision.

### **21.20 Guidelines for Writing Decisions without Identifiers**

#### **21.21 Confidentiality and Privacy**

Information which in and of itself would not need to be protected (such as geographic locations) will be protected to the extent necessary to safeguard confidentiality and privacy of the parties. Where there is doubt as to whether particular data would tend to identify a party and as to whether a descriptive term or coded initial should be used, the doubt should generally be resolved to protect confidentiality and privacy. WCAT members will write in a manner that will allow the decision to be accessible to the general public, without compromising confidentiality and privacy.

#### **21.22 Names**

The following types of names will not be used in WCAT decisions: names of parties (such as the worker and employer), names of lay witnesses, and names of expert witnesses where the use of their names would tend to identify the parties (e.g. such as where the worker's attending physician practises in a small town).

Names of expert witnesses such as physicians will normally be used. names taken from a public source (such as a published medical article or textbook, a court judgment, or *Hansard*) will also be used.

The highest level of protection of privacy is to be afforded to parties and lay witnesses. They may be identified by role (the worker, employer, manager, etc.) or by a coded initial which does not correspond to their name (Mr. Smith would be Mr. A rather than Mr. S).

Expert witnesses, such as physicians, may be referred to by name. Where a panel considers that use of the physician's name might tend to identify the worker, the expert witness may be referred to by title (e.g. the worker's attending physician) or by an actual initial. A coded initial may be used for expert witnesses at the discretion of the panel where the panel considers that using the actual initial might serve to identify a party or lay witness.

Names of treating facilities will be dealt with in a similar fashion - they may be referred to by their name, or by title (e.g. a local hospital or physiotherapy clinic) or by an actual initial. A coded initial may be used where the name of the facility might serve to identify a party or lay witness.

Other decision makers will normally be referred to by title (e.g. claims adjudicator, assessment officer, review officer, etc.). An actual name or initial may be used at the panel's discretion.

### **21.23 File Copy of Decision and Covering Pages**

The file copy of a decision will include a "header" at the top of each page with identifying information (name and file number) to ensure the accuracy and integrity of file records. The parties to the appeal or other matter will be provided with a copy of the decision with the identifying "header" and any "covering" pages (the front page of the decision which identifies the parties and the distribution list). If coded initials are used (e.g. witnesses A, B and C), the covering documentation may also include a listing as to the identity associated with each coded initial if the panel consider this necessary. A complete copy of the decision including the "header" and covering pages will also be placed on the Board's file, but will not be publicly accessible on the internet.

The "header" and covering pages will be removed from the WCAT decision before it is made publicly accessible. The decision placed on the internet will include the WCAT decision number for citation purposes.

### **21.24 Names of Representatives**

Names of representatives may be used. They may also be referred to by their role (e.g. the worker's union representative, the worker's lawyer, counsel for the employer, etc.).

### **21.25 File or Appeal Numbers**

WCB file numbers (worker's claim file number, or employer's registration number) will not be included in the body of a decision. Similarly, WCAT, Appeal Division or Review Board appeal numbers will not be used in the body of a decision. WCAT, Appeal Division or Review Division decision numbers may be cited in decisions.

### **21.26 Payroll, Revenue Data, and Salary Information**

Employers' payroll and revenue data will be protected in decisions. In some cases, protecting the identity of the employer will be sufficient as the payroll or revenue data would not be identifiable by itself. Where the reasons and analysis in a WCAT decision might tend to identify the employer, it may be necessary to refer to the payroll or revenue data in general or approximate terms.

If the decision cannot be written in a meaningful fashion without providing specific figures in the body of the decision, it may be necessary to use a second level of editing (see below).

Similarly, in addressing issues concerning a worker's employability, care must be taken to avoid disclosing the salaries paid by particular identifiable employers. This might arise, for example, in connection with a worker's job search efforts and contacts with various employers.

### **21.27 Geographic Locations**

Geographic locations may be used where these refer to a country, province, or large city such as Vancouver or Victoria. Geographic locations will not be used where this might lead to the identification of a party or lay witness. In that event, it is preferable to use a general description (e.g. a northern community) rather than identifying the specific town or community.

Names of treating facilities such as a local physiotherapy clinic or hospital may be utilized in the same fashion as physician's names. Descriptive references may be used in place of names where the name would tend to identify the worker.

### **21.30 Second Level of Editing in Exceptional Circumstances**

In limited and exceptional circumstances, it may be appropriate for a WCAT panel to issue a decision to the parties which is further edited for privacy considerations before the decision is made accessible to the public. It is anticipated this will occur rarely, such as in cases where the ability of parties to understand the facts, evidence or reasoning will be made unduly difficult by complying with the above guidelines. In this event, it will be the responsibility of the WCAT panel issuing the decision to provide the two versions of the decision.

## **21.40 Audience**

The fact that WCAT decisions will be made publicly accessible does not mean the decisions must necessarily be written for the broader audience. The parties are the primary focus for the decision, while recognizing the broader public interest. The panel will determine the extent to which it is necessary to set out the background and evidence necessary to address the issues raised by the parties and to set out the basis for the panel's decision.

## **21.50 Quotations**

Quotations contained in WCAT decisions must, for obvious reasons, also be edited to protect privacy. This will normally be accomplished by substituting a descriptive term for a name, and using square brackets to show the change, e.g. [the worker].

## **21.60 Corrections or Revisions — Inadvertent Error**

WCAT will take appropriate precautions to ensure that decisions posted to the WCAT internet website do not contain unauthorized identifiers. However, should identifying information remain in a decision by inadvertence, the decision will be re-edited to ensure compliance with these guidelines.

## **21.70 Section 257 Certification to Court**

Section 257 certificates are publicly accessible after being filed in the legal action, at a British Columbia court registry. Accordingly, WCAT decisions under s. 257 of the Act filed in British Columbia court registries will be made publicly available without removal of names and other identifying information.

However, s. 257 decisions provided for filing in court registries outside of British Columbia will also be edited for privacy, as those decisions are provided to the parties for filing in the legal action rather than being filed in the legal action by WCAT.

## **21.80 Exception**

The WCAT chair may direct that a WCAT decision not be made publicly accessible through posting on the WCAT internet website. This may be done where a secondary edit fails to protect the privacy of a party or renders the decision unintelligible.

Consideration may be given to a request by a party not to place a decision on the website, where the case is of a particularly identifiable nature and contains sensitive personal information. In general, however, privacy will be protected based on the other guidelines set out above.



## **22.00 CODE OF CONDUCT FOR WCAT EMPLOYEES**

Section 235 provides that employees necessary to exercise the powers and perform the duties of WCAT may be appointed under the *Public Service Act*. WCAT may also engage or retain consultants or contractors that WCAT considers necessary. All employees, officers, consultants or contractors engaged or retained by WCAT, are bound by, and must agree to be bound by, the Province of British Columbia *Standards of Conduct for Public Service Employees*. This is accessible on the internet at:

<http://www.bcpublicservice.ca/policies/Directives/5-8/05-4soc.htm>

## **23.00 CODE OF CONDUCT FOR WCAT MEMBERS**

### **23.10 Objective**

The objective of this directive is to describe the standards of conduct required of all Workers' Compensation Appeal Tribunal (WCAT) members.

### **23.20 General**

The requirement to comply with the Code of Conduct is a condition of appointment. Members who fail to comply with these standards may be subject to disciplinary action up to and including dismissal.

This Code establishes rules of conduct governing the professional and ethical responsibilities of WCAT members, to enhance public confidence in their integrity and fairness. The Code establishes reasonable, minimum expectations governing the conduct of all WCAT members (including the chair, vice chairs, extraordinary members, and temporary substitute members appointed under s. 232(10)). It is the responsibility of each WCAT member to ensure his or her own compliance with this Code. A WCAT member also has an obligation to bring to the attention of another WCAT member, any circumstance which raises a reasonable apprehension as to a possible contravention of this Code by a member.

### **23.30 Conflict of Interest / Reasonable Apprehension of Bias**

WCAT members must exercise their duties and responsibilities in a neutral, impartial manner. WCAT members must avoid all real or apparent conflicts of interest and must arrange their private affairs in a manner intended to avoid the possibility of a real or apparent conflict of interest arising in their role as a WCAT member. A conflict of interest arises when a WCAT member's relationships, financial interests or activities inhibit, or may reasonably be thought to inhibit, the impartial discharge of his or her obligations as a WCAT member.

A WCAT member must not participate in a proceeding where the member has (or has had within the last 12 months) a significant or close personal, professional or business relationship with a party, a party's representative, or witness to a proceeding.

For greater certainty:

- (a) a "real conflict of interest" occurs when a WCAT member has a personal attitude, interest (either pecuniary or non-pecuniary), relationship or association (past or present) that impairs the WCAT member's ability to discharge her/his duties fairly and impartially;
- (b) an "apparent conflict of interest" exists when a reasonable, well-informed person could have a reasonable perception or apprehension that the existence of a personal attitude, interest (either pecuniary or non-pecuniary), relationship or association (past or present) could impair the WCAT member's ability to discharge her/his duties fairly and impartially;
- (c) the fact that a WCAT extraordinary member has been appointed as having experience in employers' interests, or experience in workers' interests, and maintains active contact with the respective constituency, does not, by itself, place that WCAT member in a real or apparent conflict of interest;
- (d) a "proceeding" includes any matter before WCAT, including an appeal, application, or request for reconsideration, and includes all preliminary and post-decision actions in relation to a matter.

It is the responsibility of each WCAT member to actively inquire into and consider any circumstance which might suggest a possible conflict of interest or raise a perception of bias regarding any of the member's responsibilities. On recognizing a possible conflict or an issue of bias, the WCAT member should consider whether it would be appropriate to withdraw. This may involve discussion with other panel members, if any, or the registrar, chair, or tribunal counsel.

As well, members have a duty to report any situation that they believe contravenes the law, misuses public funds or assets, or represents a danger to public health and safety or a significant danger to the environment. Members can expect such matters to be treated in confidence, unless disclosure of information is authorized or required by law.

## **23.40 Procedure**

A WCAT member who has reason to believe he or she has a real or apparent conflict of interest with respect to a proceeding to which he or she has been assigned, must advise their team leader or the registrar as soon as possible. If a WCAT member is in doubt as to whether or not he or she has a real or apparent conflict of interest, he or she should seek the advice of the chair, tribunal counsel, or the registrar.

If a WCAT member reasonably believes another WCAT member has a real or apparent conflict of interest with respect to a proceeding to which the latter WCAT member has been assigned, the WCAT member holding the reasonable belief should bring the

matter to the attention of the latter WCAT member. In the event this does not resolve the matter, the WCAT member holding the reasonable belief must bring the matter to the attention of the chair, tribunal counsel, or registrar.

If a party to a matter that is then currently before a WCAT panel raises an allegation of a real or apparent conflict of interest against a member of the panel, it is suggested that the panel and parties together discuss the matter as soon as practicable after the allegation is raised. It is expected that parties will make any such allegations at the earliest opportunity after learning the circumstances that gives rise to any such allegation. If the matter cannot be resolved through a discussion among the panel and the parties, and the panel considers it necessary, the party making the allegation will be required to provide details in writing to the panel of the evidence and argument it relies upon to establish the allegation. At the panel's option, the panel can accept the details orally. If after considering that evidence and argument, and any evidence and argument the other parties present on the issue, the panel determines a real or apparent conflict of interest exists, the panel will be reconstituted. If the panel concludes neither a real nor apparent conflict of interest exists, the panel must inform the parties in writing, and provide reasons for the panel's determination. This may be by way of a preliminary decision dealing only with the conflict allegation, or as a preliminary determination made as part of a decision on the appeal or other proceeding.

If a party raises an allegation of a reasonable apprehension of bias or otherwise challenges the neutrality of a WCAT member in an oral hearing, that member may either adjourn the hearing to consider the matter and consult with the registrar, the chair, or tribunal counsel, or may proceed with the hearing, note the objection for the record, and provide a written determination concerning the objection as a preliminary decision or as part of the WCAT decision on the appeal or other proceeding.

If the WCAT panel elects to provide a separate preliminary decision concerning a possible apprehension of bias, a party has the right to seek reconsideration by the chair of the preliminary decision, on the basis of an error of law going to jurisdiction (including a breach of natural justice). Similarly, where such an allegation is addressed as part of the WCAT decision, a party has the right to seek reconsideration by the chair of the decision, on the basis of an error of law going to jurisdiction (including a breach of natural justice).

Where the possibility of a conflict of interest or bias becomes apparent to a WCAT member during a hearing, the WCAT member must identify the potential problem to all the parties, and may invite oral submissions on the matter. The WCAT panel may adjourn to reach an oral or written decision on the matter, or the WCAT member may withdraw from the proceeding if the member considers it appropriate.

If a WCAT member withdraws from a proceeding, before WCAT on the basis of a real or apparent conflict of interest, the WCAT member must not participate in any manner in the proceeding.

### **23.50 Conduct of WCAT Members**

WCAT members must approach the hearing and determination of every appeal or application with a mind that is genuinely open, with respect to every issue, and open to persuasion by convincing evidence and argument. WCAT members must avoid doing or saying anything that would cause a reasonable, well-informed individual to think otherwise. WCAT members must treat hearing participants in a manner that is respectful and courteous.

At any stage of a proceeding before WCAT, WCAT members must not communicate about the proceeding, directly or indirectly, with any party, representative or witness, except in the presence of all parties and/or their representatives, or unless the correspondence is copied to all the parties and/or their representatives.

WCAT members must be conscientious in the performance of their duties, and must ensure that their outside activities do not interfere with the impartial, effective and timely performance of their responsibilities. WCAT members must not engage in activities that bring WCAT into disrepute. Unless so authorized by the chair, WCAT members must not perform outside activities in a manner that appears to be officially supported by or connected to WCAT, or appears to represent WCAT opinion or policy. WCAT members must not use their position in WCAT to lend weight to the public expression of a personal opinion. A WCAT member must not use WCAT letterhead for personal correspondence or non-WCAT related matters.

WCAT members will not engage in discriminatory behaviour contrary to the British Columbia Human Rights Code.

WCAT members will not engage in harassment of a personal, sexual or racial nature. WCAT members will not engage in retaliation against anyone raising a concern or making a complaint in good faith under this Code.

### **23.51 Collegial Responsibilities**

The conduct and language of members in the workplace must meet acceptable social standards and must contribute to a positive work environment. A member's conduct must not compromise the integrity of WCAT or the public service.

WCAT members will foster a collegial approach in performing their adjudicative functions and exchange views, information and opinions in a spirit of respect for the independence of each other as decision makers. A WCAT member will not publicly comment, orally or in writing, on any matter before WCAT, or a colleague's conduct, and shall not divulge confidential information unless legally required or appropriately authorized to do so.

A WCAT member will be available for consultation or discussions on any policy, legal or practice or procedural issue, and will treat the views and opinions of colleagues with respect.

### **23.52 Legal Proceedings**

Members must not sign affidavits relating to facts that have come to their knowledge in the course of their duties for use in court proceedings unless the affidavit has been prepared by a lawyer acting for WCAT in that proceeding or unless it has been approved by a ministry solicitor in the Legal Services Branch, Ministry of Attorney General. In the case of affidavits required for use in arbitrations or other proceedings related to employee relations, the Labour Relations Branch, PSERC, will obtain any necessary approvals. Members are obliged to cooperate with lawyers defending the Crown's interest during legal proceedings.

### **23.53 Working Relationships**

Members and employees who are direct relatives or who permanently reside together may not be employed in situations where:

- (a) a reporting relationship exists where one member/employee has influence, input or decision-making power over the other employee's performance evaluation, salary, premiums, special permissions, conditions of work and similar matters; or
- (b) the working relationship affords an opportunity for collusion between the two individuals that would have a detrimental effect on WCAT's interest.

The above restriction on working relationships may be waived provided that the chair is satisfied that sufficient safeguards are in place to ensure that WCAT's interests are not compromised.

Members are to disqualify themselves as participants in personnel decisions when their objectivity would be compromised for any reason or a benefit or perceived benefit could accrue to them.

### **23.54 Outside Remunerative and Volunteer Work**

Members may engage in remunerative employment with another employer, carry on a business, receive remuneration from public funds for activities outside their position or engage in volunteer activities provided it does not:

- (a) interfere with the performance of their duties as a member of WCAT;
- (b) bring WCAT or the government into disrepute;
- (c) represent a conflict of interest or create the reasonable perception of a conflict of interest;
- (d) appear to be an official act or to represent WCAT or the government opinion or policy;

- (e) involve the unauthorized use of work time or government premises, services, equipment or supplies to which they have access by virtue of their employment;
- (f) gain an advantage that is derived from their employment as a member of WCAT; or,
- (g) result in payment while the member is in receipt of short- and or long-term disability plan payments.

### **23.55 Skills and Training**

A WCAT member will endeavour to develop and enhance their knowledge of both substantive and procedural matters related to WCAT appeals and proceedings, and will participate in ongoing training and professional development.

A WCAT member will make him/herself available to participate, as assigned, in other functions and activities such as training new members, participating in committees, or developing practices and procedures.

### **23.56 Oral Hearings**

- (a) WCAT members will approach every hearing with an open mind on every issue, and will avoid doing or saying anything that could cause any person to think otherwise.
- (b) WCAT members will treat all participants in the hearing process with courtesy and respect.
- (c) WCAT members will make every effort to ensure that all participants treat each other with courtesy and respect
- (d) WCAT members will allow parties reasonable latitude to present their case without interruption, subject to the presiding member's obligation to control the hearing for relevance and to ensure that the procedure is fair.
- (e) WCAT members will explain the hearing procedure and the issues to be decided. The explanation will be consistent with the expertise of the participants.

### **23.60 Confidentiality**

As a result of their duties, WCAT members acquire confidential information. In accordance with s. 260 of the Act, WCAT members must not disclose to anyone such confidential information except as may be necessary to discharge their obligations under Part 4 of the Act, when required by law, or authorized under the *Freedom of Information and Protection of Privacy Act* (FIPPA). WCAT members will comply with guidelines established by WCAT to protect the privacy and security of confidential records (see item 27.30).

All inquiries from the media will be referred to the chair or tribunal counsel (apart from requests to observe a hearing).

### **23.70 Personal Interests**

WCAT members must not use WCAT assets, internet facilities, space or time for any non-WCAT purpose without the prior authorization of the chair or a senior vice chair. The member must comply with all applicable laws and regulations and must respect the legal protection provided by copyright and licenses with respect to both programs and data. Internet users are responsible for ensuring that their use of Internet access is appropriate and consistent with ethical conduct under the Internet Usage Policy (GMOP Section 8.3.3.5). This policy does not prohibit WCAT members from, for instance, making or receiving occasional brief electronic messages or private telephone calls.

WCAT members must not directly or indirectly ask for, or accept, a gift, favour, service, or promise of future benefit from any individual or organization which appears before WCAT. This provision is not intended to prohibit the normal presentation of gifts to persons participating in public functions, or the normal exchange of gifts between friends, that does not amount to a real or apparent conflict of interest, or does not otherwise bring suspicion on the WCAT member's objectivity and impartiality. This provision is also not intended to prohibit the infrequent attendance at lunches, dinners, or public events of a common and reasonable nature, in the company of an individual or representative of an organization which regularly appears before WCAT. If there is any doubt regarding the propriety of accepting a gift or accepting an invitation to attend an event, the WCAT member should consult with the chair.

WCAT members are free to engage in political activities, so long as they are able to maintain their impartiality, and the perception of impartiality, in relation to their duties and responsibilities. WCAT members' political activities must be clearly separated from activities related to their role as WCAT members. WCAT members must not engage in political activities during working hours or use WCAT facilities, equipment or resources in support of such activities.

Partisan politics at the local, provincial or national levels are not to be introduced into the workplace. This does not apply to informal private discussions among co-workers.

### **23.80 Decision-Making Responsibilities**

A WCAT member must make their decision based on the merits and justice of the case, and must apply the law and policy to the evidence in good faith and to the best of the member's ability.

A WCAT member will not decline to follow an applicable policy on the basis that it is unlawful, except in accordance with s. 251 of the Act.

A WCAT member will not decline to follow an applicable decision of a WCAT precedent panel appointed under s. 238(6), except in accordance with s. 250(3).

WCAT members will respect and apply the provisions of s. 251 and s. 250(3) of the Act, in a similar spirit or fashion as a court must apply a decision of a higher court as binding. Even if the WCAT member would have decided the issue differently in the absence of binding authority, the WCAT member will respect and apply binding authority as provided in the Act.

After discussion and careful consideration, where a member of a WCAT panel is unable to agree with the proposed decision of a majority of the panel, that member should not abandon strongly held views on an issue of substance, either for the sake of panel unanimity or in exchange for agreement on any other point. Instead, the member should prepare a reasoned dissent in a timely fashion.

A WCAT member is responsible for ensuring that decisions are rendered within the statutory time frames, subject to suspensions or extensions as permitted under the Act. Written reasons should be prepared without undue delay, and draft decisions prepared by other members should be addressed at the earliest opportunity.

### **23.90 Compliance**

Following a WCAT decision, if a party to the decision raises an allegation of a real or apparent conflict of interest against a member of the WCAT panel, the allegation will be reviewed by the chair and, if a *prima facie* case is established, will be treated as a request for voiding of the WCAT decision on the basis of an alleged breach of the principles of natural justice. If the chair was a member of the panel which issued the decision, the allegation will be reviewed by tribunal counsel, and, if a *prima facie* case is established, will be treated as a request for reconsideration of the WCAT decision on the basis of an alleged breach of the principles of natural justice.

WCAT members who are concerned that the conduct of a WCAT member may threaten the integrity of WCAT have a duty to discuss the issue with the chair, tribunal counsel, or registrar, (and the member in question), as soon as practicable.

Any WCAT member who in good faith believes there has been a breach of this Code, and reports the matter to the chair, tribunal counsel, or registrar, is protected from any reprisal.

The chair shall, if the allegation is not considered frivolous or vexatious, make whatever inquiries or investigations she or he determines necessary, and may if appropriate report the results, and any steps consequently taken, to the person who made the report. If the chair considers the allegation is substantive, the WCAT member against whom the allegation was made will also be apprised at a time to be determined by the chair, and provided an opportunity to respond. The chair will provide the WCAT member with an opportunity to explain the circumstances surrounding the alleged breach of this Code, and to make submissions on the nature of any proposed disciplinary action.



Breach of a provision of this Code by a WCAT member may constitute grounds for discipline, up to and including dismissal by the chair. If the breach occurs in good faith or through inadvertence, such factors will be taken into account in determining if discipline is imposed and the disciplinary sanction warranted.

### **23.95            Obligations after Ceasing to be a WCAT Member**

WCAT members who cease to hold office continue to be bound by the obligations of confidentiality in respect of any matter arising while they were a WCAT member. During the WCAT member's appointment, and following, they are also prohibited from appearing or making written submissions in a proceeding or matter before WCAT as counsel, advocate or representative on behalf of a party to the proceeding or matter until six months after the WCAT member's appointment ends.

## **24.00            CODE OF CONDUCT FOR REPRESENTATIVES**

### **24.10            General**

Parties appearing before WCAT are not required to have representation. However, many are represented by agents such as friends or family members, union representatives, human resources managers, advisers from the Workers' or Employers' Advisers' Offices, private consultants, or lawyers.

This Code is intended to provide guidance to representatives, by setting out minimum standards of behaviour WCAT expects from all representatives. Representatives are expected to know and abide by this Code.

### **24.20            Duties of a Representative**

- (a) A representative must honestly represent the client. The representative will not put forward any information known to be untrue, nor will he or she knowingly assist or encourage a party to be dishonest or misrepresent facts.
- (b) A representative must be prepared. This includes being familiar with the Workers' Compensation Board claim, assessment or prevention file(s) and the relevant law, policy, and precedent decisions. This includes consulting with the client to obtain instructions prior to appearing at an oral hearing. This also includes being in a position to attend an oral hearing or provide written submissions on a timely basis.
- (c) A representative must observe WCAT's rules, practices and procedures. In particular, a representative must be familiar with the timelines permitted for providing written submissions and for scheduling oral hearings. Representatives should not undertake to represent clients unless they will be able to provide such representation within the statutory time frames, as required by s. 253 of the Act.

- (d) A representative must behave courteously and respectfully to the opposing party and his or her representative (if present), to any witnesses called during an oral hearing, to the WCAT panel hearing the appeal and to WCAT support staff. If there are ill feelings between a worker and an employer, or between the client and the Workers' Compensation Board, these should not influence the representative in their conduct and demeanour toward any other representative in the case, or toward the WCAT panel.
- (e) A representative should instruct their client and witnesses as to appropriate conduct in a hearing, and the requirement for courtesy and civility to the WCAT panel, as well as any opposing representative and their client. A representative is expected to take whatever steps are necessary to dissuade clients and witnesses from disrupting a hearing.
- (f) A vice chair or panel assigned to a hearing or pre-hearing process has the authority to control that proceeding, to ensure that it proceeds in a manner that is respectful of all participants, including WCAT members and staff, and that furthers the resolution of the issues. A representative who disrupts proceedings may be subject to removal from the hearing room. A representative who is abusive to staff may have his or her access to staff restricted.
- (g) A representative has a duty to bring forward for consideration by WCAT, at the earliest opportunity, any information which may give rise to a reasonable apprehension of bias or conflict of interest on the part of a WCAT member. However, such allegations should not be made frivolously, or in a fashion which tends to diminish confidence in the integrity of WCAT decision making. Accordingly, if the allegation has been addressed by WCAT and rejected, the representative should not continue to raise similar allegations in other cases.
- (h) A representative, in their public statements, should not engage in personal attacks on WCAT members or unfairly criticize WCAT decisions.
- (i) A representative must respect the confidentiality of information disclosed during WCAT proceedings and not use that information for other purposes without the consent of the parties and the Workers' Compensation Board.
- (j) A representative should not attempt to contact a panel directly outside the normal hearing process, unless invited or instructed to do so. A representative who wishes to communicate with a panel should do so through the registrar's office.
- (k) Following a WCAT decision, a representative must not write to or otherwise contact the panel concerning the decision. Any request for clarification or reconsideration must be sent to the office of the registrar or tribunal counsel.

## **25.00 DELEGATION BY THE WCAT CHAIR**

The chair may delegate in writing, to:

- (a) a WCAT member, or,
- (b) an officer appointed by the chair [s. 234(2)(n)],

a power or duty of the chair, and may impose limitations or conditions on the exercise of that power or performance of that duty [s. 234(4)].

If the chair has delegated a power or duty, and subsequently ceases to hold office, the delegation continues in effect [s. 234(5)]:

- (a) so long as the delegate holds office, or
- (b) until the delegation is revoked by a new chair.

The chair must not make a general delegation of his or her authority under s. 251(3), (4) or (5), concerning the chair's review of policies for lawfulness under the Act, but may delegate this authority to a vice chair or a panel for the purposes of a specific appeal if the chair believes there may be reasonable apprehension of bias [s. 251(9)].

## **26.00 TRANSITIONAL PROVISIONS**

### **26.10 General**

Transitional provisions were set out in Part 2 of Bill 63 (s. 34 to 44).

Section 43 of Bill 63 provides that the chair may establish any rules, forms, practices and procedures required for the efficient and cost effective conduct of transitional matters.

Sections 38(3) and 39(4) of Bill 63 create a "dividing line" concerning cases before the Review Board and the Appeal Division, with respect to those cases in which the tribunal has already completed an oral hearing, or has received final written submissions and commenced its deliberations as of March 3, 2003. Cases which had reached either of these stages by February 28, 2003 stayed with the Review Board or Appeal Division panel for completion. Cases which had not reached either of these stages were transferred to WCAT on March 3, 2002 for completion as WCAT decisions (to which no time frame applies).

Where written submissions had been completed and the case had been assigned to a panel of the Review Board or the Appeal Division, the panel advised whether or not it had commenced its deliberations. Where the panel advised that it has not commenced its deliberations before March 3, 2003, the case was transferred to WCAT for reassignment to a WCAT panel.

## **26.20 Review Board Proceedings**

All proceedings before the Review Board on March 3, 2003 will continue to completion. WCAT's 180-day time frame for decision making does not apply to these cases.

If, by March 3, 2003, the Review Board:

- has already completed an oral hearing, or
- has received final written submissions and commenced its deliberations,

the following apply:

- (a) the appointments of the members of the Review Board who are sitting on pending proceedings are continued until those proceedings are completed;
- (b) the Review Board panel will continue and complete the proceeding;
- (c) the panel will have the same power and authority which the Review Board had under the former Act;
- (d) the new WCAT provisions do not apply (re binding policy, binding precedent decisions, s. 251 process for considering lawfulness of policy, medical referrals under s. 249);
- (e) the panel will issue a Review Board finding;
- (f) the Review Board finding will be appealable to WCAT within 30 days after the Review Board finding is sent out; and,
- (g) the WCAT chair has authority to extend the time for an appeal to WCAT of a Review Board finding issued after March 3, 2003 (where special circumstances existed which precluded the filing of a notice of appeal within the 30-day appeal period, and an injustice would otherwise result).

If, by March 3, 2003, the Review Board has not:

- completed an oral hearing, or
- commenced its deliberations following completion of final written submissions,

the following apply:

- (a) the proceeding will be continued and completed as a WCAT matter;
- (b) WCAT has authority to refer a matter back to the Board, with or without directions, and the Board's decision on that referral may be the subject of an application for review by the Review Division;
- (c) the WCAT panel must apply the new provisions set out in s. 250(2) and (3), and s. 251, concerning the binding effect of policy and WCAT precedent decisions, and the process for addressing an issue as to the lawfulness of policy; (if necessary, published policies of the governors are to be treated as policies of the board of directors for this purpose [Bill 63 s. 42];
- (d) the WCAT panel may request an independent medical opinion under s. 249;
- (e) in considering an appeal which was initially brought to the Review Board, WCAT has jurisdiction to address issues which would not be appealable to WCAT (such as vocational rehabilitation, or commutation requests). In other words, the

- limitations as to what will be appealable to WCAT do not restrict WCAT's jurisdiction to deal with appeals which were previously filed to the Review Board;
- (f) there is no further avenue of appeal following the WCAT decision; and,
  - (g) a party may apply to the WCAT chair for reconsideration of the WCAT decision, on one occasion only, on the basis of new evidence (substantial and material, did not exist or was not discovered and could not through the exercise of reasonable diligence have been discovered).

## **26.25 Unexercised Appeal Rights to Review Board**

Where a party had an unexercised right of appeal to the Review Board on March 3, 2003, and the 90-day appeal period has not expired, the party may request a review of the decision by the Review Division. For cases in this category, the chief review officer also has authority to extend the time period for requesting a review of a decision by a Board officer (where special circumstances existed which precluded the filing of a notice of appeal within the 90-day time period, and an injustice would otherwise result).

This EOT authority includes situations where the time for appealing to the Review Board expired before March 3, 2003 (*Transitional Review and Appeal Regulation 2(1)*).

## **26.30 Part 3 - Division 13 - Prevention Reviews**

If a review of a prevention decision has been requested before March 3, 2003, it will be completed by Prevention. If that decision would have been appealable to the Appeal Division, it will be appealable to WCAT within 30 days.

Where a party had an unexercised right of review on March 3, 2003, and the 60-day review period has not expired, the party may request a review of the decision by a review officer. No extension of time is available. The review officer's final decision is appealable to WCAT on the basis set out in s. 239.

## **26.40 Appeal Division Proceedings**

All proceedings before the Appeal Division on March 3, 2003 will continue to completion. This includes appeals, reconsiderations, s. 11 applications, and criminal injury matters. WCAT's 180-day time frame for decision making does not apply to these matters.

If, by March 3, 2003, the Appeal Division:

- has already completed an oral hearing, or
- has received final written submissions and commenced its deliberations,

the following apply:

- (a) the appointments of the appeal commissioners who are sitting on pending proceedings are continued until those proceedings are completed;

- (b) the Appeal Division panel will continue and complete the proceeding;
- (c) the 90-day time frame for the making of an Appeal Division decision will continue to apply (as defined by s. 91(3) of the former Act);
- (d) the panel will have the same power and authority which the Appeal Division had under the former Act; (but not including the authority to refer the worker for examination by a Medical Review Panel under s. 58(5));
- (e) the panel will issue an Appeal Division decision;
- (f) the new WCAT provisions do not apply (re binding policy, binding precedent decisions, s. 251 process for considering lawfulness of policy, medical referrals under s. 249);
- (g) there is no further avenue of appeal following the Appeal Division decision; and,
- (h) a party may apply to the WCAT chair for reconsideration of the Appeal Division decision, on one occasion only, on the basis of new evidence (substantial and material, did not exist or was not discovered and could not through the exercise of reasonable diligence have been discovered).

If, by March 3, 2003, the Appeal Division has not:

- completed an oral hearing, or
- commenced its deliberations following completion of final written submissions,

the following apply:

- (a) the proceeding will be continued and completed as a WCAT matter;
- (b) there is no statutory time frame for decision making;
- (c) WCAT has authority to refer a matter back to the Board, with or without directions, and the Board's decision on that referral may be the subject of an application for review by the Review Division;
- (d) the WCAT panel must apply the new provisions set out in s. 250(2), 251, and 250(3), concerning the binding effect of policy and WCAT precedent decisions, and the process for addressing an issue as to the lawfulness of policy; (if necessary, published policies of the governors are to be treated as policies of the board of directors for this purpose [Bill 63 s. 42];
- (e) the WCAT panel may request an independent medical opinion under s. 249;
- (f) there is no further avenue of appeal following the WCAT decision; and,
- (g) a party may apply to the WCAT chair for reconsideration of the WCAT decision, on one occasion only, on the basis of new evidence (substantial and material, did not exist or was not discovered and could not through the exercise of reasonable diligence have been discovered).

## **26.45 Prior Appeal Division Decisions**

A party may also apply to the WCAT chair for reconsideration of a decision of the former Appeal Division (i.e. issued between June 3, 1991 and March 3, 2003) on the basis of new evidence which is substantial and material, and did not exist or did exist but was not discovered and could not through the exercise of reasonable diligence have been

discovered. A party may apply for reconsideration of an Appeal Division decision on this basis on one occasion only.

WCAT does not have jurisdiction to address an application for reconsideration of a decision of the former commissioners (pre-June 3, 1991).

#### **26.48 Unexercised Appeal Rights to Appeal Division**

Where, on March 3, 2003, a party has an unexercised right of appeal to the Appeal Division from:

- a Board officer's decision (under s. 96(6) or (6.1) or Part 3);
- a Review Board finding;

and the 30-day appeal period has not expired, the party has a right to file an appeal to WCAT within 30 days of the Board officer's decision or the Review Board finding. For cases in this category, the WCAT chair has authority to grant an extension of time to appeal a Review Board finding to WCAT (where special circumstances existed which precluded the filing of a notice of appeal within the 30-day appeal period, and an injustice would otherwise result).

This EOT authority also includes situations where the time for appealing a Review Board finding, or decision by a Board officer, to the Appeal Division expired before March 3, 2003 [*Transitional Review and Appeal Regulation 2(2)*].

Where the Review Board issues a finding on or after March 3, 2003, the Review Board finding may be appealed to WCAT within 30 days. Such appeals will be treated as WCAT appeals for all other purposes, except that the 180-day time frame for making a decision does not apply.

#### **26.50 Medical Review Panel Proceedings**

There is a distinction between the "repeal" date, and the "transition" date. The repeal date is November 30, 2002, when s. 7 of Bill 63 comes into force and repeals s. 58(3), (4) and (5), and 63(1). Those sections allowed for a request for a Medical Review Panel. The transition date is March 3, 2003, when the remainder of Bill 63 comes into force, establishing the Review Division and WCAT.

All Medical Review Panel proceedings pending under s. 58(3), (4) and (5) and s. 63(1) of the Act on November 30, 2002 are to be continued and completed. The provisions of the Act which existed at the time of the request or referral for a Medical Review Panel examination of a worker, or inquiry into the cause of death of a worker, continue to apply.

If, before November 30, 2002, a party has not exercised a right under s. 58(3) or (4) to request examination of a worker in relation to a decision dated prior to November 30, 2002, the party may still exercise that right within 90 days of the decision.

The authority of the Board (including the Appeal Division) to refer a worker for examination by a Medical Review Panel under s. 58(5) is repealed on November 30, 2002. The right of a dependant of a deceased worker to request a Medical Review Panel inquiry into the cause of death of a worker under s. 63(1) also ends on November 30, 2002.

## **26.60 Backlog Cases (Parking Lot)**

### **26.61 Introduction**

- (a) More than 22,000 cases were transferred to WCAT from the Workers' Compensation Review Board (WCRB) and the Appeal Division (AD) on March 3, 2003. There are also transitional cases involving unexercised appeal rights to the AD. No statutory time frame applies to the making of the WCAT decision on these appeals. WCAT's goal is to decide all of these cases within three years (by February 28, 2006).
- (b) The chair's authority under s. 43 of Bill 63 includes responsibility for establishing rules, forms, practices and procedures for the efficient and cost effective conduct of proceedings before WCAT under the transitional provisions contained in Part 2.
- (c) In some cases, the appellant wishes to proceed with the appeal as soon as possible, while in other cases the appellant (or representative) wishes to defer the hearing of the appeal. An orderly process is required to provide timely decisions to appellants who wish to proceed, and for bringing the other remaining cases forward so that those appeals may all be addressed within three years (by February 28, 2006).
- (d) To the extent this is consistent with the objective of eliminating the backlog within three years, WCAT will allow appellants with backlog appeals to choose to proceed with their appeal, or to temporarily "park" their appeals if the appellant wishes additional time before proceeding.

### **26.62 Backlog Strategy**

- (a) WCAT will initially focus its attention on appeals where the appellant wishes to proceed.
- (b) In general, WCAT will deal with the oldest appeals first, based on the date the WCRB Part 2 was filed. AD cases involving appeals of WCRB findings will also be given priority on the basis that these cases have generally been in the appeal system for the longest period.
- (c) WCAT will apply other strategies such as grouping appeals involving the same issues, parties, or representatives, where this will facilitate the timely hearing of these appeals.



- (d) The position of an appeal in the hearing queue will generally be based on the date the completed Part 2 is received by WCAT. When a “parked” appeal is reactivated, it rejoins the “queue” with appeals with Part 2’s of a similar age (but will be behind those appeals of similar age which have never been “parked”). If appeals with more recent Part 2’s are currently being scheduled, the reactivated appeal will move to the front of the queue.
- (e) Where a representative is representing large numbers of appellants, and the representative is limiting the number of appeals on which they wish to proceed, WCAT may require the representative to proceed with the appeals as soon as WCAT is ready to proceed, in a manner which will allow all of the cases to be heard within three years (by February 28, 2006). For this purpose, WCAT may deny a request that an appeal be “parked”, or may reactivate the appeal at an early date.

## **26.63 Voluntary “Parking Lot”**

- (a) WCAT may allow appellants to temporarily “park” an appeal, on a voluntary basis. Where an appeal has been “parked” by the appellant, WCAT will defer the scheduling of an oral hearing or requesting written submissions concerning the appeal.
- (b) A form may be utilized for requesting that an appeal be “parked”. The form, or other written request, must be signed by the appellant. A request by a representative will not be accepted as sufficient authority for “parking” an appeal unless accompanied by a request signed by the appellant.
- (c) A request to “park” an appeal which was initiated by a *Notice of Appeal - Part 1* to the WCRB will not be granted unless a completed Part 2 has been provided to WCAT.
- (d) No reasons need be provided by the appellant for “parking” an appeal. Situations where an appellant may wish to do so include:
  - the appellant is in the process of seeking additional evidence;
  - the appellant (or representative) wishes additional time before attending an oral hearing or making written submissions;
  - the appellant will be out of the Province for a period of time; or
  - the appellant is uncertain whether they wish to proceed with the appeal.
- (e) When WCAT is ready to proceed with scheduling an appeal or inviting written submissions, an appellant will be required to attend for the oral hearing or provide written submissions on a timely basis (i.e. normally within three months). If an appellant does not do so, and has not elected to “park” their appeal, WCAT may:
  - change the method of hearing from an oral hearing to a read and review;

- treat the appellant's notice of appeal as their submission; or,
  - deem the appeal to have been abandoned.
- (f) If an appellant accepts an oral hearing date (i.e. does not object within 14 days to the initial oral hearing date proposed by WCAT, or, following consultation with WCAT, agrees to an oral hearing date) the appellant cannot subsequently request that the appeal be "parked".

#### **26.64 Respondents**

- (a) A respondent cannot request than an appeal be "parked".
- (b) A respondent may exercise their right (within 14 days of receiving notice of an oral hearing date) to request rescheduling, but rescheduling will not be unduly delayed due to the unavailability of the respondent or the respondent's representative. Nor will WCAT extend time unduly for a respondent's written submissions.
- (c) Where the respondent is unable or unwilling to agree to an oral hearing date within a reasonable time frame, they may be deemed to have forfeited the right to participate in the oral hearing. A reasonable time frame normally means within three months of the first scheduled date, so long as WCAT has dates available within this further period. Where the respondent (or the respondent's representative) advises that they will be unable to attend the oral hearing, they will be offered the opportunity to participate by providing a written submission. In general, a submission (containing argument but not new evidence) must be provided in advance of the oral hearing date or submitted at the hearing (see item 9.36). Any new evidence must be submitted at least 21 days in advance of an oral hearing (see items 9.60 and 9.72). In such circumstances, WCAT will normally not invite comments from the respondent concerning any evidence or submissions provided by the appellant at the oral hearing.

#### **26.65 Re-activation of "Parked" Appeals**

- (a) Where an appeal has been "parked", the appellant may ask WCAT to reactivate the appeal at any time prior to receiving notice from WCAT that WCAT is ready to proceed with the appeal.
- (b) When a "parked" appeal is reactivated, it rejoins those appeals with Part 2's of a similar age (but subsequent to those appeals of similar age which have never been "parked"). If appeals with more recent Part 2's are currently being scheduled, the reactivated appeal will move to the front of the queue.
- (c) As the backlog diminishes, WCAT will begin notifying appellants with "parked" appeals (and all participating parties) that WCAT will soon be ready to proceed with the appeal. At the same time, WCAT will arrange for all participating parties

to be automatically provided with updated file disclosure. A minimum period of six months will be provided between the date of the notice from WCAT and the oral hearing date, or the date the appellant's written submissions are due, so that the parties may complete their preparations for the appeal. This is subject to the appellant advising that he or she wishes to proceed at an earlier date.

- (d) As set out in item 26.62(e), where a representative is acting for a large number of appellants, WCAT may require the representative to proceed with the appeals as soon as WCAT is ready to proceed, so as to allow all of the cases to be heard within three years (by February 28, 2006). WCAT may select such cases for activation on a regular basis so as to meet this goal. WCAT may consult with the representative in establishing the order in which the cases will be heard.
- (e) Once WCAT has notified an appellant with a "parked" appeal that WCAT is ready to proceed, or the appellant asks that WCAT reactivate the appeal, the deferral of the appeal comes to an end. The appeal cannot be "parked" a second time. The appellant will be required to attend for an oral hearing or provide written submissions on a timely basis. If an appellant does not do so, WCAT may:
  - change the method of hearing from an oral hearing to a read and review;
  - treat the appellant's notice of appeal as their submission; or,
  - deem the appeal to have been abandoned.
- (f) It is the appellant's responsibility to keep WCAT informed of any change of address or change of representative. Failure to notify WCAT of a change of address may result in an appeal being considered on the basis of the materials on file without further input from the appellant, or the appeal being deemed abandoned.

## **26.66 Time Frames for Written Submissions**

- (a) Parties will initially be asked to provide written submissions, or schedule an oral hearing, within the same time frames applicable to new WCAT appeals. However, as no statutory time frame applies for WCAT decision making on backlog appeals, WCAT will adopt a more flexible approach to time frames on backlog cases.
- (b) Where an appeal is proceeding on the basis of written submissions without an oral hearing, the appellant's Part 2 normally constitutes their initial submission. Where it was anticipated that an oral hearing would be scheduled but the appeal is to be heard on the basis of written submissions, or where the Part 2 is incomplete, the appellant will be given time to provide or complete their initial written submission.
- (c) The maximum time frame which will be granted to an appellant on a backlog case, for their initial written submission, will be three months from the date it was first requested by WCAT. If the appellant requires more than three months to prepare their submission, the appellant may request the appeal be "parked".

- (d) On request, a respondent may be granted up to three months to provide a written submission, but does not have the option of requesting that the appeal be “parked”.
- (e) Rebuttal from the appellant will be requested within two weeks, but an additional two weeks may be granted for this purpose (on request). If no rebuttal is received by the initial deadline, or within the further two weeks where additional time has been requested, the appeal will be forwarded to a WCAT panel for decision.

#### **26.67 Time for Filing a Part 2, and Suspensions**

- (a) WCAT will grant an appellant’s request for one further extension after March 3, 2003 of up to six months to file a Part 2, so long as the request is received by WCAT before the deadline set by the WCRB for making the request.
- (b) WCAT will not approve any request for a suspension or further period of suspension, except as set out in item 26.63 (voluntary “parking lot”) or on the basis of the new statutory grounds for requesting a suspension (items 5.50 to 5.55).
- (c) Where an appeal was suspended by the WCRB, the appellant may ask WCAT to reactivate the appeal at any time during the period of suspension.
- (d) Where an appeal was suspended by the WCRB and the appellant does not ask WCAT to reactivate the appeal before the deadline set by the WCRB for this purpose, the appeal will be deemed to be abandoned.

#### **26.68 Abandonment of Appeal**

- (a) Where an appellant fails to contact WCAT in writing on or before any deadline set by the WCRB or WCAT for the filing of a Part 2, or for re-activating a suspended appeal, the appeal will be deemed abandoned.
- (b) Where written submissions are requested, and the appellant does not provide these within the time frame set out in item 26.66 or request that the appeal be “parked”, WCAT will treat the appellant’s notice of appeal as their submission. Submissions will be invited from the respondent, and the appellant will be granted the opportunity to provide rebuttal.
- (c) Where an oral hearing is being scheduled, and the appellant is unable to agree to a hearing date within a reasonable period as determined by WCAT, and the appellant has not “parked” the appeal, WCAT may, pursuant to s. 246(5), after giving notice to the appellant:
  - change the method of hearing from an oral hearing to a read and review;
  - treat the appellant’s notice of appeal as their submission; or,
  - deem the appeal to have been abandoned.

## **26.69 Scope of Decision**

In considering an appeal which was transferred to WCAT from the WCRB on March 3, 2003, WCAT will apply the same approach to the “scope of decision” as is set out at item 14.30 (with any necessary changes relating to the fact that the subject of the appeal is a decision by a Board officer with no intervening decision by the Review Division).

## **27.00 DISCLOSURE OF RECORDS / CONFIDENTIALITY**

### **27.10 Confidentiality Obligation**

Section 260 provides:

**260** (1) Members of the appeal tribunal and officers, employees and contractors of the appeal tribunal must not disclose any information obtained by them or of which they have been informed while performing their duties and functions under this Part, except as may be necessary to discharge their obligations under this Part.

(2) If information in a claim file or in any other material pertaining to the claim of an injured or a disabled worker is disclosed for purposes of this Part to a person other than the worker, that person must not disclose the information except as permitted in circumstances described in section 95 (1.1).

(3) Every person who violates subsection (1) or (2) commits an offence.

### **27.20 Natural Justice**

Natural justice requires that the parties to a proceeding be provided with a copy of the file. The appellant will be deemed to have requested disclosure or updated disclosure. A respondent will be asked to advise whether they wish to participate and obtain disclosure or updated disclosure. Disclosure for the purposes of an appeal or other proceeding, for the purpose of complying with the requirements of natural justice, is authorized under s. 260(1) of the Act, as being necessary to the discharge of WCAT’s obligations under Part 4 of the Act.

### **27.30 Freedom of Information and Protection of Privacy Act**

WCAT is subject to the Freedom of Information and Protection of Privacy Act (FIPPA). Under the FIPPA, an applicant may apply in writing to a public body for access to any record within the custody and control of that body. WCAT is a public body within the meaning of FIPPA.

WCAT is obliged by s. 6 of FIPPA to respond to requests within 30 days, and to make every effort to respond openly, accurately and completely. If access is denied, the WCAT response will include reasons for the refusal, and explain the applicant's right to request a review of the decision by the Information and Privacy Commissioner.

Section 66 provides that the head of a public body may delegate any person to carry out their duties under FIPPA. The tribunal counsel has the delegated authority to respond to applications. Inquiries regarding disclosure under FIPPA should be directed to tribunal counsel.

Section 20 of the FIPPA provides that a public body need not disclose information which is to be published or released to the public within 60 days. As WCAT decisions are publicly accessible on the internet, WCAT will refer persons with inquiries concerning WCAT decisions to the internet site.

WCAT places all documentation and correspondence pertaining to an appeal, including evidence and submissions, on the Board file. There is also an electronic record of appeal activity. All information is for the purpose of adjudicating appeals or other proceedings. Once a finding is issued, the evidence and submissions and other evidence received in relation to the appeal or other proceedings are forwarded to the Board and become part of the Board file. All that WCAT maintains, in electronic format, is the decision and the computerized appeal activity information.

There are certain categories of records that are exempt from disclosure, or that do not fall within the scope of FIPPA. These include:

- (a) personal notes, communications or draft decisions of persons acting in a judicial or quasi-judicial capacity. (This means that vice chair and members' hearing notes, draft findings, and other communications among panel members for the purpose of deciding an appeal are not disclosable. Such notes do not become part of the Board file, and are normally destroyed.);
- (b) personal information, the disclosure of which would be an unreasonable invasion of a third party's personal privacy. (For example, WCAT will not disclose copies of decisions with identifiers attached, to third parties. Nor will WCAT disclose its personnel records concerning WCAT staff to third parties.);
- (c) information that would reveal advice or recommendations developed by or for a public body or a minister;
- (d) information that is subject to solicitor-client privilege;
- (e) information relating to the exercise of the Ombudsman's function.

The following practice guidelines apply to WCAT members' handling of documents, files, and electronic files and information, where these are taken outside the WCAT offices (for attending hearings or work at home):

- (a) log in and log out files using procedures outlined by WCAT;

- (b) transport files in a locked carrying case and, if possible, keep them with the member at all times;
- (c) if it is necessary to review the files while travelling, ensure that they are not in open view;
- (d) always store files in a locked carrying case, locked filing cabinet, or locked room to ensure they cannot be viewed by visitors or family members;
- (e) do not leave files unattended in unlocked premises (whether at home or in a hotel);
- (f) do not leave files in a vehicle, even if it is locked. If absolutely necessary, files may be locked in a trunk if the vehicle is parked in a secure location;
- (g) do not leave electronic information, database materials and related electronic file information unattended or in an area where they can be viewed by visitors, family members and other unauthorized individuals;
- (h) follow all security policies and practices established for computerized systems;
- (i) return files to the WCAT offices as soon as possible.

If, despite the above precautions, a theft occurs and files and/or electronic systems containing personal information are stolen:

- (a) notify the chair, or a senior vice chair, immediately;
- (b) file a police report immediately;
- (c) tribunal counsel will notify the Office of the Information and Privacy Commissioner of the theft;
- (d) tribunal counsel will notify individuals whose personal information was stolen of the theft, and what information about them was taken.

#### **27.40 Disclosure to Third Parties**

WCAT may receive requests for information regarding appeals from third parties such as private disability insurance carriers and provincial government agencies. To protect workers' privacy, such information will not be disclosed without a signed authorization form from the worker specifically giving WCAT permission to provide such information, or under requirement of law.

#### **28.00 GLOSSARY**

**“Act”** means the *Workers Compensation Act*, unless the context otherwise indicates.

**“cancel”** means that the WCAT panel disagreed with the determinations made on every issue covered by a decision under appeal and determined that the decision should be set aside without a new or changed decision being provided in its place. Cancellations are normally only ordered with respect to prevention decisions.

<b>“allow”</b>	means the WCAT panel disagrees with the determination made on an issue covered by a decision or order under appeal, or grants the remedy requested in an application.
<b>"chair"</b>	means the head of WCAT appointed under s. 232(2)(a), who has all the powers of the chair set out in the Part 4 of the Act [s. 231].
<b>“confirm”</b>	means that on every issue addressed in the WCAT decision, the WCAT panel agreed with the determinations made by the prior decision-maker in the decision or order under appeal, though not necessarily with the reasons for those determinations.
<b>"extraordinary member"</b>	means a member of WCAT appointed by the chair, after consultation with the minister, under s. 232(2)(c), with experience in either employers' interests or workers' interests [s. 231].
<b>“issue”</b>	<p>means each benefit, or each aspect of a benefit or obligation, dealt with in a decision or order where the decision or order includes determinations regarding:</p> <ul style="list-style-type: none"><li>• different aspects of a benefit or obligation,</li><li>• more than one type of benefit or obligation, or,</li><li>• determinations regarding the same benefit or obligation at different places or times.</li></ul>
<b>"member of family"</b>	means wife, husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half brother and half sister and a person who stood <i>in loco parentis</i> to the worker or to whom the worker stood <i>in loco parentis</i> , whether related to the worker by consanguinity or not [s. 1];
<b>"members of WCAT"</b>	means the chair, vice chairs and extraordinary members appointed under s. 232 (2) and temporary substitute members appointed under s. 232 (10) [s. 231].
<b>"presiding member"</b>	means the WCAT member (either the chair or any vice chair) chairing a WCAT panel [s. 231].



<b>“section” (or “s.”)</b>	means section of the Act, unless context otherwise indicates.
<b>“senior vice chair”</b>	means the chief operating officer, tribunal counsel, and the registrar. These three positions are all senior vice chair positions in WCAT. Reference to “a senior vice chair” means any of these three positions. Otherwise, references to the senior vice chair positions will be abbreviated to refer specifically to the chief operating officer, tribunal counsel, or the registrar.
<b>“vary”</b>	means that on one or more issues addressed in the WCAT decision, the WCAT panel reached a conclusion which differs, in whole or in part, from the conclusion or outcome provided by the prior decision-maker, and provides a changed decision.
<b>“vice chair”</b>	means a WCAT decision-maker (not an officer), appointed by the minister or chair under s. 232(2)(b), or section 35(1) of the transitional provisions of Bill 63, to make decisions on appeals or applications to WCAT, and whose position is not representative of employers’ or workers’ interests.

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