Noteworthy WCAT Decisions Subject Index

Prepared By: Workers' Compensation Appeal Tribunal

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Number of Decisions Added Since Last Update: 8
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Total Number of Decisions in Index: 453

Navigating the Index

- Although every effort has been made to organize the decisions coherently, this index is lengthy and you may find it helpful to search the document by decision number, key word, or phrase. To search within the index, find the search box onscreen, or press "Control + F" on your keyboard, and enter your search term. Press "Enter" to move to the next instance of the word that you have searched.

- If you are searching by decision number please note that none of the noteworthy WCAT decisions listed in the index that were transition appeals (those appeals transferred to WCAT on March 3, 2003) include the suffix "AD" or "RB" (which stand for Appeal Division and Review Board respectively). Therefore, if you are searching for such a decision, do so by reference to the decision number alone, i.e. "2003-01058" as opposed to "2003-01058-AD".

- Although many decisions are cross referenced and found in more than one category, if you are looking for decisions on a specific subject, consider consulting all likely categories.

- You can link directly from the table of contents to the corresponding area of the index. You can also select the "bookmark" tab on the right hand side of the working area of Adobe Reader and navigate through the document by using the bookmarked headings.

Notes to Index

- Decisions added to the index since the last index update are indicated by a yellow highlighted decision number.

- Decisions are listed within each subject category in reverse chronological order (i.e. the most recent decisions are at the beginning of each list) along with a brief summary of each decision.

- Full summaries of each indexed decision as well as the decisions themselves can be found on the WCAT website under Research > Noteworthy WCAT Decisions, where they are categorized by year. You can also find the documents by using the WCAT Decision Search page on the WCAT website.

- Unless otherwise indicated, statutory provisions and policy items referenced in parentheses in the category headings refer to the *Workers Compensation Act* and the *Rehabilitation Services and Claims Manual* of the Workers' Compensation Board. "ATA" stands for the *Administrative Tribunals Act*.

- The Index contains four hierarchical category levels. The Table of Contents to the Index lists the first three category levels. The bookmarked headings in Adobe Reader allow you to view all available category levels.

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1. SUBSTANTIVE ISSUES

1.1. Whether Person is a Worker

A1603743 (also indexed under "1.3.2.1. Whether Injury Arose out of Employment (section 5(1)) – Decision Made Under Current Policy - General", "1.4.2. Travelling Workers", and "3.5.13. Constitutional Issues")

Non-resident flight crew employed by a foreign airline that does not fly between British Columbia destinations, who are injured while on a layover in British Columbia do not have sufficient connection to a British Columbia industry to be "workers" within the meaning of Part 1 of the *Workers Compensation Act*, which does not apply to them as a matter of constitutional law.

2008-01577, 2008-01578

This decision is noteworthy as it provides an analysis of whether a party is an independent operator or a worker, and whether another party is a volunteer or in an employment relationship.

2007-03606

This decision is noteworthy as it illustrates the complexity involved in determining whether the status of an individual under workers' compensation law and policy is that of a worker, labour contractor, or an independent operator/firm.

2007-01737 (also indexed under "2.3. Board Practice")

This decision is noteworthy as the three person (non-precedent) panel discusses the measure of deference to be given to a non-binding Practice Directive when determining the status of an individual under the *Workers Compensation Act* and Board policies.

2006-01747 (also indexed under "1.2. Whether Person is an Employer" and "1.8. Compensable Consequences")

(1) For the purposes of item #22.10 of the *Rehabilitation Services and Claims Manual*, entitled "Further Injury or Increased Disablement Resulting from Treatment", it is not appropriate to distinguish between medical investigation and medical treatment. (2) Item #20:30:30 of the *Assessment Policy Manual* does not merely prevent the Board from having to pay a claim for compensation by a principal of an unregistered company who is responsible for the company's failure to register, but also relates to the question of the principal's status as a worker or employer under the *Workers Compensation Act*. As such, for purposes of certification under section 257 of the Act, the policy applies equally to a plaintiff or a defendant in a legal action.

2005-05297 (also indexed under "1.2. Whether Person is an Employer")

This was a section 257 determination in the context of an action in the Supreme Court of British Columbia. In determining whether a person is a worker or an independent contractor, or whether a business is an independent firm, Board policies should not be treated as rigid rules when they have been drafted as guidelines. An active principal of a private company who is responsible for the company's failure to register with the Board is not entitled to compensation benefits.

2005-04670

This decision is an example of the analysis used to determine the status of a party contracting to work for another party, namely whether that party is a worker, a labour contractor, or an independent firm. If a labour contractor is not registered as an employer, he is considered a worker of the person with whom he is contracting.

2005-04895

The test for distinguishing between an honorarium and a wage, and between voluntary acts and employment, should be based on the actual nature of the activity and the resulting legal relationships, rather than on the motive or purpose of a non-profit society and its members. Honoraria tend to be for short term or occasional activities. The provision of a service on a daily basis, paid for on that basis, is more readily characterized as involving the payment of a wage under a contract of service.

2005-04416

In a section 11 determination, a worker who suffers further injury as a result of negligence in the medical treatment of a work-related injury is a worker within the meaning of Part 1 of the *Workers Compensation Act*, and any further injury arises out of and in the course of his employment. In coming to this conclusion the panel preferred an interpretation guided by an apparently retroactive policy contained only in *Rehabilitation Services and Claims Manual, Volume II*, even though it was unclear whether the policy was binding on a determination governed by *Rehabilitation Services and Claims Manual, Volume I*. If a physician is registered with the Board as an employer, his action or conduct in negligently treating a work-related injury arises out of and in the course of employment, regardless of whether the physician himself purchased Personal Optional Protection coverage.

2005-02049/2005-02051

Elected Indian Band officials are not "workers" within the meaning of Part 1 of the *Workers Compensation Act* while in the course of performing duties related to Band Council activities.

1.2. Whether Person is an Employer

2006-01932 (also indexed under "3.3.1. Application of Board Policy - Effect of Policy Deletion")

The guidance formerly provided in policy item #111.40 of the *Rehabilitation Services and Claims Manual*, Volume II and Decision 169 of the *Workers' Compensation Reporter* with regard to the determination of employer status in a section 257 application is no longer available with the deletion and retirement of the policy and Decision. However, the reasoning can still be considered in the absence of any new policy. The policy and decision provided that a party to a section 257 (then section 11) determination cannot claim to be an independent operator when the obligations of an employer under the *Workers Compensation Act* are being considered, and then claim to be an employer in respect of the same time period when there subsequently appears to be some advantage in that position.

2006-01747 (also indexed under "1.1. Whether Person is a Worker" and "1.8. Compensable Consequences")

(1) For the purposes of item #22.10 of the *Rehabilitation Services and Claims Manual* entitled "Further Injury or Increased Disablement Resulting from Treatment", it is not appropriate to distinguish between medical investigation and medical treatment. (2) Item #20:30:30 of the *Assessment Policy Manual* does not merely prevent the Board from having to pay a claim for compensation by a principal of an unregistered company who is responsible for the company's failure to register, but also relates to the question of the principal's status as a worker or employer under the *Workers Compensation Act*. As such, for purposes of certification under section 257 of the Act, the policy applies equally to a plaintiff or a defendant in a legal action.

2005-05297 (also indexed under "1.1. Whether Person is a Worker")

This was a section 257 determination in the context of an action in the Supreme Court of British Columbia. In determining whether a person is a worker or an independent contractor, or whether a business is an independent firm, Board policies should not be treated as rigid rules when they have been drafted as guidelines. An active principal of a private company who is responsible for the company's failure to register with the Board is not entitled to compensation benefits.

2005-01937

In determining whether an employer's activities arose out of and in the course of employment for the purposes of determining whether a court action for personal injury is barred by operation of section 10(1) of the *Workers Compensation Act*, "employment activities" are those activities of the employer that relate to the business as a whole, as distinct from the employer's personal activities. Board policy does not support dividing up an employer's activities into activities related to the activities of his or her workers and activities related to the other aspects of the business. In the absence of any principles or guidelines, it is not possible to separate out a set of duties or tasks that make up an employer's employment activities for the purpose of obtaining the benefit of the worker-employer bar. The failure to purchase personal optional protection is not a significant factor in determining status as an employer.

2004-04112

Former Section 11 determination. A self-employed housecleaner, who was not registered with the Board but sometimes hired other cleaners to help her on a casual basis and had hired two on the date of a motor vehicle accident, was an employer within the meaning of the *Workers Compensation Act* on that date. Lack of registration does not affect a party's status as an employer under the Act.

2003-01006

On a former section 11 determination, the panel concluded that a courier who was injured slipping on the stairs of a building was a worker within the meaning of the Act and his injuries arose out of and in the course of his employment, but the defendant strata corporation was not an employer engaged in an industry within Part 1 of the Act.

1.3. Whether Injury Arose out of Employment (section 5(1))

1.3.1. Decisions Made Under Old Policy

1.3.1.1. General

2004-06686

This decision is noteworthy for its illustration of how a claim is adjudicated as a personal injury under section 5(1) of the *Workers Compensation Act* even when there is no definitive medical diagnosis.

2004-05173

Where a worker is injured during a functional capacity evaluation undertaken as a condition of receiving a job promotion with his or her employer, the injury occurred in the course of the worker's employment, and is therefore compensable under section 5 of the *Workers Compensation Act*.

2004-04737 (also indexed under "1.7.2. Specific Injuries - Mental Disorder")

A teacher was assaulted by a student and developed acute stress. The panel found that where a physical injury occurs alongside mental stress that is independent of the physical injury, but also a result of the circumstances that gave rise to the physical injury, an award for mental stress may be made under section 5(1) of the *Workers Compensation Act* whether or not the circumstances are such as to also give rise to a claim under section 5.1 of the Act. Section 5(1) applies when a disability results from multiple causes, as long as at least one of those causes is compensable. If a compensable injury aggravates symptoms of another disorder, this is sufficient for that disorder to fall within the criteria set out in section 5(1) of the Act.

2004-02912

Apportionment when the work injury's contribution to the worker's total disability was not de minimus. The Board cannot apportion under section 5(1) of the *Workers Compensation Act* where the Medical Review Panel certified that other non-work causes of the disability, which arose after the claim injury, did not independently produce a portion of the worker's disability but rather acted together with the claim injury to produce the worker's current disability.

2004-01807

At issue was whether the lower back pain experienced by the worker while filling a cup from a water cooler was due to a personal injury arising out of and in the course of her employment. The panel concluded that the injury did not arise out of the employment as there was nothing in the employment that had a particular significance in producing the injury.

2004-00182

There was a two and a half year delay before the onset of tinnitus, and hence the injury was found not to be causatively significant.

2003-03729

A twenty percent contribution was found to be of causative significance.

2003-00254

The panel applied section 5(4) of the *Workers Compensation Act* and found that the worker was stung by a wasp when grasping some wood at work and this was compensable as the worker was performing an employment activity which exposed him to certain specific risks associated with reaching into a load of wood where an insect might not be visible.

1.3.1.2. Cumulative Effects of Injuries

2006-01779 (also indexed under "2.16.1. Review Division Jurisdiction - Scope of Review" and "3.8. Legal Precedents")

(1) The jurisdiction of a review officer is limited to the decisions contained in the Board decision being reviewed, regardless of the desirability of addressing all possible matters so that parties are not required to cycle through the appellate system. (2) The Board has the jurisdiction under section 5(1) of the *Workers Compensation Act* to adjudicate entitlement arising out of the cumulative effects of prior injuries. (3) When considering an issue, it is not appropriate to ignore the reasoning of applicable court decisions raised by a party merely because section 99 of the Act provides that court decisions are not binding on the Board.

1.3.1.3. Natural Causes (policy items #15.00 and #15.10)

2007-02958

This decision is noteworthy because it provides an analysis of whether a worker's heart attack arose out of and in the course of his employment.

1.3.1.4. Natural Elements (former policy item #17.00)

2010-03142 (also indexed under "1.3.2.3. Whether Injury Arose out of Employment - Decisions Made Under Current Policy - Hazards Arising From Nature (policy item #C3-14.30)")

This decision is noteworthy for its analysis of insect stings under the old version of Chapter 3 of the *Rehabilitation Services and Claims Manual, Volume II* in effect prior to July 1, 2010. The decision compares the old version of Chapter 3 to the new policy in effect after July 1, 2010.

1.3.1.5. Injuries Following Motions at Work (former policy item #15.20)

Policy item #15.20 has been replaced by policy item #C3-15.00. The new policy applies to all claims for injuries occurring on or after July 1, 2010.

2007-01340

This decision is noteworthy as an illustration of a well-reasoned decision involving the weighing of evidence when determining a claim for a left shoulder injury following a work-required motion.

2006-02262

This decision is noteworthy because it is a good example of the application of the policy found at item #15.20 of the *Rehabilitation Services and Claims Manual*, *Volume II* to cases involving natural body motions. It also considers the three questions set out in *WCAT-2005-04824* for determining whether an injury following a motion in the workplace arises out of and in the course of employment.

2005-04824

A three-member, non-precedent panel was appointed to decide this case because of the inconsistency of the approaches to these types of determinations. This decision sets out the questions to be answered in determining whether, under policy item #15.20 of the *Rehabilitation Services and Claims Manual, Volume II*, a motion in the workplace caused an injury arising out of and in the course of employment: First, is there a deteriorating condition which brings the injury within item #15.10, and renders it noncompensable? Second, was there an "accident," triggering the section 5(4) presumption that the accident occurred in the course of employment, or arose out of the employment? If neither apply, three broad questions must be answered in determining whether an injury following a motion in the workplace arises out of and in the course of employment: (1) Did the motion alleged to have caused personal injury take place in the course of employment? (2) Did the motion have enough work connection? (3) Did the motion have causative significance in producing a personal injury?

2005-02559

A motion is a work-required motion where the purpose of the motion was the accomplishment of the worker's job. However, the fact that a motion is a work-required motion does not necessarily mean that an injury that occurred at the time of that motion arose out of the worker's employment. All of the circumstances, and not just the temporal relationship between the work-required motion and the onset of symptoms, must be considered. The evidence must show that the work-required motion was of causative significance in producing the injury.

2004-01432

A bus driver's act of turning a steering wheel on his bus was a work-required motion.

1.3.2. Decisions Made Under Current Policy

1.3.2.1. General

A1603743 (also indexed under "1.1. Whether Person is a Worker", "1.4.2. Travelling Workers", and "3.5.13. Constitutional Issues")

Non-resident flight crew employed by a foreign airline that does not fly between British Columbia destinations, who are injured while on a layover in British Columbia do not have sufficient connection to a British Columbia industry to be "workers" within the meaning of Part 1 of the *Workers Compensation Act*, which does not apply to them as a matter of constitutional law.

2014-01750 (also indexed under "1.4.3. Parking Lot Injuries")

This decision is noteworthy for its consideration of the new policies under Chapter 3 of the *Rehabilitation Services and Claims Manual, Volume II*. Specifically, the decision shows the interplay between policy items #C3-14.00 (Arising Out of and in the Course of the Employment), #C3-19.00 (Work-Related Travel), and #C3-20.00 (Employer-Provided Facilities), and the consideration given to the various policy factors in determining whether an injury arose out of and in the course of employment.

2014-01468 (also indexed under "1.7.2. Specific Injuries - Mental Disorder")

This decision is noteworthy for the interpretation of "employer" in the context of section 5.1(1)(c) of the *Workers Compensation Act* and policy item #C3-13.00 of the *Rehabilitation Services and Claims Manual, Volume II*. An 'employer' for the purposes of section 5.1(1)(c) is an individual with direct supervision and control over working conditions, work performance, scheduling.

1.3.2.2. Natural Body Motion (policy item #C3-15.00)

2012-00447

This decision is noteworthy as an example of an organized analysis of the causative significance of a natural body motion, and for the weighing of conflicting medical evidence.

1.3.2.3. Hazards Arising From Nature (policy item #C3-14.30)

2010-03142 (also indexed under "1.3.1.4. Whether Injury Arose out of Employment - Decisions Made Under Old Policy - Natural Elements (former policy item #17.00)")

This decision is noteworthy for its analysis of insect stings under the old version of Chapter 3 of the *Rehabilitation Services and Claims Manual, Volume II* in effect prior to July 1, 2010. The decision compares the old version of Chapter 3 to the new policy in effect after July 1, 2010.

1.3.2.4. Injuries Following Motions at Work (current policy item #C3-15.00)

2013-02924

A three-member, non-precedent panel considered policy item #C3-15.00 of the *Rehabilitation Services and Claims Manual, Volume II*, "Injuries Following Natural Body Motions at Work". A temporal relationship between the natural body motion that caused the injury and the employment activity is not, by itself, enough for a finding of sufficient employment connection between the motion and the employment. A motion is required by the employment when performance of the motion is a compulsory or necessary part of the worker's employment. A motion is incidental to the employment when it is directly related to the performance of a primary employment task.

2013-00694 (also indexed under "1.4.3. Parking Lot Injuries")

The fact the worker's symptoms arose at work does not mean that her work was of causative significance to those symptoms.

2012-02319

This decision is noteworthy for its discussion and application of policy item #C3-15.00 in the *Rehabilitation Services and Claims Manual, Volume II*, and in particular its analysis of the test in policy requiring sufficient connection between the natural body motion and the worker's employment.

1.3.2.5. Physiological Changes Resulting from Work-related Mental Stress

2015-03855

This decision is noteworthy for its conclusion that where a physiological change, such as a heart condition, is attributed to workplace stress, but the worker does not have a diagnosed mental disorder, the compensability of the condition is determined under section 5(1) of the *Workers Compensation Act*.

1.4. Whether Injury In the Course of Employment (section 5(1))

1.4.1. Extra-Employment Activities

1.4.1.1. Sporting Activities

2012-00238

This decision is noteworthy because it is a good example of the application of policy found at items C3-14.00 and C3-21.00 of the *Rehabilitation Services and Claims Manual, Volume II* in cases involving workers injured while participating in sporting events associated with their employment. In particular, it addresses the issue of whether workers using their banked overtime to participate in a sporting activity are being paid for their participation.

2009-00491

This decision is noteworthy as it provides an analysis of June 2004 revisions to policy item #20.20 of the *Rehabilitation Services and Claims Manual, Volume II,* which addresses injuries sustained by a worker while he or she is engaged in recreational, exercise or sports activities. It also considers the application of that policy to a teacher involved in an extra-curricular sports activity (volleyball).

2006-02497

This decision is noteworthy as an example of the application of the amended policy items #14.00 and #20.20 of the *Rehabilitation Services and Claims Manual, Volume II* relating to recreational, exercise or sports injuries. Where a worker is injured playing a sport, the injury cannot be said to arise out of and in the course of employment where the only connection between the injury and the worker's employment is a job requirement that the worker be physically fit. The mere existence of an employment related sports team, or a regular game such a team might play in, is not sufficient to establish a clear intention on an employer's behalf to foster good community relations.

1.4.2. Travelling Workers

A1603743 (also indexed under "1.1. Whether Person is a Worker", "1.3.2.1. Whether Injury Arose out of Employment (section 5(1)) – Decisions Made Under Current Policy - General", and "3.5.13. Constitutional Issues")

Non-resident flight crew employed by a foreign airline that does not fly between British Columbia destinations, who are injured while on a layover in British Columbia do not have sufficient connection to a British Columbia industry to be "workers" within the meaning of Part 1 of the *Workers Compensation Act*, which does not apply to them as a matter of constitutional law.

2008-01799

This decision is noteworthy as it provides an analysis of the status of persons who are involved in an accident when travelling between a home office and a work site.

2006-02659

Workers such as community health care workers will be considered travelling workers rather than workers with irregular starting points for the purposes of policy item #18.00 of the *Rehabilitation Services and Claims Manual*, *Volume II* if travelling is an essential part of the service provided, whether or not the worker is paid for the travel.

1.4.3. Parking Lot Injuries

2014-01750 (also indexed under "1.3.2.1. Whether Injury Arose out of Employment - Decisions Made Under Current Policy - Whether Injury Arose out of Employment - General")

This decision is noteworthy for its consideration of the new policies under Chapter 3 of the *Rehabilitation Services and Claims Manual, Volume II*. Specifically, the decision shows the interplay between policy items #C3-14.00 (Arising Out of and in the Course of the Employment), #C3-19.00 (Work-Related Travel), and #C3-20.00 (Employer-Provided Facilities), and the consideration given to the various policy factors in determining whether an injury arose out of and in the course of employment.

2013-00694 (also indexed under "1.3.2.4. Whether Injury Arose out of Employment - Decisions Made Under Current Policy - Injuries Following Motions at Work (current policy #C3-15.00")

The fact the worker's symptoms arose at work does not mean that her work was of causative significance to those symptoms.

2009-03071

This decision discusses whether a personal activity of retrieving a container of oil from the worker's vehicle amounts to a significant deviation, which removes a worker from the course of her employment.

2007-02634

This decision is noteworthy as it examines the factors to consider when determining whether an injury which occurs in a parking lot constitutes a personal injury arising out of and in the course of employment. This decision provides a summary of other WCAT decisions which have addressed the factors to be considered with respect to parking lot injuries.

2005-01035

The worker was struck and injured by a motor vehicle in a parking lot owned by the employer as she was returning from a lunch break. The worker met the criteria listed in policy item #19.20 of the *Rehabilitation Services and Claims Manual, Volume I*. As the worker was acting in the course of her employment under item #21.10, she was entitled to the benefit of the presumption in section 5(4) of the *Workers Compensation Act* that her injuries, caused by an accident, also arose out of her employment. Her injuries arose out of and in the course of her employment under section 5(1) of the Act.

1.4.4. Unauthorized Activities

1.4.4.1. Deviations from Employment (policy item #C3-17.00)

A1601379

This decision is noteworthy for its analysis of whether a worker's conduct in assisting an injured person was such a significant deviation from the reasonable expectations of employment as to take the worker out of the course of employment. The worker, a registered nurse, was in the course of returning to her office after dropping off a co-worker to visit a client when she saw and then assisted a person lying on the road who had been stabbed. The worker was exposed to the person's blood and claimed to have suffered a mental disorder as a reaction to the traumatic event. WCAT found that the worker's action and exposure to blood arose out of and in the course of her employment.

2008-00166 (also indexed under "1.22. Relief of Costs")

This decision is noteworthy as it provides an analysis of section 5(3) of the *Workers Compensation Act* and policy item #16.60 of the *Rehabilitation Services and Claims Manual, Volume II* regarding injuries solely attributable to the serious and wilful misconduct of the worker, and the related issue of relief of claims costs.

2007-03680 (also indexed under "1.5. Section 5(4) Presumption")

This decision is noteworthy for its analysis of the application of sections 5(1), (3) and (4) of the *Workers Compensation Act* and of policy item #16.60 of the *Rehabilitation Services and Claims Manual*, *Volume II* on Serious and Wilful Misconduct.

1.4.4.1.1. General

2011-02468

This decision considers policy item #C3-14.00 and #C3-17.00 of the *Rehabilitation Services and Claims Manual, Volume II* and finds that a worker's actions in standing on a chair spraying insecticide outside his kiosk arose out of and in the course of his employment and did not amount to a substantial deviation.

1.4.4.1.2. Horseplay

2007-02492

This decision is noteworthy for its analysis of whether participation in horseplay in a forestry camp involved a substantial or insubstantial deviation from employment.

2007-00511

This decision is noteworthy as it illustrates the factors to consider when applying the Board's policy on horseplay to the facts of a particular case.

1.4.4.1.3. Assault

2011-02370

This decision is noteworthy for its consideration of published policy regarding assaults found in policy item #C3-17.00 of the *Rehabilitation Services and Claims Manual, Volume II*. The panel found the worker's actions of borrowing money from a co-worker to buy cigarettes, and his non-payment of the loan, were not connected to his employment. The subject matter of the dispute that led to the assault was a personal matter, and the injury was not considered to have arisen out of and in the course of the employment.

1.4.4.2. Intoxication

2006-04412, 2006-04413

This decision involved a certification proceeding under section 251 of the *Workers Compensation Act*. The defendant truck driver struck the plaintiff's vehicle. Policy item #16.30 of the *Rehabilitation Services and Claims Manual*, *Volume II* regarding assaults contemplates intentional behaviour. Given that conduct that constitutes an assault or suicide requires the element of intent, there was insufficient evidence to establish that the defendant's erratic driving behaviour was either an attempt to commit suicide or assault against the drivers of oncoming vehicles. The evidence was that his erratic behaviour was due to severe impairment caused by ingestion of methamphetamine and cocaine. However, pursuant to item #16.10 so long as the employment activity was of causative significance in the death of the worker, the fact that his or her intoxication was also a contributing factor is not a basis for denying compensation coverage. Both the defendant's intoxication and his employment activity of driving a truck were of causative significance in his death; absent either one, the deaths would most likely not have occurred. Applying the policy on intoxication, the defendant's action or conduct that allegedly caused a breach of duty of care arose out of and in the course of his employment, notwithstanding the impairment.

1.4.5. Side Effects of Preventative Treatment

2004-06735 (also indexed under "1.6.4. Whether Occupational Disease Due to Nature of Employment - Meaning of 'Contamination'" and "1.7.2. Specific Injuries - Mental Disorder")

Subjective reactions to stress, such as anxiety and difficulty sleeping, are common and do not constitute psychological impairment. In the absence of personal injury or occupational disease, side effects from a drug administered as preventive treatment are not compensable. "Contamination", in the definition of "occupational disease" in section 1 of the *Workers Compensation Act*, means "a substance with inherent properties causative of adverse consequences from exposure", such as a poison.

1.4.6. Emergency Actions

2007-02604

This decision is noteworthy because it examines the exception in policy item #16.50 of the *Rehabilitation Services and Claims Manual, Volume II* "Emergency Actions" whereby claims may be accepted from workers who, in the ordinary course of their work, are situated in an environment which, by its very nature, may become the site of an emergency situation.

1.5. Section 5(4) Presumption

2013-01624

This decision explains that adjudication under section 5(1) of the *Workers Compensation Act* includes consideration of section 5(4). In deciding appeals under section 5(1), WCAT will not give notice to parties that section 5(4) will be considered.

2008-02713

This decision is noteworthy as it provides an analysis of whether the presumption in subsection 5(4) of the *Workers Compensation Act* has been rebutted.

2007-03680 (also indexed under "1.4.4.1. Unauthorized Activities - Deviations from Employment")

This decision is noteworthy for its analysis of the application of sections 5(1), (3) and (4) of the *Workers Compensation Act* and of policy item #16.60 of the *Rehabilitation Services and Claims Manual*, *Volume II* on Serious and Wilful Misconduct.

2007-02935 (also indexed under "3.6.4. Evidence - Orders to Obtain Evidence (WCAT Orders)")

This decision is noteworthy as it illustrates the application of the presumption in section 5(4) of the *Workers Compensation Act* that is, where an injury or death is caused by an accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment and vice versa. This decision evaluates what would be evidence to the contrary, and explains the difference between speculation and evidence. It also illustrates when a subpoena (order) to obtain records from the Board and the police will be issued.

1.6. Whether Occupational Disease Due to Nature of Employment (section 6(1)(b))

2011-01422 (also indexed under "1.6.3. Schedule "B" Occupational Diseases" and "1.6.5. Activity Related Soft Tissue Disorders (ASTD)")

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

1.6.1. General

2013-01169

The fact that workplace irritant levels are within appropriate occupational health and safety limits may be of limited relevance in determining whether a worker's underlying asthma condition is aggravated by workplace exposure. While other non-sensitized people may not experience adverse effects after exposure to low levels of an irritant, the individual worker may be an unusual and 'thin skulled' person who does not fall within normal guidelines.

2012-00875

This decision is noteworthy for its discussion of the test used to determine whether work is a factor in a worker's disablement. The test is not whether work activities "likely caused" the worker's condition, but whether work activities and their risk factors were of causative significance to the condition. Work activities are of causative significance when they are a more than trivial or *de minimis* cause of the condition. Work activities need not be the sole or predominant cause.

2011-01415

This decision is noteworthy for its interpretation and analysis of section 6(1) of the *Workers Compensation Act* and policy item #26.30 of the *Rehabilitation Services and Claims Manual, Volume II*. Specifically, the decision discusses factors relevant in determining whether a worker is precluded from earning full wages at the work in which they were regularly employed, particularly by the need to change jobs to avoid further exacerbation of an occupational disease.

2007-02436

This decision is noteworthy because it provides an analysis of a situation where a worker's claim was accepted for a work-caused temporary aggravation of pre-existing asthma.

2007-00515

This decision is noteworthy as WCAT allowed the employer's appeal, finding that a flight attendant's breast cancer was not due to the nature of her employment that is, her exposure to ionizing and cosmic radiation during long-haul/intercontinental flights.

2006-01197

In occupational exposure claims, while certain types of exposure may cause disease, exposure, in itself, is not a disease

2005-04230

A worker must establish that it is more likely than not that the chainsaw vibrations caused the osteoarthritis in his hands. A worker cannot rely on general literature which associates different kinds of vibrations with different forms of osteoarthritis in workers in different fields. Where a worker's symptoms worsen throughout the workday and improve when he is off work, it is reasonable to conclude that the work aggravated the worker's pre-existing condition.

2003-03143

A forensic analyst's multiple symptoms were not due to his exposure to various chemicals / toxins, like dioxin, from burnt vehicles.

2003-01110

An auto mechanic's coronary heart disease and subsequent heart attacks were not related to exposure to carbon monoxide in the course of his employment.

1.6.2. Date of Disablement

2005-03633

Section 6 of the *Workers Compensation Act* dictates that the date of disablement must be treated as the occurrence of the injury. The statement in policy item #32.50 of the *Rehabilitation Services and Claims Manual, Volume II*, indicating that the date treatment is first sought should be used, applies only where there is no period of disablement and the claim is for health care expenses only.

1.6.3. Schedule "B" Occupational Diseases (section 6(3))

2011-01422 (also indexed under "1.6. Whether Occupational Disease Due to Nature of Employment" and "1.6.5. Activity Related Soft Tissue Disorders (ASTD)")

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

1.6.3.1. Rebutting the Presumption (section 6(3))

2005-02493 (also indexed under "1.6.3.2. Whether Occupational Disease Due to Nature of Employment – Schedule "B" Occupational Diseases - Meaning of 'Prolonged Exposure'")

For the purposes of policy item 4(e) of Schedule B to the *Workers Compensation Act*, a worker's exposure to a substance is "prolonged" when the exposure has exceeded a reasonable duration. Although the amount of the exposure must be greater than what would be received by an average person in their day-to-day life, there is no required minimum level of exposure. The exposure need not be continuous but must be frequent and ongoing. For the section 6(3) presumption to be rebutted there must be positive proof of another cause of the disease rather than merely a question as to whether the employment is the cause of the disease. In the absence of an amendment to Schedule B, it is not open to the Board to rebut the section 6(3) presumption by asserting that the evidence in the medical literature does not, in fact, support the presumption. Although the widow applied for compensation more than 20 years after the death of the worker, special circumstances existed that precluded the widow from filing an application within one year after the worker's death.

1.6.3.2. Meaning of "Prolonged Exposure"

2005-02493 (also indexed under "1.6.3.1. Whether Occupational Disease Due to Nature of Employment – Schedule "B" Occupational Diseases - Rebutting the Presumption")

For the purposes of policy item 4(e) of Schedule B to the *Workers Compensation Act*, a worker's exposure to a substance is "prolonged" when the exposure has exceeded a reasonable duration. Although the amount of the exposure must be greater than what would be received by an average person in their day-to-day life, there is no required minimum level of exposure. The exposure need not be continuous but must be frequent and ongoing. For the section 6(3) presumption to be rebutted there must be positive proof of another cause of the disease rather than merely a question as to whether the employment is the cause of the disease. In the absence of an amendment to Schedule B, it is not open to the Board to rebut the section 6(3) presumption by asserting that the evidence in the medical literature does not, in fact, support the presumption. Although the widow applied for compensation more than 20 years after the death of the worker, special circumstances existed that precluded the widow from filing an application within one year after the worker's death.

1.6.4. Meaning of "Contamination" (section 1)

2004-06735 (also indexed under "1.4.5. Whether Injury in the Course of Employment - Side Effects of Preventative Treatment" and "1.7.2. Specific Injuries - Mental Disorder")

Subjective reactions to stress, such as anxiety and difficulty sleeping, are common and do not constitute psychological impairment. In the absence of personal injury or occupational disease, side effects from a drug administered as preventive treatment are not compensable. "Contamination", in the definition of "occupational disease" in section 1 of the *Workers Compensation Act*, means "a substance with inherent properties causative of adverse consequences from exposure", such as a poison.

1.6.5. Activity Related Soft Tissue Disorders (ASTD)

2011-02911

This decision provides an example of the weighing of risk factors in a case of bilateral lateral epicondylitis.

2011-02335

This decision is an example of a panel's analysis of causation in a case of bilateral plantar fasciitis.

2011-01422 (also indexed under "1.6. Whether Occupational Disease Due to Nature of Employment" and "1.6.3. Schedule "B" Occupational Diseases")

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

2011-01329 (also indexed under "2.6.3. Board Medical Advisors")

This decision is an example of adjudication of a claim for carpal tunnel syndrome, where there are both non-occupational and occupational risk factors. The panel declined to accept a medical opinion that failed to take into account the unaccustomed nature of the work activities.

2011-00268

Before a worker's claim for compensation for carpal tunnel syndrome can be accepted, the Board must have evidence that the worker's work activities placed sufficient stress on the tissue affected by carpal tunnel syndrome. The mere fact that a worker uses his or her hands or wrists while working is insufficient to establish a causal connection between the worker's employment duties and his or her development of carpal tunnel syndrome. WCAT noted that policy item #27.32 of the *Rehabilitation Services and Claims Manual, Volume II*, identifies activities which, based on epidemiological studies, are most likely to cause carpal tunnel syndrome.

2007-02562

This decision is noteworthy because it provides an analysis of the application of the law and policy related to the adjudication of a de Quervain's tenosynovitis claim.

2005-01425

This decision is an example of the analysis used to determine whether a worker's activity-related soft tissue disorder is caused by the nature of the worker's employment. The worker engaged in frequently repetitive and awkward postures of her right wrist in the course of her employment and was diagnosed with right wrist tendonitis that improved when she was off work. These factors indicated that her employment activities caused her right wrist tendonitis. The worker also had diagnosed left wrist tendonitis. However, this could not be presumed to have been caused by employment activities under section 13(a) of *Schedule B*. Although the worker occasionally placed her left wrist in an extended position for a short duration, the affected tissues had an opportunity to rest as most of the job duties did not involve use of the worker's left hand.

2005-01400

This decision is noteworthy as an example of an analysis of the issue of whether a worker's plantar fasciitis is due to the nature of the worker's employment and compensable under section 6 of the *Workers Compensation Act*.

2005-01331

This decision is an example of the analysis used to determine whether a worker's activity-related soft tissue disorder is caused by the nature of the worker's employment. It emphasizes the importance of determining whether there exist significant causative factors in the worker's employment activities which meet the criteria set out in Board policy. The fact that a worker experiences physical problems while at work is not determinative.

2005-00530

This was one of a group of similar decisions considering whether numerous workers developed plantar fasciitis as a result of working long shifts on a ship which vibrated. The decision demonstrates the difficulties in determining the cause of plantar fasciitis, and details the policies and considerations which assist in evaluating arguments of causation. In particular, it contains an analysis of the interaction between occupational and non-occupational factors in plantar fasciitis cases.

1.6.6. Whole Body Vibration (WBV)

2006-02502

Degenerative disc disease and osteoarthritis of the spine have not been designated or recognized as occupational diseases by the Board. To establish employment causation, it must first be established that the proposed relationship is biologically plausible. There must be sound evidence that whole body vibration (WBV) can cause or accelerate lumbar degenerative disc disease. WBV may be a significant contributing factor in low back disorders. It may be difficult to obtain reliable evidence of the extent of exposure which includes both amplitude of vibration and duration. To estimate the vibration amplitude exposure of a worker who has used different types of equipment over long periods of time, it is appropriate to use measurements found in the literature. It is appropriate to refer to standards of exposure to WBV from different jurisdictions as the Board has not created standards.

2005-06866

The worker claimed his degenerative spinal disease was caused by exposure to whole body vibration while working as a truck driver. The panel denied the worker's appeal. The amplitude and duration of vibration the worker was exposed to were not sufficient to establish a probability that the worker's spinal degeneration was a result of occupational exposure.

1.6.7. Firefighters

2004-05368

Upon review of epidemiological studies, the panel found that under section 6(1) of the *Workers Compensation Act*, the firefighter's death from stomach cancer was not due to the nature of his employment.

1.7. Specific Injuries

1.7.1. Depression

2012-00195 (also indexed under "1.16.2. Loss of Function Awards)

This decision is noteworthy as an example of a decision that addresses the appropriate amount for a permanent disability award for depression, especially in cases where the medical evidence describes the worker's depression as "severe".

2005-05830 (also indexed under "1.8. Compensable Consequences")

Where the Board has acted in good faith, and the dealings between Board officers and the claimant are within the range of the norm, depression resulting from dealings with the Board is not a compensable consequence.

1.7.2. Mental Disorder (section 5.1 and prior to enactment of section 5.1)

A1900037

Where a mental disorder results from a series of significant stressors, the date of injury is when the worker first experienced a psychological change subsequent to a work event or incident. In determining whether another person's actions were traumatic or were a significant stressor, consideration must be given to the worker's general characteristics that were known or ought to have been known to the other person. Refusing to accommodate a worker's condition by saying that the worker does not have the condition, when the worker does in fact have the condition, may be a significant workplace stressor, and is not covered by the exclusion in section 5.1(1)(c) of the *Workers Compensation Act*.

2015-01712

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

2015-00506 (also indexed under "2.7. Federal Employees")

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

2014-02791

Bullying and harassment is interpersonal conflict which, in order to constitute a significant workplace stressor, must contain an element of abusive or threatening behaviour. Rudeness or thoughtless conduct alone is not a "significant" stressor.

2014-02340

This decision is noteworthy for its discussion and application of policy item #C3-13.00 of the *Rehabilitation Services and Claims Manual, Volume II* to a section 5.1 of the *Workers Compensation Act* mental disorder claim.

2014-01468 (also indexed under "1.3.2.1. Whether Injury Arose out of Employment - Decisions Made Under Current Policy - General")

This decision is noteworthy for the interpretation of "employer" in the context of section 5.1(1)(c) of the *Workers Compensation Act* and policy item #C3-13.00 of the *Rehabilitation Services and Claims Manual, Volume II*. An 'employer' for the purposes of section 5.1(1)(c) is an individual with direct supervision and control over working conditions, work performance, scheduling.

2014-01368 (also indexed under "2.10. Applications for Compensation (section 55)")

This decision analyzes a late application for compensation of a mental disorder where the very nature of the mental disorder is alleged to have precluded a timely application for compensation.

2014-01272

This decision is noteworthy for its reference to the *Occupational Health and Safety (OHS) Guidelines G-D3-115(1)-3 Bullying and harassment* in assessing the meaning of "bullying and harassment" in the workplace, and how the guidelines interact with section 5.1 of the *Workers Compensation Act* and policy item #C3-13.00 of the *Rehabilitation Services and Claims Manual, Volume II*. Specifically, the objective and subjective standards as described in the guidelines are used to assess impugned conduct to decide if certain behaviours in the workplace constitute bullying and harassment.

2013-00858

Physical proximity to the workplace does not transform an event into one that arises out of and in the course of employment; briefly witnessing a fight between two unknown men does not constitute a traumatic event.

2010-01035

This decision considers the effect of *Plesner v. British Columbia Hydro and Power Authority,* 2009 BCCA 188, on a reconsideration of a decision by WCAT with respect to a mental stress claim by a sorter at a warehouse for a courier company.

2010-00598

This decision considers the application of section 5.1 of the *Workers Compensation Act* and policy item #13.30 of the *Rehabilitation Services and Claims Manual*, as amended following the B.C. Court of Appeal's decision in *Plesner v. British Columbia Hydro and Power Authority*, 2009 BCCA 188, to the worker's claim for compensation for mental stress.

2004-06735 (also indexed under "1.4.5. Whether Injury In the Course of Employment - Side Effects of Preventative Treatment" and "1.6.4. Whether Occupational Disease Due to Nature of Employment - Meaning of 'Contamination'")

Subjective reactions to stress, such as anxiety and difficulty sleeping, are common and do not constitute psychological impairment. In the absence of personal injury or occupational disease, side effects from a drug administered as preventive treatment are not compensable. "Contamination", in the definition of "occupational disease" in section 1 of the *Workers Compensation Act* means "a substance with inherent properties causative of adverse consequences from exposure", such as a poison.

2004-06341

Although a ferry worker witnessed a boat capsizing because the ferry on which she was working sailed past it, witnessing the accident did not arise out of her employment. The ferry was not involved in rescue attempts, and the evidence did not support a conclusion that it could or should have been involved. The worker was in no different position than a member of the general public who may have been on the ferry, on shore, or on another vessel in the area that day. The fact that she was personally acquainted with some of the people who died in the boat capsize was a personal risk factor.

2004-04737 (also indexed under "1.3.1. Whether Injury Arose out of Employment - General")

A teacher was assaulted by a student and developed acute stress. The panel found that where a physical injury occurs alongside mental stress that is independent of the physical injury, but also a result of the circumstances that gave rise to the physical injury, an award for mental stress may be made under section 5(1) of the *Workers Compensation Act* whether or not the circumstances are such as to also give rise to a claim under section 5.1 of the Act. Section 5(1) applies when a disability results from multiple causes, as long as at least one of those causes is compensable. If a compensable injury aggravates symptoms of another disorder, this is sufficient for that disorder to fall within the criteria set out in section 5(1) of the Act.

1.7.3. Chemical Sensitivity

2006-01155 (also indexed under "3.5.3. WCAT Jurisdiction - Adjudicating New Diagnosis")

This decision is noteworthy as it provides an overview of WCAT's jurisdiction to consider a new diagnosis and gives a detailed analysis of a chemical sensitivity claim.

1.7.4. Shoulder Dislocation

2005-02580

This decision is noteworthy as an example of the application of those portions of item #15.60 of the *Rehabilitation Services and Claims Manual, Volume II* which provide rules for the payment of benefits in shoulder dislocation claims where the worker has previously experienced a non-compensable shoulder dislocation.

1.7.5. Non-Traumatic Loss of Hearing

2014-00679 (also indexed under "1.8. Compensable Consequences")

The wording of policy item #31.00 of the *Rehabilitation Services and Claims Manual, Volume II* (Hearing Loss) does not limit the acceptance of tinnitus so that it is only compensable where it arises as a compensable consequence of an accepted claim for noise-induced hearing loss. Policy item #C3-22.00 (Compensable Consequences) may still apply if a prior compensable injury or its treatment is of causative significance to the development of tinnitus.

2011-00280

In 2009, the worker claimed compensation for hearing loss due to exposure to occupational noise 25 years earlier. The worker's claim had been denied by the Board and the Review Division on the basis that the worker, a paramedic, did not prove a causal connection between his exposure to loud siren noises in the early 1980s and his hearing loss diagnosed in 2009. WCAT allowed the appeal, having found there was both contemporaneous and forensic evidence of sufficient occupational exposure to hazardous noise levels to satisfy the requirement in policy item #31.20 of the *Rehabilitation Services and Claims Manual, Volume II*.

1.8. Compensable Consequences (item #22.00)

2015-01459

This decision is noteworthy for its conclusion that under policy item #C3-22.30 of the *Rehabilitation Services and Claims Manual, Volume II*, in the absence of special and exceptional circumstances a worker is not entitled to compensation under the *Workers Compensation Act* for psychological impairment resulting from his or her interactions with the Workers' Compensation Board.

2014-00679 (also indexed under "1.7.5. Non-Traumatic Loss of Hearing")

The wording of policy item #31.00 of the *Rehabilitation Services and Claims Manual, Volume II* (Hearing Loss) does not limit the acceptance of tinnitus so that it is only compensable where it arises as a compensable consequence of an accepted claim for noise-induced hearing loss. Policy item #C3-22.00 (Compensable Consequences) may still apply if a prior compensable injury or its treatment is of causative significance to the development of tinnitus.

2011-01582 (also indexed under "1.16.7.3. Permanent Disability Awards – Specific Permanent Disabilities - Psychological Impairment" and "2.16.5. Review Division Jurisdiction - Refusal to Review")

Policy items #22.33 and #22.35 of the *Rehabilitation Services and Claims Manual, Volume II* do not preclude the Board from adjudicating a worker's diagnosed pain disorder, where it has previously accepted a permanent chronic pain condition. A refusal by the Board to adjudicate a worker's claim for a pain disorder in these circumstances constitutes an implicit denial of the claim for pain disorder. Such a decision is reviewable by the Review Division.

2009-01094 (also indexed under "2.10. Applications for Compensation")

This decision determined that the limitation period set out in section 55 of the *Workers Compensation Act*, which requires a worker to apply for compensation within one year of the date of injury or disablement from occupational disease, does not apply to an application by a worker for compensation related to a consequence of the original injury where the Board has already accepted the original injury.

2006-01747 (also indexed under "1.1. Whether Person is a Worker" and "1.2. Whether Person is an Employer")

(1) For the purposes of item #22.10 of the *Rehabilitation Services and Claims Manual*, entitled "Further Injury or Increased Disablement Resulting from Treatment", it is not appropriate to distinguish between medical investigation and medical treatment. (2) Item #20:30:30 of the *Assessment Policy Manual* does not merely prevent the Board from having to pay a claim for compensation by a principal of an unregistered company who is responsible for the company's failure to register, but also relates to the question of the principal's status as a worker or employer under the *Workers Compensation Act*. As such, for purposes of certification under section 257 of the Act, the policy applies equally to a plaintiff or a defendant in a legal action.

2005-05830 (also indexed under "1.7.1. Specific Injuries - Depression")

Where the Board has acted in good faith, and the dealings between Board officers and the claimant are within the range of the norm, depression resulting from dealings with the Board is not a compensable consequence.

1.9. Out of Province Injuries (section 8(1))

2003-01170

The worker, who was an independent operator, suffered injuries while servicing his mobile welding rig at his residence in Alberta. The worker's main job functions were in BC and the worker paid for personal optional protection in BC. The panel concluded that the worker was entitled to compensation.

1.10. Compensation in Fatal Cases (section 17)

2010-03026

This decision is noteworthy for its analysis of the phrase "reasonable expectation of pecuniary benefit" in section 17(3)(i) of the *Workers Compensation Act*.

1.10.1. Entitlement to, and Calculation of, Compensation for Dependents (section 17(3))

2006-00937

This decision is noteworthy for its analysis of section 17(3) of the *Workers Compensation Act*, in particular the statutory requirement of dependency under section 17(3) (f) for a child from a common law relationship, and of a reasonable expectation of pecuniary benefit under section 17(3) (i) of the Act.

2005-04492 (also indexed under "1.10.2. Compensation in Fatal Cases - Spouses Living Separate and Apart" and "3.4. Lawfulness of Board Policy Determinations")

Section 251 referral to the Chair. Whether policy in items #55.40 and #59.22 of *Rehabilitation Services and Claims Manual, Volume I*, which deal with dependent children's benefits, are patently unreasonable. The worker had sons with his former common law spouse, and was living separate and apart from the children and their mother at the time of his compensable death. The children's mother was not a dependent spouse for the purposes of section 17. The impugned element of item #55.40 provides that section 17(9) is applicable to this situation. Chair concluded that the impugned element of item #55.40 is patently unreasonable because section 17(9) does not apply when there is no dependent spouse. Item #59.22, which applies to orphans and other dependent children, should be applied to the appeal before the vice chair because it is consistent with section 17(3)(f) and not patently unreasonable.

2004-01966

At issue in this case was whether section 17(3)(e) of the *Workers Compensation Act* violates the equality provisions of section 15 of the Charter as it draws distinctions between surviving spouses on the basis of their age and whether they have dependent children. The panel followed the findings of the B.C. Court of Appeal in *Burnett v. British Columbia (Workers' Compensation Board)* (2003), 16 B.C.L.R. (4th) 203 (C.A.), and concluded that section 17(3)(e) of the Act does not violate the equality provisions of section 15 of the Charter.

1.10.2. Spouses Living Separate and Apart (section 17(9))

2005-04492 (also indexed under "1.10.1. Entitlement to, and Calculation of, Compensation for Dependents" and "3.4. Lawfulness of Board Policy Determinations")

Section 251 referral to the Chair. Whether policy in items #55.40 and #59.22 of *Rehabilitation Services and Claims Manual, Volume I*, which deal with dependent children's benefits, are patently unreasonable. The worker had sons with his former common law spouse, and was living separate and apart from the children and their mother at the time of his compensable death. The children's mother was not a dependent spouse for the purposes of section 17. The impugned element of item #55.40 provides that section 17(9) is applicable to this situation. Chair concluded that the impugned element of item #55.40 is patently unreasonable because section 17(9) does not apply when there is no dependent spouse. Item #59.22, which applies to orphans and other dependent children, should be applied to the appeal before the vice chair because it is consistent with section 17(3)(f) and not patently unreasonable.

1.11. Temporary Disability Benefits (sections 29 and 30)

1.11.1. Amount of Benefits

1.11.1.1. Recurrence of Disability (section 32)

2004-04731 (also indexed under "1.20. Recurrence of Injury")

This decision is noteworthy as an example of the application of section 32 of the *Workers Compensation Act* and item #70.20.2(b) of the *Rehabilitation Services and Claims Manual, Volume II* to the issue of whether a worker who is unemployed prior to a recurrence of disability is entitled to wage loss benefits arising out of the recurrence, where the recurrence occurs more than three years after injury.

1.11.2. Duration of Benefits

2012-00357 (also indexed under "2.4. What Constitutes a "Decision" and "2.5.2. Reconsiderations")

This decision is noteworthy as an example of the interpretation and application of policy item #99.20 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) when there is uncertainty around whether a reconsideration was made within the statutory timeline and the interpretation and application of item #34.32 of the RSCM II when the worker experiences a temporary lay-off during a period of compensable disability.

2008-00584

This decision is noteworthy for its analysis of the factors to be considered when determining whether it is unreasonable for a worker to refuse selective light employment.

2005-04407

This decision is noteworthy as an example of an analysis of whether a worker is eligible for pre-operative and post-operative wage loss benefits in relation to the repair of a hernia.

2004-05624

The Board should terminate benefits cautiously when a worker is in a graduated return-to-work program or employed in temporary light duties, because if it is later determined that the worker has an ongoing temporary disability, it will generally not be open to the Board to reopen the worker's claim. The Board may reconsider the termination decision, but only if no more than 75 days has passed since the decision was made. Retroactive benefits can be paid on reconsideration but not on reopening. Where appropriate, a failure by the Board to use the appropriate procedure can be rectified by the Review Division.

2003-04102

The worker was not entitled to temporary disability wage loss benefits from October 2001 to October 2002 as his disability was permanent as of October 2001 given that surgical intervention was not considered medically appropriate and there was no expectation of a change in his condition by that time. This finding is not affected even though the worker did undergo surgery in October 2002 and was again found to be temporarily disabled as of October 2002.

1.11.3. Transition Issues

2006-03125 (also indexed under "2.14.2. Transition Issues - Meaning of 'Recurrence of Disability'")

Where a worker was injured prior to the transition date (June 30, 2002) and has a recurrence of temporary disability after that date, pursuant to section 35.1(8) of the *Workers Compensation Act* and policy item #1.03(4) of the *Rehabilitation Services and Claims Manual*, the current provisions of the Act apply to the calculation of the worker's temporary disability wage rate. The recent amendments to item #1.03(4)(b) in response to the B.C. Supreme Court *Cowburn v. WCB* decision do not affect the calculation of wage loss benefits for the recurrence of a temporary disability. They only apply to the calculation of benefits when there has been deterioration of a permanent disability.

1.12. Average Earnings

For Review Division and WCAT jurisdiction over average earnings also see below in "Review Division Jurisdiction" and "WCAT Jurisdiction"

1.12.1. General

2006-02602 (also indexed under "3.6.7. Evidence - Witnesses")

(1) Where a party wants WCAT to require adverse witnesses to attend an oral hearing for cross-examination, there is no breach of procedural fairness if the panel does not subpoena a witness if the worker did not make an express request that a specific witness be compelled to attend the hearing. (2) Even if a party presents arguments focusing on a particular option under a section of the *Workers Compensation Act*, WCAT has a duty to consider the full range of options permitted by the section and there is no obligation to provide reasons that expressly addressed each of the options.

2005-05961 (also indexed under "3.6.5. Evidence - Credibility")

Primarily on the basis of an assessment of credibility, the panel found that the worker was not employed by his wife under a contract of service during the one year prior to the date of his injury claim. It also found that, as required by policy item #66.00 of the *Rehabilitation Services and Claims Manual, Volume II*, there was insufficient verified earnings information from an independent source to set a wage rate on the worker's claim.

1.12.2. Calculating Average Earnings – General Rule (section 33.1)

1.12.2.1. Long Term (section 33.9)

2005-02770 (also indexed under "1.16.4. Permanent Disability Awards - Average Earnings", "2.16.6. Review Division Jurisdiction - Permanent Disability Awards" and "3.5.10.2. WCAT Jurisdiction – Permanent Disability Awards - Average Earnings")

Where the Board has set a worker's long term wage rate at the ten week wage rate review it no longer has the authority to change the long term wage rate for purposes of calculating the worker's permanent disability award. Therefore, the Review Division does not have the jurisdiction to review such permanent disability award decisions where the only issue on review is the wage rate used by the Board.

1.12.3. Calculating Average Earnings – Exceptions to the General Rule

1.12.3.1. Apprentice or Learner (section 33.2)

2007-03559

This decision is noteworthy for its analysis of the requirement for corroboration of the worker's status as an apprentice when considering the exception to the general rule for setting the long term wage rate.

2007-02982

This decision is noteworthy because it provides an analysis of how to determine an apprentice's long term average earnings for purposes of setting a long term wage rate.

1.12.3.2. Employed less than 12 months (section 33.3)

2007-02166

This decision is noteworthy as an illustration of decision regarding a worker's "earning potential" when determining the average earnings for purposes of the long-term wage rate.

2006-03851

This decision is noteworthy as an example of the factors relevant to determining whether a person is a "person of similar status" to the worker when calculating the worker's long term average earnings under section 33.3 of the *Workers Compensation Act*. Such factors may be informed by an applicable collective agreement and may include the worker's seniority level and defined position. The fact that a worker performs essentially the same functions as another worker does not necessarily mean that the other worker is a "person of similar status".

2006-03045

This decision is noteworthy for its application of section 33.3 of the *Workers Compensation Act* and item #67.50 of the *Rehabilitation Services and Claims Manual, Volume II* in determining the average earnings of a regular worker employed for less than 12 months with the injury employer.

2005-00404

Section 33.3 of the *Workers Compensation Act* is a mandatory provision that applies in calculating the long-term average earnings of a regular worker employed less than 12 months with the injury employer. Where there is insufficient evidence to calculate the worker's average earnings based on those of a worker of similar status for the purposes of policy item #67.50 of the *Rehabilitation Services and Claims Manual, Volume II*, the class average for all workers should be used to calculate the average earnings of a worker whose employment is seasonal in nature. Exceptional circumstances may not be considered when a worker has been employed for less than 12 months with the injury employer at the date of the injury.

1.12.3.3. Exceptional Circumstances (section 33.4)

2008-01745

This decision is noteworthy because it illustrates the application of the March 19, 2008 amended policy (*2008/03/19-01*, "Re: Average Earnings – Exceptional Circumstances"), and Practice Directive #C9-12 regarding exceptional circumstances.

2004-02452

Where a worker's gross earnings for the 12-month period preceding the date of injury is lower than in the years preceding the 12-month period, and this lower amount is used to calculate the worker's long-term wage rate under section 33.1(2) of the *Workers Compensation Act*, the exceptional circumstances test in section 33.4 of the Act is not met if the lower gross earnings is due to the worker's ongoing decision to change occupations.

1.12.3.4. Casual Workers (section 33.5)

2004-06831 (also indexed under "2.5. Board Changing Board Decisions - Reopenings")

(1) A new diagnosis is a new matter for adjudication by the Board and does not trigger a reopening under section 96(2) of the *Workers Compensation Act*. (2) A worker who works varying shifts with the same employer on a continuous basis such that the worker has an ongoing attachment to the employer is not a casual worker under policy item #67.10 of the *Rehabilitation and Services Claims Manual, Volume II*.

2004-02208

At issue was whether the worker was properly classified as a regular worker, rather than a casual worker. The panel concluded that despite the fact that the worker had worked for the employer for several years, the worker was engaged in on call employment that amounted to a few days a month of work and that fit with being a casual worker on call with a single employer. Accordingly, the worker's initial wage rate should be set using her earnings in the 12-month period immediately preceding her injury.

2004-01787

At issue was whether the worker was properly classified as a casual worker such that section 33.5 of the *Workers Compensation Act* is applicable. In answering this question the panel refers to the related item #67.10 of the *Rehabilitation Services and Claims Manual, Volume II*, and notes that while the effective date at the end of item #67.10 refers to the date of the latest change to the policy, the relevant passages in item #67.10 came into effect on June 30, 2002 and, thus, are applicable in this case.

1.12.4. Whether Payments Included as Average Earnings

1.12.4.1. Overtime Earnings

2003-02711

The worker's banked overtime wages should have been included as earnings in the calculation of his wage rate as there was evidence that the worker had consistently worked overtime during the course of the year and for several previous years.

1.12.4.2. Employment Insurance Benefits (section 33(3.2))

2005-03166

Recurring temporary interruptions of employment, as the phrase is used in section 33(3.2) of the *Workers Compensation Act*, includes interruptions that are a regular and integral part of the worker's occupation or industry. They are not restricted to repeating annual patterns of unemployment.

2004-00222-RB

Employment insurance benefits should be included in calculating the average earnings for the worker employed in a seasonal occupation (golf course work) not listed under item #68.40 of the *Rehabilitation Services and Claims Manual, Volume I*, because the factual circumstances clearly fit the intent of section 33(3.2) of the *Workers Compensation Act*.

1.12.4.3. Capital Cost Allowance Deductions

2006-02511

Capital cost allowance deductions made in relation to a motor vehicle that does not generate revenue for a self employed worker should be added to the worker's net earnings and be treated as personal income for wage loss calculation purposes.

1.12.5. Historical Versions of Act (Pre-Bill 49)

1.12.5.1. Use of Class Averages (item #67.21 RSCM I)

2003-01800 (also indexed under "3.4. Lawfulness of Board Policy Determinations")

Item #67.21 of the *Rehabilitation Services and Claims Manual, Volume I*, which deals with the use of class averages for setting wage rates, is not patently unreasonable since it does not set out an inflexible rule. Accordingly, pursuant to section 251(4) of the *Workers Compensation Act*, the panel must apply the policy in rendering a decision on the worker's appeal.

1.12.6. Transition Issues

1.12.6.1. Recurrence of Temporary Disability

2006-03125 (also indexed under "1.11.3. Temporary Disability Benefits - Transition Issues")

Where a worker was injured prior to the transition date (June 30, 2002) and has a recurrence of temporary disability after that date, pursuant to section 35.1(8) of the *Workers Compensation Act* and policy item #1.03(4) of the *Rehabilitation Services and Claims Manual*, the current provisions of the Act apply to the calculation of the worker's temporary disability wage rate. The recent amendments to item #1.03(4)(b) in response to the B.C. Supreme Court *Cowburn v. WCB* decision do not affect the calculation of wage loss benefits for the recurrence of a temporary disability. They only apply to the calculation of benefits when there has been deterioration of a permanent disability.

2004-00110 (also indexed under "2.5.1. Board Changing Board Decisions - Re-openings")

Example of an application of the Bill 49 wage rate as it applies to reopenings for recurrences of temporary disability after June 30, 2002 that resulted from an injury before that date.

1.12.6.2. Permanent Disability Award Assessment when Injury Occurred Before June 2002

2006-04128

The worker's injury occurred before June 30, 2002, and his claim was reopened in 2004 for temporary benefits which were paid under the current provisions of the *Workers Compensation Act* and Board policy. Amended policy item #1.03(b) of the *Rehabilitation Services and Claims Manual* limits reassessments of pension entitlements under the former provisions to workers who were granted a pension prior to June 30, 2002. Given the judgment in *Cowburn v. Workers' Compensation Board* and the provisions of the Act, it does not appear that this policy is patently unreasonable. Since the worker was not awarded a pension before June 30, 2002, he was now disallowed from receiving a pension reassessment under the former provisions of the Act and the RSCM

1.13. Vocational Rehabilitation (section 16)

2012-01006

This decision is noteworthy for its analysis of the law and policy on WCAT's jurisdiction to hear appeals from Board decisions regarding vocational rehabilitation benefits.

2003-01744

The worker was not eligible to receive retroactive rehabilitation allowance since the effort expended by the worker to secure suitable alternate employment, or to obtain retraining, was minimal and sporadic and the documentation was anecdotal.

1.14. Deductions from Compensation (section 34)

2014-00372

This decision is noteworthy for its summary and analysis of previous WCAT decisions regarding deductions from compensation pursuant to section 34 of the *Workers Compensation Act*.

2008-01545

This three person non-precedent panel determined that temporary wage loss benefits payable to a teacher in the months of July and August should be paid to the employer.

1.15. Health Care Benefits (section 21)

1.15.1. General

2004-04921 (also indexed under "2.5.1. Board Changing Board Decisions - Reopenings")

The language in section 96(2) of the *Workers Compensation Act* is clear that a reopening involves a matter that has been previously decided. Where there is no earlier decision relating to treatment of an injury, a request for payment for treatment is not a request for reopening. Rather, it is a new matter for adjudication.

2003-02217

The worker appeals the decision that denied her compensation beyond eight weeks of chiropractic treatment. The panel found that the Board medical advisor erred in its decision noting that the worker was not examined in order to determine whether to extend treatment and, contrary to the advisor's statement, there was objective evidence of recovery.

1.15.2. Drugs (item #77.00)

2004-02507 (also indexed under "1.16.7.1.. Specific Permanent Disabilities - Chronic Pain")

A worker, who suffered from chronic pain syndrome, was not entitled to medical marijuana as a section 21 health care benefit to control his pain because its effectiveness in reducing his symptoms was questionable, and it would delay his recovery and create unwarranted risks for further injury.

1.15.3. Independence and Home Maintenance Allowance

2011-01042 (also indexed under "1.15.4. Personal Care Allowance")

This decision is noteworthy for its discussion of the distinction between personal care allowances and independence and home maintenance allowances. The decision describes and clarifies the type of activities that fall within the two types of allowance.

1.15.4. Personal Care Allowance

2011-01042 (also indexed under "1.15.3. Independence and Home Maintenance Allowance")

This decision is noteworthy for its discussion of the distinction between personal care allowances and independence and home maintenance allowances. The decision describes and clarifies the type of activities that fall within the two types of allowance.

1.16. Permanent Disability Awards (section 23)

For issues relating to the Review Division's jurisdiction and WCAT's jurisdiction over aspects of permanent disability awards, such as setting long term average earnings, scheduled awards, specific disabilities, and so on, also see "WCAT Jurisdiction" and "Review Division Jurisdiction" below.

1.16.1. General

2007-00524

This decision is noteworthy because it describes the process and type of evidence needed for accepting an actual or potential significant permanent change in a permanent functional impairment which would warrant a referral to the Disability Awards Department for a reassessment.

2006-03087 (also indexed under "1.16.7.1. Specific Permanent Disabilities - Chronic Pain")

This decision is noteworthy because of its discussion of the issues that arise if a worker has a permanent condition accepted under a claim, but the permanent functional impairment examination does not provide reliable range of motion findings.

2004-01881

At issue is whether a worker who has established entitlement to receive temporary wage-loss benefits under section 6(1) of the *Workers Compensation Act*, is required to re-establish entitlement prior to receiving a permanent partial disability award. The panel concluded that the fact that the worker was absent from work in order to recover from the disabling effects of her occupational disease was sufficient to be considered for a permanent partial disability award and it was not necessary for the worker to re-establish that she was disabled from earning full wages.

1.16.2. Loss of Function Awards (section 23(1))

2013-02463 (also indexed under "1.16.7.1. Specific Permanent Disabilities – Chronic Pain")

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

2012-00718 (also indexed under "1.16.7.1. Specific Permanent Disabilities - Chronic Pain")

This decision is noteworthy for the approach taken by the panel to determine the amount of the worker's partial permanent disability award under section 23(1) of the *Workers Compensation Act* where the worker's presentation during a permanent functional impairment evaluation is compounded by chronic pain.

2012-00195 (also indexed under "1.7.1. Depression)

This decision is noteworthy as an example of a decision that addresses the appropriate amount for a permanent disability award for depression, especially in cases where the medical evidence describes the worker's depression as "severe".

1.16.2.1. General

2010-01894

This decision is noteworthy for its discussion and analysis of an Additional Factors Outline award for cold intolerance arising from a knee injury as opposed to a hand injury.

2010-00191

This decision is noteworthy for its analysis of when a separate permanent functional impairment award for cold intolerance will be awarded, in addition to a chronic pain award.

2009-01863

This decision provides an analysis of whether it was appropriate to increase a permanent functional impairment award for cold intolerance in a case where the worker's employment as a long haul truck driver required periods of working in a refrigerated container.

2007-01520

This decision is noteworthy as it is an example of a useful and detailed analysis of a permanent disability award based upon a loss of range of motion.

2005-02255

This decision provides a useful discussion of the nature of functional impairment permanent disability awards awarded under section 23(1) of the *Workers Compensation Act* and emphasizes that the earnings and the occupation of a particular worker are not factors the Board can consider when determining an individual worker's functional award.

2004-04219

The panel rejected a medical opinion that placed the worker's impairment of the whole person at 0%, reasoning that since the worker had been left with an impaired liver, permanent symptoms and sensitivities, and diminished employment prospects, the nature and degree of a worker's disability could not be zero.

1.16.2.2. Scheduled Awards (item #39.10)

2010-01298 (also indexed under "1.16.7.1. Specific Permanent Disabilities - Chronic Pain" and "1.16.7.4. Specific Permanent Disabilities - Sensory Loss")

This decision provides an example of when the *Additional Factors Outline* will be used, when a chronic pain award ought to be made, and when benefits ought to be paid beyond age 65.

2005-06645

The Board awarded the worker a permanent disability award (PDA) of 8.6% for amputation, reduced range of motion (ROM), and sensory deficits of his right hand with an additional 9.0% for reduced grip strength. The Board later rescinded the 9.0% PDA for reduced grip strength. The panel upheld the Board's decision. The initial Board officer had clearly incorrectly applied the Additional Factors Outline (Outline) by not turning her mind to whether the worker's reduced grip strength had already been taken into account in the PDA for reduced ROM. The discretion provided under item #39.10 is not an unfettered discretion which may be exercised in an arbitrary manner. The Outline was established as a guide to the exercise of discretion under item #39.10.

2005-01671 (also indexed under "1.16.7.1. Specific Permanent Disabilities - Chronic Pain")

This decision is noteworthy as an example of analyses of the current chronic pain policy and permanent disability award (PDA) entitlement. The "other variables" that may be considered in increasing a PDA under policy item #39.10 of the *Rehabilitation Services and Claims Manual, Volume II* are only those variables relating to the degree of physical impairment of the worker. In claims involving injury to a limb, a comparison of the injured side to the uninjured side provides an accurate measurement of the worker's impairment.

1.16.2.3. Enhancement and Devaluation (items #32.12 and #32.13)

2005-01417 (also indexed under "1.16.7.1. Specific Permanent Disabilities - Chronic Pain")

It is inappropriate to apply an enhancement factor to a permanent disability award unless there is an injury to more than one functional part of the body. The elbow and forearm constitute one functional part of the body. Devaluation is not normally applied to each aspect of loss of range of motion of a particular joint. The loss of range of movement of the elbow and forearm constitutes one injury and not an injury to two separate parts of the upper extremity such that devaluation should be applied to either or any of them. Where a surgical complication is not an expected

consequence of the injury, pain resulting from the complication can be considered disproportionate and a chronic pain award given.

2004-02598 (also indexed under "3.5.10.1. WCAT Jurisdiction – Permanent Disability Awards - Scheduled Awards")

WCAT's jurisdiction over a Review Division decision where the worker injures his thumb and one or more fingers, and pursuant to item #39.24, the Board adds an "enhancement factor" which is normally equivalent to 100% of the lesser of the two disabilities. Because the amount of an enhancement factor is subject to discretion, it was not a "specified percentage" captured by section 239(2)(c). Since this worker had suffered greater loss of range of motion to his thumb as compared to his finger, WCAT's jurisdiction was limited to the thumb only.

1.16.3. Proportionate Entitlement (section 5(5))

2009-00644

This decision is noteworthy as it considers proportionate entitlement under section 5(5) of the *Workers Compensation Act* where a worker's psychological disability is superimposed on a pre-existing psychological disability that had previously impaired his earning capacity.

2004-02368

Under section 5(5) of the *Workers Compensation Act*, proportionate entitlement only applies when the pre-existing disability is in the part of the body that was affected by the work injury or disease. Even if section 5(5) permitted proportionate entitlement for disabilities in other parts of the body, section 23(3) of the Act forecloses its application because it dictates the loss of earnings method of calculation, and does not allow for reduction based on pre-existing disability.

1.16.4. Average Earnings

2005-02770 (also indexed under "1.12.2.1. Average Earnings - Calculating Average Earnings – Long Term", "2.16.6. Review Division Jurisdiction - Permanent Disability Awards" and "3.5.10.2. WCAT Jurisdiction – Permanent Disability Awards - Average Earnings")

Where the Board has set a worker's long term wage rate at the ten week wage rate review it no longer has the authority to change the long term wage rate for purposes of calculating the worker's permanent disability award. Therefore, the Review Division does not have the jurisdiction to review such permanent disability award decisions where the only issue on review is the wage rate used by the Board.

1.16.5. Retirement Age

A1603334 (also indexed under "1.17. Period of Payment" and "3.6.3. Obligations of Parties to Provide Evidence")

This decision concluded that changes made to item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II*, effective June 1, 2014, did not establish a strict requirement for independently verifiable evidence that a worker would have retired later than age 65. Although item #41.00 creates a clear preference for independently verifiable evidence, where such evidence is not available, the Board must consider other relevant information.

2014-03091

This decision provides a comprehensive summary of the legislative background informing section 23.1 of the *Workers Compensation Act* and policy item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II*. The effect of the Act is to establish age 65 as the minimum date to which a worker is entitled to a pension award: in the absence of at least evenly balanced evidence to support a later date, age 65 will be used as a retirement date for the purpose of terminating a worker's total or partial disability benefit payments.

2014-00467 (also indexed under "1.17. Period of Payment" and "3.6.3 Obligations of Parties to Provide Evidence")

In considering the worker's argument that his permanent disability award should not terminate when he turns 65, WCAT interpreted policy item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II* to mean that independently verifiable evidence is required to confirm a worker's subjective statement regarding his or her intention to work past age 65 and to establish the worker's later retirement date, but if such evidence is not available, a determination will be made on the available evidence, including the worker's statements.

2011-02455

This decision concludes that the general approach to the consideration of section 23.1 of the *Workers Compensation Act* and policy item #41.00* in the *Rehabilitation Services and Claims Manual, Volume II* regarding a worker's retirement age would appropriately involve a consideration of the worker's intentions at the time of injury as set out in practice directive #C5-1.

**The board of directors of the Workers' Compensation Board has enacted a new version of policy item #41.00, applicable to all Board decisions made on or after June 1, 2014. This decision applies the old version of policy item #41.00, in force prior to June 1, 2014.*

2007-00769

This decision is noteworthy for its discussion of the relevant information used in determining whether a worker would have worked past age 65. Section 23.1 of the *Workers Compensation Act* provides the Board with the authority to extend permanent disability payments beyond age 65 where the Board is satisfied that the worker would have retired after this age if he had not been injured.

2006-02105 (also indexed under "3.5.5. WCAT Jurisdiction - Findings of Fact")

A letter from the Board communicating a finding of fact that will affect entitlement to benefits at a future date is not a reviewable decision that may be appealed to WCAT. The Board may change such findings of fact before a decision affecting entitlement to benefits has been made. Thus a letter advising a worker, who was 65 years of age on the date of injury, that his retirement date would be two years after the injury was not a decision but, rather, a finding of fact.

1.16.6. Loss of Earnings Awards (section 23(3))

2015-00465

A reasonably available occupation under policy item #40.12 of the *Rehabilitation Services and Claims Manual, Volume II* is one that takes into account the worker's functional capabilities, and one that the worker is medically fit to undertake. This requires the Workers' Compensation Board to consider a worker's pre-existing non-compensable condition when determining whether the worker is competitively employable.

2014-02222

The cost of living adjustment provisions in policy item #40.13 of the *Rehabilitation Services and Claims Manual, Volume II* are only applicable if the Workers' Compensation Board does not have the average earnings for the worker's post injury occupation, at the date of injury.

2013-00190 (also indexed under "2.6.2. Relying on Previous Findings of Fact" and "3.9.4. No Reasonable Prospect of Success (ATA section 31(1)(f))")

Findings of fact made in the course of determining whether a worker is entitled to a loss of earnings assessment are not binding in the subsequent determination of whether the worker is entitled to a loss of earnings award. Therefore, these findings of fact are not appealable to WCAT.

2011-02457

In this decision, the panel declined to follow the decision in *WCAT-2008-02127* and concluded that the amount of a worker's award based on functional impairment is properly taken into account when determining whether, for the purposes of the third criterion in policy item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II*, a worker will sustain a significant loss of earnings.

2011-00833 (also indexed under "3.4. Lawfulness of Board Policy Determinations")

Portions of item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* are so patently unreasonable that the policy is not capable of being supported by the *Workers Compensation Act* and its regulations and should not be applied. Specifically, the inclusion of the phrase "an occupation of a similar type or nature" in the policy is patently unreasonable because the result is to add a restriction to entitlement to loss of earnings awards that is not consistent with or contemplated by section 23 of the Act. Section 23 only contemplates that a worker's occupation at the time of injury and ability to adapt to another suitable occupation be considered. Pursuant to section 251 of the Act the policy is referred to the board of directors.

2006-02023 (also indexed under "2.6.2. Evidence - Relying on Previous Findings of Fact")

The Board cannot rely on previous findings of fact with respect to a worker's fitness to return to work in relation to temporary wage loss benefits in deciding whether a worker is eligible for a loss of earnings award under section 23(3) of the *Workers Compensation Act*.

2006-01687 (also indexed under "1.18. Retirement Benefits", "2.2.1.1. Board Policy - Creating Policy – Fixed Rules", and "3.4. Lawfulness of Board Policy Determinations")

Section 251 referral to the chair. The worker was awarded a loss of earnings pension payable until he retires at age 70. The issue was whether the fixed rule in policy item #40.20 of the *Rehabilitation Services and Claims Manual, Volume I*, that payments under the rule of 15ths will not be made to workers who receive loss of earnings pensions beyond age 65, is patently unreasonable under section 23 of the *Workers Compensation Act*. The board of directors can establish policies that constitute fixed rules provided those policies are within the objectives of the Act and their authority under the Act. The current section 82 grants the board of directors broad authority to set compensation policies. Given that payments under the rule of 15ths appear to constitute a retirement benefit that is additional to the compensation for permanent disability established under section 23, and the fact that there is a legitimate rationale for the framework established under item #40.20, the impugned policy does not unlawfully fetter the discretion granted under section 23 or involve a patently unreasonable application of section 23.

2006-01383

The worker, a manual labourer, suffered multiple injuries. The medical evidence showed that he was unable to work for more than two to three hours a day and had several physical limitations. The worker's ability to sustain full time employment was a fundamental consideration in determining whether he would be able to adapt to another suitable occupation without incurring a significant loss of earnings. The Board should have considered the worker's limited learning abilities, his lack of literacy skills, and the lack of available jobs in his community when determining his eligibility for an assessment for a loss of earnings award. A financial test is used for considering whether a significant loss of earnings exists.

2006-00573

This decision is noteworthy for its consideration of the test of eligibility for a permanent disability award on a loss of earnings basis under the current *Workers Compensation Act*. The panel concluded: (1) it is important when considering the suitability of an occupation to consider a worker's physical abilities to handle materials and equipment necessary for the occupation and (2) in determining the worker's ability to continue in their pre injury occupation or a similar occupation it is suitable to consider any medical restrictions as well as limitations.

2005-05460

This decision is noteworthy for its discussion of the evidentiary foundation required to determine whether a worker is eligible for a loss of earnings assessment under section 23(3) of the *Workers Compensation Act*.

2004-06588 (also indexed under "3.5.17. WCAT Jurisdiction - Vocational Rehabilitation")

WCAT's lack of jurisdiction over appeals from vocational rehabilitation decisions under section 16 of the *Workers Compensation Act* does not prevent WCAT from considering vocational rehabilitation evidence for the purpose of adjudicating other aspects of a worker's claim.

1.16.7. Specific Permanent Disabilities

1.16.7.1. Chronic Pain

A1601702

Chronic pain stabilizes as a permanent condition if there is a likelihood of change in the condition over a protracted period of time (generally longer than 12 months), as set out in policy item #34.54 of the *Rehabilitation Services and Claims Manual, Volume II*. Policy item #C3-22.20 concerns the definition of chronic pain, but does not determine when chronic pain becomes a permanent condition. Policy item #42.10 contemplates exceptions to the general rule that payment of permanent disability awards begin the day following the date on which temporary wage loss ends.

2015-03834

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

2014-03154 (also indexed under "3.4. Lawfulness of Board Policy Determinations")

Policy item #39.12, as it relates to non-specific chronic pain awards, is not patently unreasonable under section 251(1) of the *Workers Compensation Act*. Policy item #39.12 states in part that the Board will not award an enhancement factor in relation to a chronic pain award.

2013-02463 (also indexed under "1.16.2. Loss of Function Awards")

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

2012-00718 (also indexed under "1.16.2. Loss of Function Awards")

This decision is noteworthy for the approach taken by the panel to determine the amount of the worker's partial permanent disability award under section 23(1) of the *Workers Compensation Act* where the worker's presentation during a permanent functional impairment evaluation is compounded by chronic pain.

2010-01298 (also indexed under "1.16.2.2. Permanent Disability Awards – Loss of Function Awards - Scheduled Awards" and "1.16.7.4. Specific Permanent Disabilities - Sensory Loss")

This decision provides an example of when the *Additional Factors Outline* will be used, when a chronic pain award ought to be made, and when benefits ought to be paid beyond age 65.

2008-03257 (also indexed under "1.16.7.5. Specific Permanent Disabilities - Disfigurement")

This decision is noteworthy for its analysis of the factors to consider with regard to chronic pain and disfigurement awards.

2007-03304 (also indexed under "1.16.7.2. Specific Permanent Disabilities - Hearing")

This decision is noteworthy because it considers whether tinnitus alone entitles a worker to a permanent disability award and, in particular, an award based upon chronic pain.

2007-00171 (also indexed under "3.6.6. Evidence - Expert Evidence")

This decision is noteworthy as an example of how to assess the relative merits of expert evidence when determining whether a worker is entitled to an additional permanent disability award for chronic pain pursuant to section 23(1) of the *Workers Compensation Act* and item #39.01 of the *Rehabilitation Services and Claims Manual, Volume I.*

2006-03087 (also indexed under "1.16.1. Permanent Disability Awards – Loss of Function Awards")

This decision is noteworthy because of its discussion of the issues that arise if a worker has a permanent condition accepted under a claim, but the permanent functional impairment examination does not provide reliable range of motion findings.

2005-06524 (also indexed under "3.4. Lawfulness of Board Policy Determinations")

Section 251 referral to the chair. Policy item #39.01 of the *Rehabilitation Services and Claims Manual, Volume I* can rationally be supported by former section 23 and is not patently unreasonable under the *Workers Compensation Act.* The policy takes the degree or extent of injury into account by establishing the threshold criteria for a worker becoming eligible for a chronic pain award. Section 23(1) has a long history of being viewed as establishing a method for determining impairment of earning capacity based on averages rather than the circumstances of individual workers, which is justified on the basis of presumed loss of earning capacity. The broad discretion granted under section 23(3) of the Act and the related policies in RSCM I enable decision-makers to apply the projected loss of earnings method when the 2.5% award does not adequately compensate the worker for his or her impairment of earning capacity.

2005-03569

Where a worker has disproportionate chronic pain arising from more than one body part, policy item #39.01 of the *Rehabilitation Services and Claims Manual, Volume I* does not limit a worker to one chronic pain award under section 23(1) of the *Workers Compensation Act*. Therefore, to the extent that disability in the workers' compensation system is reflected by an increased percentage of total disability, a worker should receive multiple chronic pain awards where more than one body part is the source of the disproportionate disabling chronic pain.

2005-03239

This decision is noteworthy as an example of the application of the chronic pain policy found at policy item #39.02 of the *Rehabilitation and Services Claims Manual, Volume II* in cases involving workers with specific chronic pain. In particular, it addresses the issue of whether specific chronic pain which is aggravated by work is sufficiently disproportionate to the associated physical impairment so as to create entitlement to an award for chronic pain.

2005-01671 (also indexed under "1.16.2.2. Permanent Disability Awards – Loss of Function Awards - Scheduled Awards")

This decision is noteworthy as an example of analyses of the current chronic pain policy and permanent disability award (PDA) entitlement. The "other variables" that may be considered in increasing a PDA under policy item #39.10 of the *Rehabilitation Services and Claims Manual, Volume II* are only those variables relating to the degree of physical impairment of the worker. In claims involving injury to a limb, a comparison of the injured side to the uninjured side provides an accurate measurement of the worker's impairment.

2005-01417 (also indexed under "1.16.2.3. Permanent Disability Awards – Loss of Function Awards - Enhancement and Devaluation")

It is inappropriate to apply an enhancement factor to a permanent disability award unless there is an injury to more than one functional part of the body. The elbow and forearm constitute one functional part of the body. Devaluation is not normally applied to each aspect of loss of range of motion of a particular joint. The loss of range of movement of the elbow and forearm constitutes one injury and not an injury to two separate parts of the upper extremity such that devaluation should be applied to either or any of them. Where a surgical complication is not an expected consequence of the injury, pain resulting from the complication can be considered disproportionate and a chronic pain award given.

2004-04324 (also indexed under "3.5.10.1. WCAT Jurisdiction - Permanent Disability Awards – Scheduled Awards")

A chronic pain award is not a "scheduled" award pursuant to the "Permanent Disability Evaluation Schedule" contemplated by section 23(2) of the *Workers Compensation Act*. Therefore, WCAT has jurisdiction to hear appeals of chronic pain decisions.

2004-02507 (also indexed under "1.15.2. Health Care Benefits - Drugs")

A worker, who suffered from chronic pain syndrome, was not entitled to medical marijuana as a section 21 health care benefit to control his pain because its effectiveness in reducing his symptoms was questionable, and it would delay his recovery and create unwarranted risks for further injury.

2004-01842

The term "initial adjudication", which is used in the Panel of Administrators Resolution as the effective date of the new policy for chronic pain, means the initial adjudication with respect to entitlement for compensation for subjective, chronic pain, not the initial adjudication of the claim.

2003-03993 (also indexed under "1.16.7.3. Specific Permanent Disabilities - Psychological Impairment")

Pain Disorder Associated with Both Psychological Factors and a General Medical Condition should be assessed as a psychological condition under policy item #38.10 of the *Rehabilitation Services and Claims Manual* as it is a condition under the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition and is not excluded as being a mental disorder.

1.16.7.2. Hearing

2015-00574

Policy item #31.20 of the *Rehabilitation Services and Claims Manual, Volume II* specifically recognizes that damage can continue to occur to lower hearing frequencies after more than 10 years of exposure to hazardous occupational noise. Consequently, entitlement to a permanent partial disability award for occupational noise-induced hearing loss cannot be denied on the primary basis of a loss of hearing in the lower frequencies (below 2000 hz), despite the fact that scientific research may suggest that hazardous occupational noise does not affect hearing at the lower frequencies.

2007-03304 (also indexed under "1.16.7.1. Specific Permanent Disabilities - Chronic Pain")

This decision is noteworthy because it considers whether tinnitus alone entitles a worker to a permanent disability award and, in particular, an award based upon chronic pain.

2007-03165

This decision is noteworthy because it provides an analysis of whether the former or the current provisions of the *Workers' Compensation Act* apply to a permanent disability award for occupational noise-induced hearing loss.

2007-02967

This decision is noteworthy because it provides an analysis of the use of Robinson's Tables and expert evidence in an occupational noise-induced hearing loss claim.

2007-02600 (also indexed under "3.6.6. Evidence - Expert Evidence")

This decision is noteworthy because it provides an analysis of how to address conflicting medical evidence in determining a worker's entitlement to a permanent disability award for noise-induced hearing loss.

2005-04371

For a hearing loss claim, entitlement to a permanent disability award only arises when the hearing loss is of a pensionable degree under Schedule D of the *Workers Compensation Act*, even if tests showed some hearing loss before that point. If the hearing was not of a pensionable degree before June 30, 2002, the current provisions of the Act apply. If there are no earnings at the time of the injury, it is appropriate to use the worker's earnings in the one year prior to her cessation of employment.

2005-01943 (also indexed under "3.5.10.3. WCAT Jurisdiction – Permanent Disability Awards - Occupational Noise-Induced Hearing Loss")

Schedule D of the *Workers Compensation Act* is not a "rating schedule" compiled under section 23(2) of the Act. Therefore section 239(2)(c) of the Act does not limit WCAT's jurisdiction to hear appeals from decisions relating to occupational noise-induced hearing loss permanent disability awards where Schedule D of the Act is used to determine the worker's award.

1.16.7.3. Psychological Impairment

A1604527

The ranges of impairment for permanent psychological conditions set out in the *Permanent Disability Evaluation Schedule*, as amended effective January 1, 2015, are binding policy with respect to new decisions made after that date. *The Permanent Psychological Impairment Guidelines* published by the Workers' Compensation Board are not binding policy. The assessment of impairment resulting from a psychological condition provided by the Psychological Disability Assessment Committee is an adjudicative decision not expert evidence.

2011-01582 (also indexed under "1.8. Compensable Consequences" and "2.16.5. Review Division Jurisdiction - Refusal to Review")

Policy items #22.33 and #22.35 of the *Rehabilitation Services and Claims Manual, Volume II* do not preclude the Board from adjudicating a worker's diagnosed pain disorder, where it has previously accepted a permanent chronic pain condition. A refusal by the Board to adjudicate a worker's claim for a pain disorder in these circumstances constitutes an implicit denial of the claim for pain disorder. Such a decision is reviewable by the Review Division.

2006-02310

This decision is noteworthy for providing a detailed discussion of the process for determining permanent functional impairment awards for psychological impairment.

2003-03993 (also indexed under "1.16.7.1. Specific Permanent Disabilities - Chronic Pain")

Pain Disorder Associated with Both Psychological Factors and a General Medical Condition should be assessed as a psychological condition under policy item #38.10 of the *Rehabilitation Services and Claims Manual* as it is a condition under the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition and is not excluded as being a mental disorder.

1.16.7.4. Sensory Loss

2010-01298 (also indexed under "1.16.2.2. Permanent Disability Awards – Loss of Function Awards - Scheduled Awards" and "1.16.7.1. Specific Permanent Disabilities - Chronic Pain")

This decision provides an example of when the *Additional Factors Outline* will be used, when a chronic pain award ought to be made, and when benefits ought to be paid beyond age 65.

2008-03007

This decision is noteworthy as it provides an analysis of the percentage of impairment to be awarded for sensory loss under policy item #39.40 of the *Rehabilitation Services and Claims Manual, Volume II* and the Additional Factors Outline guidelines.

1.16.7.5. Disfigurement

2008-03257 (also indexed under "1.16.7.1. Specific Permanent Disabilities - Chronic Pain")

This decision is noteworthy for its analysis of the factors to consider with regard to chronic pain and disfigurement awards.

1.16.8. Permanent Disability Award Transition Issues

For noteworthy decisions relating to this issue see under "Transition Issues"

1.17. Period of Payment (section 23.1)

A1700491 (also indexed under "2.5.1.1. Permanent Disability Awards")

Section 32(3) of the *Workers Compensation Act* does not give the Workers' Compensation Board jurisdiction to reconsider the duration of a permanent partial disability award when a worker's claim is reopened more than three years after the date of injury to consider a significant change in permanent disability.

A1603334 (also indexed under "1.16.5. Retirement Age" and "3.6.3. Obligations of Parties to Provide Evidence")

This decision concluded that changes made to item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II*, effective June 1, 2014, did not establish a strict requirement for independently verifiable evidence that a worker would have retired later than age 65. Although item #41.00 creates a clear preference for independently verifiable evidence, where such evidence is not available, the Board must consider other relevant information.

2014-00467 (also indexed under "1.16.5. Retirement Age" and "3.6.3. Obligations of Parties to Provide Evidence")

In considering the worker's argument that his permanent disability award should not terminate when he turns 65, WCAT interpreted policy item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II* to mean that independently verifiable evidence is required to confirm a worker's subjective statement regarding his or her intention to work past age 65 and to establish the worker's later retirement date, but if such evidence is not available, a determination will be made on the available evidence, including the worker's statements.

2005-05843 (also indexed under "2.14.2. Transition Issues - Meaning of 'Recurrence of Disability'" and "3.4. Lawfulness of Board Policy Determinations")

Pursuant to section 251(8) of the *Workers Compensation Act*, WCAT does not have the authority to refuse to apply a policy of the Board where the board of directors has decided that the policy is not patently unreasonable and must be applied. Policy item #1.00(4) of the *Rehabilitation Services and Claims Manual, Volume I and II,* now item #1.03(b)(4), is broad enough to apply to an anticipated deterioration in the permanent effects of an injury or an occupational disease. The expression "date of injury", as used in section 23.1 of the Act, does not include the date of recurrence of an injury.

1.18. Retirement Benefits

2006-01687 (also indexed under "1.16.6. Permanent Disability Awards - Loss of Earnings Awards", "3.4. Lawfulness of Board Policy Determinations" and "2.2.1.1. Board Policy - Creating Policy – Fixed Rules")

Section 251 referral to the chair. The worker was awarded a loss of earnings pension payable until he retires at age 70. The issue was whether the fixed rule in policy item #40.20 of the *Rehabilitation Services and Claims Manual, Volume I*, that payments under the rule of 15ths will not be made to workers who receive loss of earnings pensions beyond age 65, is patently unreasonable under section 23 of the *Workers Compensation Act*. The board of directors can establish policies that constitute fixed rules provided those policies are within the objectives of the Act and their authority under the Act. The current section 82 grants the board of directors broad authority to set compensation policies. Given that payments under the rule of 15ths appear to constitute a retirement benefit that is additional to the compensation for permanent disability established under section 23, and the fact that there is a legitimate rationale for the framework established under item #40.20, the impugned policy does not unlawfully fetter the discretion granted under section 23 or involve a patently unreasonable application of section 23.

1.19. Protection of Benefits

1.19.1. Interest on Retroactive Changes to Benefits (item #50.00)

1.19.1.1. General

A1701547

Policy #50.00 of the *Rehabilitation Services and Claims Manual, Volume II* as amended effective January 1, 2014 does not permit payment of interest on retroactive benefits in circumstances other than as provided in section 19(2)(c) and 258 of the *Workers Compensation Act*, and, in the absence of policy specifically authorizing it, the Board does not have discretion to pay interest on retroactive benefits in any other circumstances.

2015-00701

This decision is noteworthy for its analysis of the amendments effective January 1, 2014 to policy item #50.00, *Interest,* of the *Rehabilitation Services and Claims Manual, Volume II*.

2013-01282

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

2007-04002 (also indexed under "3.2. Precedent Panel Decisions")

As ordered by the British Columbia Supreme Court on judicial review, a WCAT precedent panel reconsidered their prior precedent panel decision, *WCAT-2005-03622-RB* dated July 8, 2005, concerning the payment of interest on retroactive compensation benefits. The precedent panel declined to initiate a referral of the new interest policy to the WCAT chair under section 251 of the *Workers Compensation Act*. The worker had originally appealed the Board officer's decision on the payment of interest to the (former) Review Board, and the appeal had been transferred to WCAT for completion following the March 3, 2003 changes to the Act. The precedent panel referred the Board decision back to the Board under section 38(2) of the transitional provisions of Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*. The precedent panel directed the Board to make a fresh decision concerning the worker's entitlement to interest in light of the court decision and any further policy direction which might be provided by the board of directors.

2005-04320 (also indexed under "3.5.12. WCAT Jurisdiction - Vocational Rehabilitation" and "3.18. Costs and Expenses")

WCAT's jurisdiction is established by statute, in this case, section 239 of the *Workers Compensation Act*. WCAT has no jurisdiction to address the awarding of interest in relation to a matter over which WCAT has no jurisdiction, such as vocational rehabilitation assistance. In any event, there is no statutory entitlement to interest on retroactive benefits except in the limited situations expressly addressed in the Act or Board policy. Section 6(c) of the *Workers Compensation Act Appeal Regulation*, allowing WCAT to award costs in exceptional circumstances, must be read within the context of the clear limitations on the authority of WCAT contained in the Act. When WCAT does not have jurisdiction over a matter, such as vocational rehabilitation assistance, WCAT cannot hear an appeal on the issue of legal fees alone.

1.19.1.2. Meaning of Blatant Board Error

The blatant Board error test will continue to apply to decision made before January 1, 2014 but does not apply to decisions made on or after that date. See *WCAT-2015-00701*.

2005-06872

The Board initially denied the employer's request for relief of costs associated with a worker's injury. The Board then made a new decision to approve the relief of costs, but denied the employer's request for interest. The employer's appeal was allowed. The Board made a blatant error in failing to consider its own policy on costs arising during graduated return to work programs. The "blatant error" test is similar to the common law "patent unreasonableness" standard of review, but the tests are not interchangeable.

2005-00296

The worker, a firefighter, suffered heart attacks in 1989 and 1999. The Board ultimately granted the worker a permanent disability award in 2003. The Board's earlier decision to deny the worker an award was inconsistent with published decisions of the former Appeal Division. The Board denied the worker's request for retroactive interest as it did not consider the earlier decision was a "blatant error". The panel concluded that, although desirable, the Board was not required to interpret its policy so as to be consistent with Appeal Division decisions. The Board policy on occupational disease was ambiguous and the initial decision could not be characterized as a "blatant error". The worker was not entitled to interest.

2004-01152

A difference of opinion does not constitute a blatant error as defined in interest policy #50.00.

2004-00890

Interpreting "blatant error" in policy #50.00.

1.20. Recurrence of Injury (section 96(2)(b))

2007-01194

This decision is noteworthy for concluding that the Supreme Court of British Columbia decision in *Cowburn v. Workers' Compensation Board of British Columbia* does not encompass circumstances where a worker's claim is reopened for a period of additional temporary disability benefits after June 30, 2002. The *Cowburn* decision considered the definition of recurrence in relation to a deterioration of a permanent condition, and not a recurrence of a temporary disability, after June 30, 2002.

2005-05496

The worker requested reopening after recurrence of symptoms caused by an injury to her finger. There had been a complete resolution of the symptoms prior to recurrence. A plastic surgeon had indicated at the time of the original complaint that the symptoms may recur. The location and description of the physical findings at the time of reopening were nearly identical to those at the time of the original complaint. There was no evidence the worker's subsequent symptoms resulted from non-occupational activities or an intrinsic condition. The worker's claim was reopened for a recurrence of the original injury.

2005-01710 (also indexed under "2.14.2. Transition Issues - Meaning of 'Recurrence of Disability'" and "3.4. Lawfulness of Board Policy Determinations")

Note: This decision of the Chair was provided to the Board pursuant to section 251(5) of the *Workers Compensation Act*. In response, and pursuant to section 251(6) of the Act, the Board determined that policy item #1.03(b)(4) of the *Rehabilitation Services and Claims Manual, Volume I and II* was not patently unreasonable and must be applied by the WCAT. The Board's decision can be found on WCAT's website. In *Cowburn v. Worker's Compensation Board of British Columbia* (2006 BCSC 722), a judicial review from a Review Division decision, the British Columbia Supreme Court concluded that the board of directors' policy on recurrence of disability in item #1.03(b)(4) is a patently unreasonable interpretation of the Act. The court's decision may be found on the BCSC website at: http://www.courts.gov.bc.ca/jdb-txt/sc/06/07/2006bcsc0722.htm.

The element of item #1.03(b)(4) of the RSCM I and II that characterizes a reopening of a worker's claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" was referred to the Chair under section 251(2) of the Act. In this decision the Chair concluded that the policy is so patently unreasonable that it is not capable of being supported by the Act. Thus, section 35.1(8) of the Act cannot be rationally interpreted to mean that there is a "recurrence" when a permanent disability for which a pension was granted under the former Act permanently gets worse or deteriorates after June 30, 2002.

2005-01278

The panel referred to a new policy amendment to policy item #C14-102.01 of the *Rehabilitation Services and Claims Manual, Volume II* which, although inapplicable to the appeal, was useful as an interpretive guide on what constitutes a recurrence for the purposes of section 96(2) of the *Workers Compensation Act*. The questions to be answered are: (1) Have there been any intervening incidents, work-related or otherwise? (2) Has there been a continuity of symptoms and/or continuity of medical treatment? (3) Can the current symptoms be related to the original injury?

2004-04731 (also indexed under "1.11.1.1. Temporary Disability Benefits – Amount of Benefits - Recurrence of Disability (section 32)")

This decision is noteworthy as an example of the application of section 32 of the *Workers Compensation Act* and item #70.20.2(b) of the *Rehabilitation Services and Claims Manual, Volume II* to the issue of whether a worker who is unemployed prior to a recurrence of disability is entitled to wage loss benefits arising out of the recurrence, where the recurrence occurs more than three years after injury.

2004-03496

"Injury" in section 96(2)(b) of the *Workers Compensation Act* means compensable injury. Hence, if an injury has not yet been determined to be compensable, it cannot recur for the purpose of section 96(2)(b).

1.21. Assessments

2011-02362 (also indexed under "2.5.2 Reconsiderations" and "3.4. Lawfulness of Board Policy Determinations")

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

2011-00522 (also indexed under "2.5.2. Reconsiderations")

This decision is noteworthy for its enumeration of potentially relevant factors to consider, when determining reimbursement of expenses of written evidence, such as expert reports.

1.21.1. Responsibility to Register with Board

2008-00639 (also indexed under "3.5.19. WCAT Jurisdiction - Equitable Remedies")

This decision is noteworthy for its analysis of the responsibility on an employer to register with the Board. Where the employer believes that the Board not to levy penalties or interest on employers who voluntarily registered, it is doubtful that WCAT has the authority to provide relief in the nature of promissory estoppel or equitable estoppel.

1.21.2. Assessable Payroll

2006-03798

Policy item AP1-38-2 of the *Assessment Manual* authorizes the Board to include dividend income in a firm's assessable payroll only to the extent that the included dividend amount is reasonably equivalent to the value of the active shareholders' services. Example 2 of practice directive 1-38-2(A) is inconsistent with the policy to the extent that it authorizes the Board to include all dividend payments in assessable payroll, without regard to the value of the shareholders' activities.

2006-00104

The Board assessed the employer for payments made to the active shareholder's mother. The employer characterized these payments as being in the nature of "benefits" or "superannuation". The employer's appeal was denied. The Board has the jurisdiction to define assessable payroll as being broader than payments made to workers or active principals and shareholders of a company.

2005-00120

This decision is noteworthy for providing a comprehensive summary of the history of the law and policy regarding assessments in the fishing industry.

2004-03070

WCAT found an error of law and breach of policy in a Board assessment decision that justified the cancellation of that decision under s. 253. The Board office assessor did not turn his mind to applying policy in section 20:30:20, despite the employer's request to do so, when reaching his decision to include payments to all commissioned agents as part of the employer's assessable payroll, and this failure to consider relevant policy constituted an error of law and a breach of policy.

1.21.3. Industry Classification

2014-00203

In reclassifying an employer to a different classification unit, the Workers' Compensation Board cannot take into account changes to policy item #AP1-37-2 of the *Assessment Manual* effective after the date of the Board's decision.

2006-04059

Where an employer rents land to different companies in several different industry classifications, the "inescapability inclusion exception" in policy item AP1-37-1 of the *Assessment Manual* cannot apply because there is no single industry classification to which the employer's classification can be the "same". Affiliation in the sense of common directors and/or family connections between two firms is not a necessary or a sufficient condition of "inescapability" in this policy.

2006-03676

This decision is noteworthy as the employer's estoppel argument regarding a payroll allocation change to another classification unit was successful to the extent that the employer was entitled to rely on the representations of the assessment officers, but only until the employer became otherwise aware, or should have been otherwise aware, that the Board had officially clarified its practice and its position with respect to the payroll allocation for ski rental activities/payroll.

2006-03504 (also indexed under "3.6.2. Evidence - Burden of Proof")

The employer bears the onus of providing evidence to the Board when disputing its industry classification. Evidence from financial statements and news releases may be sufficient to demonstrate an employer is engaging in mineral exploration activities for the purposes of determining its industry classification.

2005-06104

An employer must provide adequate evidence to the Board to support multiple classifications for assessment rate purposes. In the absence of such evidence, the Board must classify the employer under the single classification unit that best fits its descriptions. For classification purposes, it does not matter whether the employer subcontracts certain aspects of its operations to be done by other firms.

2005-01851

The Board policy of classifying employers based on industrial undertaking rather than on occupation or hazard is consistent with section 42 of the *Workers Compensation Act*. Where a firm's operations are an essential part of another firm's operations, the firm's classification will be the same as that of the other firm, regardless of the occupations of the firm's workers.

2003-03419

The Director of the Assessment Department found that although the employer had registered with the Board it had misrepresented its operations. The panel concluded that the Board erred in finding that there was misrepresentation since accurate information had been provided to the Board in the employer's payroll reports.

1.21.4. Change in Ownership

2004-05255

Criteria to use in determining whether there has been a "change in ownership" for the purpose of s. 49(2). If a father's business is transferred to his sons, and operates in the same location with virtually the same business name, there has been a "change in ownership". Hence outstanding assessments owed to the Board by the father's company may be properly transferred to the sons' company.

1.21.5. Experience Rating

2004-03600

Experience rating and lawfulness of Board policy. The October 17, 2002 Resolution of the panel of administrators and the application of policy AP-1-42-1, item 7 to experience rate the employer during the transition period set out in the Resolution was not patently unreasonable.

2009-01313

This decision determined that "distinct change" for the purpose of policy item AP1-37-3(4), which relates to the transfer of an employer's experience rating upon a change in the employer's industry classification, should be interpreted as allowing for the potential transfer of experience rating unless an employer's new operations represent a clear and marked difference from their former operations.

1.22. Relief of Costs

2008-00166 (also indexed under "1.4.4.1. Unauthorized Activities - Deviations from Employment")

This decision is noteworthy as it provides an analysis of section 5(3) of the *Workers Compensation Act* and policy item #16.60 of the *Rehabilitation Services and Claims Manual, Volume II* regarding injuries solely attributable to the serious and wilful misconduct of the worker, and the related issue of relief of claims costs.

2006-00554

Section 6(2) of the *Workers Compensation Act* states that the date of occurrence of an occupational disease is the date of disablement. Policy item #32.50 of the *Rehabilitation Services and Claims Manual, Volume I* does not establish a second date of occurrence of injury for administrative purposes for relief of claim costs consideration.

2005-06541 (also indexed under "2.4. What Constitutes a 'Decision'")

The employer appealed a letter by the Board advising the employer that the Board had already provided a decision with regard to the employer's entitlement to relief of costs under section 39(1)(e) of the *Workers Compensation Act*. The employer's appeal was denied. The letter did not contain a new appealable decision.

2005-05621

In cases coming within the terms of the historical project, policy in the *Assessment Policy Manual* at No. 40:70:40 does not provide for the payment of interest prior to the date of the employer's application for relief of costs on the basis of blatant Board error. The 1998 resolution on section 39(1)(e) which formed the basis of this policy is not patently unreasonable in stipulating a single criterion (the date of the employer's application) to govern the payment of interest on cases coming within the terms of the historical project.

2005-02226

Vulnerability or predisposition to the development of a personal injury or occupational disease does not constitute a pre-existing condition, disease or disability for the purpose of section 39(1)(e) of the *Workers Compensation Act*.

2004-06118 (also indexed under "3.5.2. WCAT Jurisdiction - Reducing/Removing Appellant's Entitlement on Appeal")

Where a party has been partially successful in a lower decision, the party cannot assume that there is no "risk" in pursuing an appeal. Where an employer obtains a favourable relief of costs decision from the Board, but only receives relief for a portion of the worker's claim, and then the employer appeals, WCAT has the authority to reweigh the evidence and find that the employer is not entitled to any relief of costs.

2004-04852 (also indexed under "2.5.2. Board Changing Board Decisions - Reconsiderations")

This is a decision of interest involving the characterization of letters from the Board regarding relief of costs, namely whether they were appealable decisions, and the characterization of the employer's request for a new decision, namely whether it was a request for a reconsideration or a request for a determination on something not already determined by the Board.

1.23. Occupational Health and Safety

2012-02266 (also indexed under "1.23.2.5 Administrative Penalties - Amount of Penalty")

When an employer complies with industry practice and does not proceed in the face of actual or constructive knowledge of a safety hazard, it cannot be found to have acted wilfully or with reckless disregard for the safety of its workers; in such circumstances, when there is a lack of wilfulness or reckless disregard, a presidential penalty is inappropriate.

1.23.1. Discriminatory Actions

2015-03765

This decision is noteworthy for its conclusion that making a "bare" claim for compensation that does not identify any occupational health or safety issues is not a protected activity under section 151 of the *Workers Compensation Act*.

2011-00503

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

2011-00160 (also indexed under "2.7. Federal Employees" and "2.8. Discriminatory Actions")

This decision finds that the Board was without the necessary jurisdiction to decide whether or not a federal employer engaged in discriminatory action against the federal employee contrary to section 151 of the *Workers Compensation Act*.

2011-00152

Common law or employment standards approaches to remedies for wrongful dismissal or termination do not incorporate the "make whole" approach to remedy contemplated by section 153(2) of the *Workers Compensation Act*. Therefore, they should be rejected as the basis for awarding remedies under this section.

2010-00781

This decision considers whether an employer terminated a worker's employment as a shipper-receiver for reasons prohibited under section 151 of the *Workers Compensation Act* where the motivation for termination was partly because the worker had made a compensation claim.

2010-00430

This decision considers the meaning of "occupational environment" in section 151 of the *Workers Compensation Act*, which addresses prohibited discrimination against workers.

2009-02609

A WCAT panel found that, in determining an appropriate monetary remedy for a worker in circumstances where an employer terminates the worker in violation of section 151 of the *Workers Compensation Act* (which prohibits discriminatory actions), the fact that a worker had only worked for the employer for a short period of time is irrelevant. The panel also determined that policy item D6-153-2 of the *Prevention Manual* is not patently unreasonable to the extent that it provides that employment insurance benefits received by a worker are not to be considered in measuring a worker's actual loss.

2008-03843 (also indexed under "3.16. Applications to WCAT to Stay an Appealed Decision")

This decision is noteworthy as it provides an analysis of the criteria WCAT takes into consideration when determining whether to issue a stay under section 244 of the *Workers Compensation Act* pending an employer's appeal of a discriminatory action decision.

2004-05922

The employer warned the worker, a member of the workplace occupational health and safety committee, that his inappropriately aggressive communication on workplace safety issues might lead to his termination. The panel found that, in the overall context, the employer's actions were not in the nature of discipline or a reprimand, and thus were not discriminatory actions within the meaning of section 150 of the *Workers Compensation Act*. The panel also found the employer was not motivated by any of the reasons prohibited under section 151.

2004-02587

The employer terminated the worker's job in circumstances that suggested the employer suspected the worker had made a complaint to the Board. The panel found the employer violated section 151 of the *Workers Compensation Act* and ordered the employer to compensate the worker for lost wages but did not order reinstatement.

2004-02065

The claimant alleged that the employer and the union unlawfully undertook a number of discriminatory actions against her, including a four month suspension with pay, contrary to s. 151 of the *Workers Compensation Act*. The panel concluded that while the worker had raised safety concerns at the workplace, the actions of the employer and the union were in response to the worker's behaviour and personality conflicts, not for reasons prohibited under section 151 of the Act.

2004-00641

Discriminatory action complaint - in the absence of an impartial, objective investigation by the employer done in accordance with the *Workers Compensation Act* and Regulations, the worker had reason to be concerned that his safety was at risk from the other worker if he returned to the workplace, and hence his refusal to return to work amounted to a constructive dismissal.

2003-02559

The claimant alleged that the employer unlawfully terminated her employment contrary to section 151 of the *Workers Compensation Act*. The parties agreed to the panel's request to meet with a mediator under section 246(2)(g) of the Act and successfully came to a consensual resolution of their dispute.

1.23.2. Administrative Penalties

2014-01756 (also indexed under "2.16.1. Scope of Review")

This decision is noteworthy for its discussion of a review officer's authority to issue new contravention orders. The *Workers Compensation Act* does not grant review officers explicit jurisdiction to substitute one contravention order for another.

1.23.2.1. Board Jurisdiction to Levy Penalties (section 196(1))

2006-01337 (also indexed under "1.23.2.3. Occupational Health and Safety – Administrative Penalties - Obligation of Owner to Disclose Workplace Hazards")

Subsection 119(b) of the *Workers Compensation Act* requires an owner to disclose a known hazard as soon as practicable to any person reasonably likely to come within the scope of that hazard. Generally, an owner will not discharge its obligation by providing information of a potential hazard only at such time as the owner is aware of a specific person's intention to engage in an activity likely to fall within the scope of that hazard, even in cases in which the person may have a legal obligation to give advance notice to the owner of their intention to engage in the activity. Section 196 of the Act authorizes the Board to levy an administrative penalty against an owner. The term "employer" as used in that section includes "owners" or any other person who employs one or more workers.

1.23.2.2. Employer's Responsibilities Toward the Public

2007-00316

This decision is noteworthy because it describes the occupational health and safety responsibilities of an employer towards its workers even when a worksite injury involves a member of the public.

1.23.2.3. Obligation of Owner to Disclose Workplace Hazards (section 119)

2006-01337 (also indexed under "1.23.2.1. Occupational Health and Safety – Administrative Penalties - Board Jurisdiction to Levy Penalties")

Subsection 119(b) of the *Workers Compensation Act* requires an owner to disclose a known hazard as soon as practicable to any person reasonably likely to come within the scope of that hazard. Generally, an owner will not discharge its obligation by providing information of a potential hazard only at such time as the owner is aware of a specific person's intention to engage in an activity likely to fall within the scope of that hazard, even in cases in which the person may have a legal obligation to give advance notice to the owner of their intention to engage in the activity. Section 196 of the Act authorizes the Board to levy an administrative penalty against an owner. The term "employer" as used in that section includes "owners" or any other person who employs one or more workers.

1.23.2.4. Wilful Non-Compliance

2005-06255

The employer, a pub operator, refused for several months to enforce section 4.81 of the *Environmental Tobacco Smoke Regulation* (ETS Regulation) and build a designated smoking room. The Board imposed a $2500.00 administrative penalty nine months after the employer complied with the ETS Regulation. The panel confirmed a Category A penalty was appropriate due to the employer's wilful non-compliance. However, the panel reduced the penalty to $1750.00 due to mitigating factors.

1.23.2.5. Amount of Penalty

2012-02266 (also indexed under “1.23. Occupational Health and Safety”)

When an employer complies with industry practice and does not proceed in the face of actual or constructive knowledge of a safety hazard, it cannot be found to have acted wilfully or with reckless disregard for the safety of its workers; in such circumstances, when there is a lack of wilfulness or reckless disregard, a presidential penalty is inappropriate.

2008-02573

This decision is noteworthy as it provides an analysis of the administrative penalty and claims cost levy provisions of the *Workers Compensation Act* and *Occupational Health and Safety Regulation,* and in particular it reviews the criteria to be considered in determining quantum when imposing a penalty or levy.

2. BOARD PROCEDURAL ISSUES

2.1. Board Jurisdiction

2.1.1. Implementing Appellate Decisions

2006-03192

The Board and the Review Division are not bound by comments made by a WCAT panel that are not essential to the decision being made.

2005-04960

The Board must implement a WCAT decision that appears to have failed to take into account policy. The Board cannot purport to exercise a supervisory role over WCAT decision-making which has not been conferred on the Board by the legislature.

2.2. Board Policy

2.2.1. Creating Policy

2.2.1.1. Fixed Rules

2006-01687 (also indexed under "1.16.6. Permanent Disability Awards - Loss of Earnings Awards", "1.18. Retirement Benefits", and "3.4. Lawfulness of Board Policy Determinations")

Section 251 referral to the chair. The worker was awarded a loss of earnings pension payable until he retires at age 70. The issue was whether the fixed rule in policy item #40.20 of the *Rehabilitation Services and Claims Manual, Volume I*, that payments under the rule of 15ths will not be made to workers who receive loss of earnings pensions beyond age 65, is patently unreasonable under section 23 of the *Workers Compensation Act*. The board of directors can establish policies that constitute fixed rules provided those policies are within the objectives of the Act and their authority under the Act. The current section 82 grants the board of directors broad authority to set compensation policies. Given that payments under the rule of 15ths appear to constitute a retirement benefit that is additional to the compensation for permanent disability established under section 23, and the fact that there is a legitimate rationale for the framework established under item #40.20, the impugned policy does not unlawfully fetter the discretion granted under section 23 or involve a patently unreasonable application of section 23.

2.2.1.2. Scope of Board's Duty to Consult

2004-03362, 2004-03430, 2004-03445, 2004-03429, 2004-03431

The effective date for reclassification changes in Resolution 2003/02/1-06 which created a new classification for resort timeshare operations. The lack of consultation with the employer, other resort timeshare employers, or stakeholders did not render the Resolution patently unreasonable, nor give rise to a breach of natural justice or procedural unfairness. The Resolution, including its interim effective date, was the exercise of a quasi-legislative function (or a policy-making function) by the board of directors and as such the board of directors was not required to engage in a process of direct consultation with each employer who fell into the new classification.

2.2.2. What Board Policies are Binding

2.2.2.1. Is Policy a Rigid Rule or Guideline

2004-03646

Interpreting "must apply" in section 250(2) of the *Workers Compensation Act*. If a policy contains the words "normally or "usually", it is intended to be applied as a guideline from which a departure may be considered in exceptional circumstances, rather than a rigid rule. If a policy is stated as a set of rigid rules, rather than guidelines, a WCAT panel must either apply those rules or initiate a referral under section 251.

2.3. Board Practice

2007-01737 (also indexed under "1.1. Whether Person is a Worker")

This decision is noteworthy as the three person (non-precedent) panel discusses the measure of deference to be given to a non-binding Practice Directive, when determining the status of an individual under the *Workers Compensation Act* and Board policies.

2006-03608 (also indexed under "2.6.3. Evidence - Board Medical Advisors" and "2.6.4. Evidence - Work Simulations")

(1) The role of a Board Medical Advisor is to provide medical expertise, not to interpret and apply policy of the Board. (2) The Board may not rely on internal guidelines where to do so would result in ignoring binding Board policy. (3) In general, it is possible to duplicate a worker's job in a work simulation.

2.4. What Constitutes a "Decision"

2012-00357 (also indexed under "1.11.2. Duration of Benefits" and "2.5.2. Reconsiderations")

This decision is noteworthy as an example of the interpretation and application of policy item #99.20 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) when there is uncertainty around whether a reconsideration was made within the statutory timeline and the interpretation and application of item #34.32 of the RSCM II when the worker experiences a temporary lay-off during a period of compensable disability.

2009-00149 (also indexed under "2.16.4. Review Division Jurisdiction - Breach of Natural Justice" and "3.5.4. WCAT Jurisdiction - Decisions Not Formally Communicated")

This decision is noteworthy as it provides an analysis of why disclosure of a claim file is not an appropriate method for communication of a decision.

2008-03567

This decision is noteworthy as it provides an analysis of what triggers the time period for requesting a review where a decision by the Board is communicated to the parties at different times.

2008-03461

This decision is noteworthy as it provides an analysis of whether an oral communication of a Board decision declining to accept a claim precludes a worker or employer from proceeding with a review of a subsequent written decision.

2007-01927

This decision is noteworthy for its analysis of what constitutes a reviewable decision which has been communicated both orally and in writing.

2007-00798

This decision is noteworthy as an example of the distinction between an informational letter which is not reviewable and an adjudicative decision which is reviewable in the context of an implementation of a WCAT decision.

2007-00430 (also indexed under "3.5.5. WCAT Jurisdiction - Findings of Fact")

This decision is noteworthy as the three person (non-precedent) panel considers the fundamental question of whether a statement by a Board officer is merely a finding of fact that cannot be the subject of a review or appeal, or whether that statement is a decision that can be the subject of a review or appeal.

2006-02669 (also indexed under "2.5.2. Board Changing Board Decisions - Reconsiderations")

In the absence of specific direction in the *Workers Compensation Act*, or in Board policy, the Board does not have the authority, pursuant to section 96(5) of the Act, to reconsider an original Board decision unless the reconsideration decision is communicated to the affected party(ies) within 75 days. Communication can be oral or written.

2006-02121 (also indexed under "2.5.2. Board Changing Board Decisions - Reconsiderations")

In the absence of specific direction in the *Workers Compensation Act* (Act), or in Board policy, the Board does not have the authority, pursuant to section 96(5) of the Act, to reconsider an original Board decision unless the reconsideration decision is communicated to the affected party(ies) within 75 days.

2005-06541 (also indexed under "1.22. Relief of Costs")

The employer appealed a letter by the Board advising the employer that the Board had already provided a decision with regard to the employer's entitlement to relief of costs under section 39(1)(e) of the *Workers Compensation Act*. The employer's appeal was denied. The letter did not contain a new appealable decision.

2005-03920 (also indexed under "2.5.2. Board Changing Board Decisions - Reconsiderations")

A letter confirming a prior decision and noting the new 75 day time limit on reconsiderations is not a reviewable decision. This is an example of how section 96 of the *Workers Compensation Act* prevents reconsideration of a decision even when that previous decision is contrary to Board policy.

2004-06708 (also indexed under "2.5.2. Board Changing Board Decisions - Reconsiderations")

When the Board fails to communicate a Board decision to a party, it is not a "decision" for the purposes of section 96(4) of the *Workers Compensation Act* or the *Review Division Practices and Procedures Manual*. Therefore the Board has the authority to reconsider the decision at the request of the party, even where the 75-day time limit set out in the Act has passed.

2004-04157

What constitutes a reviewable decision respecting compensation. Review Division has jurisdiction to review a Board's action under section 15 of the *Workers Compensation Act* directing payment of compensation to a third party private insurance company.

2004-03983 (also indexed under "2.5.2. Board Changing Board Decisions - Reconsiderations")

Board's reconsideration power under s. 96(4) and s. 96(5), and what constitutes a reviewable decision. Where the Board issues a second decision more than 75 days after its first decision to correct an error in its first decision, the second decision is reviewable. The question of whether the Board has the power and authority to correct errors in its decisions after 75 days has passed is an important one that has not been addressed in the Board's policies or practice directives.

Note: Since this decision was issued, the board of directors has issued item C14-103.01 of the *Rehabilitation Services and Claims Manual, Volume I and II* which provides that the correction of an administrative error does not constitute a reconsideration of a decision. This policy is effective January 1, 2005 and applies to all decisions made on or after that date. See the board of directors Resolution 2004/11/16-04.

2004-03907

The 75-day time limit on the Board's reconsideration authority in section 96(4) and section 96(5) of the *Workers Compensation Act* does not apply if the Board made an internal determination that was not communicated to the parties. Relief of costs under section 39(1)(e).

2004-03709 (also indexed under "2.16.4. Review Division Jurisdiction - Breach of Natural Justice" and "3.5.4. WCAT Jurisdiction - Decisions Not Formally Communicated")

WCAT may take jurisdiction over an issue the Board has identified and investigated but not formally communicated in its decision letter, even if the Review Division declined jurisdiction. A potential breach of natural justice at the Review Division may be remedied on appeal to WCAT.

2004-00638

By letter a case manager advised the employer that relief of costs had not been granted in an earlier decision letter. The panel concluded that the case manager's letter was merely informational and did not constitute a new decision, nor were the grounds for reconsideration of the earlier decision met.

2003-04167

Refusal to review by the Review Division upheld where the statement in question in the case manager's decision letter did not constitute a decision, but was included for information purposes only.

2.5. Board Changing Board Decisions

2.5.1. Reopenings (section 96(2))

2011-01618 (also indexed under "2.5.1.1. Permanent Disability Awards")

This decision discusses the principles applicable to reopening of a claim that has been accepted for permanent aggravation of a pre-existing but non-disabling degenerative condition because the condition has worsened.

2006-00107 (also indexed under "3.6.6. Evidence - Expert Evidence")

The Board accepted the worker's claim for psychological symptoms resulting from a motor vehicle accident. The worker returned to work but stopped working four months later. The Board denied the worker's request to reopen the claim. The worker presented a medical legal opinion by his treating psychiatrist stating that his inability to work was caused by post-traumatic stress disorder resulting from the accident. The panel preferred the opinion of an independent psychologist as it was based on a comprehensive interview with the worker, psychological testing, and a review of the medical information on file. The worker's appeal was denied.

2005-01106

For the Board to have jurisdiction to reopen a claim under section 96(2) of the *Workers Compensation Act*, the symptoms that the worker reports on reopening must have been caused by the same condition for which the worker's claim was originally accepted.

2004-06831 (also indexed under "1.12.3.4. Average Earnings – Calculating Average Earnings - Casual Workers")

(1) A new diagnosis is a new matter for adjudication by the Board and does not trigger a reopening under section 96(2) of the *Workers Compensation Act*. (2) A worker who works varying shifts with the same employer on a continuous basis such that the worker has an ongoing attachment to the employer is not a casual worker under policy item #67.10 of the *Rehabilitation and Services Claims Manual, Volume II*.

2004-06682

It is not necessary that the diagnosis on reopening be the same as the initial diagnosis upon which the Board accepts a claim. In this case, a CT scan clarified the original diagnosis. Despite a new diagnosis, the worker's medical condition was the same and the worker was entitled to reopening of his claim.

2004-04921 (also indexed under "1.15.1. Health Care Benefits - General")

The language in section 96(2) of the *Workers Compensation Act* is clear that a reopening involves a matter that has been previously decided. Where there is no earlier decision relating to treatment of an injury, a request for payment for treatment is not a request for reopening. Rather, it is a new matter for adjudication.

2004-04632

The scope of section 96(2) of the *Workers Compensation Act*, which provides the Board limited authority to reopen a matter that the Board has previously decided, is limited to matters previously decided. A condition that was never adjudicated by the Board is not a matter previously decided. The Board's authority to make entitlement decisions relating to such conditions does not come from the reopening power granted to the Board under section 96(2).

2004-00110 (also indexed under "1.12.6.1. Average Earnings – Transition Issues - Recurrence of Temporary Disability")

Example of an application of the Bill 49 wage rate as it applies to reopenings for recurrences of temporary disability after June 30, 2002 that resulted from an injury before that date.

2003-04322 (also indexed under "3.5.9. WCAT Jurisdiction - Application for Reopening")

The panel considers whether a general request for benefits, which does not specify any of the grounds for reopening a claim, constitutes an "application" within the meaning of section 96(2) of the Act. This affects whether a matter is reviewable by the Review Division or appealable directly to WCAT.

2003-01952

The worker, who received compensation after she fell off a stool at work, sought to have her claim reopened. The worker's appeal was denied as the panel concluded that there had not been a significant change in the worker's physical condition or a recurrence of the injury since the worker's symptoms were in a different part of the body than the injuries accepted under the claim.

2.5.1.1. Permanent Disability Awards

A1700491 (also indexed under "1.17. Period of Payment (section 23.1)")

Section 32(3) of the *Workers Compensation Act* does not give the Workers' Compensation Board jurisdiction to reconsider the duration of a permanent partial disability award when a worker's claim is reopened more than three years after the date of injury to consider a significant change in permanent disability.

2011-01618 (also indexed under "2.5.1. Reopenings")

This decision discusses the principles applicable to reopening of a claim that has been accepted for permanent aggravation of a pre-existing but non-disabling degenerative condition because the condition has worsened.

2.5.2. Reconsiderations (section 96(4) and (5))

A1606018 (also indexed under "2.5.3 Board Changing Board Decisions - Decisions Based on Fraud or Misrepresentation")

The Workers' Compensation Board does not have a duty to act reasonably in relying on a negligent misrepresentation in order to reconsider a decision resulting from the misrepresentation under subsection 96(7) of the *Workers Compensation Act*.

2012-00357 (also indexed under "1.11.2. Duration of Benefits" and "2.4. What Constitutes a "Decision")

This decision is noteworthy as an example of the interpretation and application of policy item #99.20 of the *Rehabilitation Services and Claims Manual, Volume II* when there is uncertainty around whether a reconsideration was made within the statutory timeline and the interpretation and application of item #34.32 of the RSCM II when the worker experiences a temporary lay-off during a period of compensable disability.

2011-02362 (also indexed under "1.21. Assessments" and "3.4. Lawfulness of Board Policy Determinations")

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

2011-00522 (also indexed under "1.21. Assessments")

This decision is noteworthy for its enumeration of potentially relevant factors to consider, when determining reimbursement of expenses of written evidence, such as expert reports.

2006-04763

This decision is noteworthy for its analysis of the effect of an unappealed decision not to accept a pre-existing degenerative condition when that decision was issued more than 75 days before the acceptance of a new medical condition.

2006-04043

This decision is noteworthy as an example of the application of policy item C14-101.01 of the *Rehabilitation Services and Claims Manual* and the Board's *Best Practice Information Sheet #5.* Among other things, these provide that the Board may change a decision that had been made more than 75 days previously and that has not been appealed where an appeal body varies or cancels a different but related decision upon which the decision depended. Here, WCAT confirmed a Board decision that changed an earlier unappealed Board decision relating to a worker's entitlement to a loss of earnings award. WCAT did so on the basis that an earlier WCAT decision varying a Board vocational rehabilitation decision removed the foundation for the Board's original loss of earnings decision.

2006-02669 (also indexed under "2.4. What Constitutes a 'Decision'")

In the absence of specific direction in the *Workers Compensation Act*, or in Board policy, the Board does not have the authority, pursuant to section 96(5) of the Act, to reconsider an original Board decision unless the reconsideration decision is communicated to the affected party(ies) within 75 days. Communication can be oral or written.

2006-02341 (also indexed under "2.18. Former Medical Review Panel")

The effect of the amendments to the *Workers Compensation Act* occasioned by the *Workers Compensation Amendment Act (No. 2), 2002* is that Medical Review Panel certificates may not be reconsidered on the basis of significant new evidence.

2006-02121 (also indexed under "2.4. What Constitutes a 'Decision'")

In the absence of specific direction in the *Workers Compensation Act*, or in Board policy, the Board does not have the authority, pursuant to section 96(5) of the Act, to reconsider an original Board decision unless the reconsideration decision is communicated to the affected party(ies) within 75 days.

2005-03920 (also indexed under "2.4. What Constitutes a 'Decision'")

A letter confirming a prior decision and noting the new 75 day time limit on reconsiderations is not a reviewable decision. This is an example of how section 96 of the *Workers Compensation Act* prevents reconsideration of a decision even when that previous decision is contrary to Board policy.

2005-02379

A worker who applied for reconsideration before the 75 day time limit in section 96(5)(a) of the *Workers Compensation Act* was enacted does not have a vested right to a reconsideration such that the new provisions should be interpreted not to have immediate effect. A worker did not have a right to a reconsideration under the former provisions, despite the application procedure set out in related policy items, because the Board's discretion to reconsider was unfettered.

2005-02376 (also indexed under "2.5.3 Board Changing Board Decisions - Decisions Based on Fraud or Misrepresentation")

(1) The Board does not have the authority under section 96(7) of the *Workers Compensation Act* to set aside decisions which have been superseded by a subsequent decision of the former Review Board, the former Appeal Division, or WCAT. (2) The 75 day time limit which generally applies to the Board's reconsideration authority under sections 96(4) and (5) of the Act does not apply to decision-making under section 96(7) on the basis of fraud or misrepresentation.

2004-06808

As set out in Resolution 2004/11/16-04, implementing an appellate decision is not a reconsideration by the Board of a Board decision, and thus when implementing such a decision, the Board is not constrained by the 75-day time limit set out in section 96(5) of the *Workers Compensation Act*. When there has been an appeal taken and a decision rendered by an appellate body, the Board decision is no longer the final decision on the matter and the Board has no power to reconsider it, regardless of the amount of time that has elapsed.

2004-06708 (also indexed under "2.4. What Constitutes a 'Decision'")

When the Board fails to communicate a Board decision to a party, it is not a "decision" for the purposes of section 96(4) of the *Workers Compensation Act* or the *Review Division Practices and Procedures Manual*. Therefore the Board has the authority to reconsider the decision at the request of the party, even where the 75-day time limit set out in the Act has passed.

2004-04852 (also indexed under "1.22. Relief of Costs")

This is a decision of interest involving the characterization of letters from the Board regarding relief of costs, namely whether they were appealable decisions, and the characterization of the employer's request for a new decision, namely whether it was a request for a reconsideration or a request for a determination on something not already determined by the Board.

2004-03983 (also indexed under "2.4. What Constitutes a Decision")

The Board's reconsideration power under sections 96(4) and 96(5), and what constitutes a reviewable decision. Where the Board issues a second decision more than 75 days after its first decision to correct an error in its first decision, the second decision is reviewable. The question of whether the Board has the power and authority to correct errors in its decisions after 75 days has passed is an important one that has not been addressed in the Board's policies or practice directives.

Note: Since this decision was issued, the board of directors has issued item C14-103.01 of the *Rehabilitation Services and Claims Manual, Volume I and II* which provides that the correction of an administrative error does not constitute a reconsideration of a decision. This policy is effective January 1, 2005 and applies to all decisions made on or after that date. See the board of directors Resolution 2004/11/16-04.

2003-02227

The worker's application for an occupational disease claim was not an application for reconsideration of an earlier decision as the issue of occupational disease was not raised by the earlier decision.

2.5.3. Decisions Based on Fraud or Misrepresentation (section 96(7))

A1700498

The Workers' Compensation Board (Board) may carry out surveillance of a worker where there are reasonable grounds to suspect misrepresentation or fraud by the worker and other methods of investigation would be ineffective. The Board does not need to have evidence on a balance of probabilities to reach such a conclusion, but must have a supportable basis to believe that surveillance would be a reasonable investigative tool that would result in evidence to either prove or disprove on a balance of probabilities that misrepresentation was occurring.

A1606018 (also indexed under "2.5.2. Board Changing Board Decisions - Reconsiderations")

The Workers' Compensation Board does not have a duty to act reasonably in relying on a negligent misrepresentation in order to reconsider a decision resulting from the misrepresentation under subsection 96(7) of the *Workers Compensation Act*.

2010-00396 (also indexed under "3.5.12. WCAT Jurisdiction – Vocational Rehabilitation")

Section 239(2)(b) of the *Workers' Compensation Act* precludes WCAT from hearing an appeal of a decision of the Board to set aside a previous decision to grant vocational rehabilitation and to declare an overpayment under section 96(7) of the Act.

2005-02376 (also indexed under "2.5.2. Board Changing Board Decisions - Reconsiderations")

(1) The Board does not have the authority under section 96(7) of the *Workers Compensation Act* to set aside decisions which have been superseded by a subsequent decision of the former Review Board, the former Appeal Division, or WCAT. (2) The 75 day time limit which generally applies to the Board's reconsideration authority under sections 96(4) and (5) of the Act does not apply to decision-making under section 96(7) on the basis of fraud or misrepresentation.

2.6. Evidence

2.6.1. Burden of Proof (sections 250(4) and 99(3))

2006-03504 (also found in "1.21.3. Assessments - Industry Classification" and "3.6.2. Evidence - Burden of Proof")

The employer bears the onus of providing evidence to the Board when disputing its industry classification. Evidence from financial statements and news releases may be sufficient to demonstrate an employer is engaging in mineral exploration activities for the purposes of determining its industry classification.

2004-00793 (also indexed under "3.6.2. Evidence - Burden of Proof")

Description of the tests in section 250(4) and section 99, and their application to speculative possibilities.

2.6.2. Relying on Previous Findings of Fact

2013-00190 (also indexed under "1.16.6. Loss of Earnings Awards" and "3.9.4. No Reasonable Prospect of Success (ATA section 31(1)(f))")

Findings of fact made in the course of determining whether a worker is entitled to a loss of earnings assessment are not binding in the subsequent determination of whether the worker is entitled to a loss of earnings award. Therefore, these findings of fact are not appealable to WCAT.

2006-02023 (also indexed under "1.16.6. Loss of Earnings Awards")

The Board cannot rely on previous findings of fact with respect to a worker's fitness to return to work in relation to temporary wage loss benefits in deciding whether a worker is eligible for a loss of earnings award under section 23(3) of the *Workers Compensation Act*.

2.6.3. Board Medical Advisors

2011-01329 (also indexed under "1.6.5. Activity Related Soft Tissue Disorders (ASTD)")

This decision is an example of adjudication of a claim for carpal tunnel syndrome, where there are both non-occupational and occupational risk factors. The panel declined to accept a medical opinion that failed to take into account the unaccustomed nature of the work activities.

2006-03608 (also indexed under "2.3. Board Practice" and "2.6.4. Evidence - Work Simulations")

(1) The role of a Board Medical Advisor is to provide medical expertise, not to interpret and apply policy of the Board. (2) The Board may not rely on internal guidelines where to do so would result in ignoring binding Board policy. (3) In general, it is possible to duplicate a worker's job in a work simulation.

2.6.4. Work Simulations

2006-03608 (also indexed under "2.3. Board Practice" and "2.6.3. Evidence - Board Medical Advisors")

(1) The role of a Board Medical Advisor is to provide medical expertise, not to interpret and apply policy of the Board. (2) The Board may not rely on internal guidelines where to do so would result in ignoring binding Board policy. (3) In general, it is possible to duplicate a worker's job in a work simulation.

2.7. Federal Employees

2015-00506 (also indexed under "1.7.2. Mental Disorder")

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

2011-00160 (also indexed under "1.23.1 Discriminatory Actions" and "2.8. Discriminatory Actions")

This decision finds that the Board was without the necessary jurisdiction to decide whether or not a federal employer engaged in discriminatory action against the federal employee contrary to section 151 of the *Workers Compensation Act*.

2010-02437 (also indexed under "3.18. Costs and Expenses")

This decision considers the application of section 6 of the *Workers Compensation Act Appeal Regulation* to parties whose claims are made under the *Government Employees Compensation Act.*

2005-01542

The Board has jurisdiction to determine whether a person is an "employee" pursuant to the federal *Government Employees Compensation Act*. Also, persons performing work for the federal government should be given access to the same avenues of review and appeal provided under the *Workers Compensation Act* as provincial workers on issues relating to the nature and extent of compensation payable. The employer applied for judicial review of WCAT's decision and was denied (see *Canadian Broadcasting v. Luo*, 2007 BCSC 971). The B.C. Court of Appeal upheld the B.C. Supreme Court's decision (see *Canadian Broadcasting v. Luo*, 2009 BCCA 318).

2.8. Discriminatory Actions

2011-00160 (also indexed under "1.23.1 Discriminatory Actions" and "2.7. Federal Employees")

This decision finds that the Board was without the necessary jurisdiction to decide whether or not a federal employer engaged in discriminatory action against the federal employee contrary to section 151 of the *Workers Compensation Act*.

2010-02964

This decision is noteworthy for its analysis of whether the section 151 discriminatory action provisions of the *Workers Compensation Act* apply to the bare filing of an application for compensation.

2004-01652

If an employer fails to participate in an appeal of a section 151 discriminatory action complaint, then, pursuant to the reverse onus provision in section 152(3), the worker can potentially introduce new evidence that meets the bare requirements of a prima facie case of unlawful discrimination and win the appeal.

2.9. Mediation

2005-00892 (also indexed under "3.13.10. WCAT Reconsiderations - Bias")

The worker appealed a decision by the Board to dismiss his complaint under section 151 of the *Workers Compensation Act*. The worker and the employer had attempted mediation with the Board. The substance of the employer's settlement offer was in the material before the panel. The panel decided not to refer the appeal for reassignment to another panel. The employer did not participate in the appeal and the worker did not object to her deciding the appeal. The panel was satisfied that in deciding the merits of the case, she was able to ignore the substance of the parties' settlement discussions.

2.10. Applications for Compensation (section 55)

A1606663

The personal representative of a deceased worker may initiate a claim for workers' compensation benefits on behalf of the deceased worker's estate by application under section 55 of the *Workers Compensation Act*.

2014-01931

This decision illustrates how to determine whether an application for compensation should be adjudicated as a personal injury under section 5 or as an occupational disease under section 6 of the *Workers Compensation Act*. For claims adjudicated under section 6 of the Act, no 'date of disablement' exists for section 55 purposes if the worker has taken no time off work.

2014-01368 (also indexed under "1.7.2. Mental Disorder (section 5.1 and prior to enactment of Section 5.1)")

This decision analyzes a late application for compensation of a mental disorder where the very nature of the mental disorder is alleged to have precluded a timely application for compensation.

2010-01650

This decision is noteworthy for its analysis of the test under section 55 of the *Workers Compensation Act* for determining whether special circumstances existed that precluded the worker from filing an application for compensation within the statutory timeframe. In particular, its reference to evaluating a worker's reasons for filing a claim late by looking at whether his or her actions were that of a reasonable person.

2010-01291

This decision considers whether the "reasonable person test" should be applied when determining whether there were special circumstances that precluded a worker from filing an application for compensation within the one-year timeframe under section 55 of the *Workers Compensation Act.*

2009-01094 (also indexed under "1.8. Compensable Consequences")

This decision determined that the limitation period set out in section 55 of the *Workers Compensation Act*, which requires a worker to apply for compensation within one year of the date of injury or disablement from occupational disease, does not apply to an application by a worker for compensation related to a consequence of the original injury where the Board has already accepted the original injury.

2007-03478

This decision is noteworthy for its consideration of the practical effects for the worker arising from the interaction between claiming for automobile insurance benefits and subsequently for workers' compensation benefits in the context of determining whether there were special circumstances which precluded the worker from filing an application for compensation within one year of the date of injury.

2005-03006

This decision is noteworthy for its analysis of the test under section 55 of the *Workers Compensation Act* for determining whether special circumstances existed that precluded the worker from filing an application for compensation within the statutory time. The appropriate test is whether unusual and extraordinary circumstances existed that made it difficult or otherwise hindered the worker from undertaking the claim.

2.11. Refusal to Submit to Medical Treatment (Reduction or Suspension of Compensation) (section 57(2)(b))

2005-06488

This decision is noteworthy because it examines the requirements set out in law and policy which are needed before a worker's wage loss benefits can be suspended under section 57(2)(b) of the *Workers Compensation Act*.

2005-05194

A refusal by a worker to participate in a graduated return to work program is not refusal to submit to essential medical treatment. Thus, the worker's wage loss benefits may not be suspended under section 57(2)(b) of the *Worker's Compensation Act* and policy item #78.13 of the *Rehabilitation Services and Claims Manual*, Volume I.

2005-04542

This decision is noteworthy because it examines what constitutes a clear expert medical opinion as to whether relevant treatment is reasonably essential to promote the worker's recovery. The law and policy require an expert medical opinion or surgical advice on the claim file before a worker's wage loss benefits can be suspended under section 57(2)(b) of the *Workers Compensation Act*.

2.12. Failure to Provide Information to Board (section 57.1)

2004-05616

Section 57.1 of the *Workers Compensation Act* does not apply to workers injured before June 30, 2002.

2004-01698

The worker's application to set aside the suspension of the worker's claim was allowed. Section 57.1, which provides that the Board may suspend payments if the obligation to provide information is not met, applies to decisions made after June 30, 2002, regardless of the date of injury. However, in this case, the request for information was not necessary and the notification requirements in section 57.1 were not met, therefore, the suspension was not appropriate.

2.13. Limitation of Actions (section 10)

2.13.1. Elections to Sue or Claim Compensation

2005-01460

This decision is noteworthy because it lists several factors the Board should consider in exercising its discretion to allow a worker an extension of time to elect to sue or claim compensation under section 10 of the *Workers Compensation Act*, noting that there are no policy criteria to apply in exercising that discretion. The panel further noted that section 10 does not bar workers from pursuing other administrative remedies.

2.13.2. Settlement of Legal Action by Worker (section 10(5))

2005-01144

A worker who settles a legal claim without prior written approval from the Board is not entitled to seek compensation from the Board for the difference between the settlement amount and the compensation which the worker would otherwise be entitled to under section 10(5) of the *Workers Compensation Act*. The worker is precluded from seeking compensation even where the failure to seek prior written approval from the Board is due to an error by the worker's representative or the failure does not actually result in a financial loss to the Board.

2.14. Transition Issues

2.14.1. Meaning of "Disability First Occurs" (section 35.1(4))

2006-01413 (also indexed under "3.13.10. WCAT Reconsiderations - Bias")

The worker requested a reconsideration of a WCAT decision. The reconsideration was allowed in part. There was no indication the panel had taken a relevant policy into account - policy item #1.00 of the *Rehabilitation Services and Claims Manual, Volume I* – in deciding if the current or former provisions of the *Workers Compensation Act* and related policy applied to the claim. The other aspects of the reconsideration were denied. Although the panel's decision on her jurisdiction over lumbar spine impairment was wrong, she provided alternative reasons. The panel did not pre-judge the appeal by alerting the parties to a previous decision she had made on the issue of jurisdiction.

As a result of the B.C. Court of Appeal's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, decisions in the Noteworthy Decisions Index that discuss WCAT's jurisdiction to reconsider a prior decision for jurisdictional error are no longer noteworthy for this point. However, these decisions remain noteworthy for the other points set out in the noteworthy summary. For a summary of the *Fraser Health* decision, click here: http://www.wcat.bc.ca/appeals/after/JRSummaries/Fraser+Health+Authority+(BCCA)+(summary)+22_12_2014.pdf

2005-05357

The worker suffered a compensable shoulder injury in March 2002. He was advised that his condition was likely permanent in July 2002. The panel held that, as there was no change in the worker's condition between March and July 2002, there was an indication the injury was permanently disabling before the June 30, 2002 transition date and thus the former provisions of the *Workers Compensation Act* applied.

2005-01826

This decision is noteworthy as an example of an analysis of when permanent disability "first occurs" under section 35.1(4) of the *Workers Compensation Act*.

2.14.2. Meaning of "Recurrence of Disability" (section 35.1(8))

2006-03125 (also indexed under "1.11.3. Temporary Disability Benefits - Transition Issues")

Where a worker was injured prior to the transition date (June 30, 2002) and has a recurrence of temporary disability after that date, pursuant to section 35.1(8) of the *Workers Compensation Act* and policy item #1.03(4) of the *Rehabilitation Services and Claims Manual*, the current provisions of the Act apply to the calculation of the worker's temporary disability wage rate. The recent amendments to item #1.03(4)(b) in response to the B.C. Supreme Court *Cowburn v. WCB* decision do not affect the calculation of wage loss benefits for the recurrence of a temporary disability. They only apply to the calculation of benefits when there has been deterioration of a permanent disability.

2005-01710 (also indexed under "1.20. Recurrence of Injury", "3.4. Lawfulness of Board Policy Determinations")

Note: This decision of the Chair was provided to the Board pursuant to section 251(5) of the *Workers Compensation Act.* In response, and pursuant to section 251(6) of the Act, the Board determined that policy item #1.03(b)(4) of the *Rehabilitation Services and Claims Manual, Volumes I and II* was not patently unreasonable and must be applied by the WCAT. The Board's decision can be found on WCAT's website. In *Cowburn v. Worker's Compensation Board of British Columbia* (2006 BCSC 722), a judicial review from a Review Division decision, the British Columbia Supreme Court concluded that the Board of Directors' policy on recurrence of disability in item #1.03(b)(4) is a patently unreasonable interpretation of the Act. The court's decision may be found on the BCSC website at: http://www.courts.gov.bc.ca/jdb-txt/sc/06/07/2006bcsc0722.htm.

The element of item #1.03(b)(4) of the RSCM I and II that characterizes a reopening of a worker's claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" was referred to the Chair under section 251(2) of the Act. In this decision the Chair concluded that the policy is so patently unreasonable that it is not capable of being supported by the Act. Thus, section 35.1(8) of the Act cannot be rationally interpreted to mean that there is a "recurrence" when a permanent disability for which a pension was granted under the former Act permanently gets worse or deteriorates after June 30, 2002.

2005-05843 (also indexed under "1.17. Period of Payment" and "3.4. Lawfulness of Board Policy Determinations")

Pursuant to section 251(8) of the *Workers Compensation Act*, WCAT does not have the authority to refuse to apply a policy of the Board where the board of directors has decided that the policy is not patently unreasonable and must be applied. Policy item #1.00(4) of the *Rehabilitation Services and Claims Manual, Volume I and II,* now item #1.03(b)(4), is broad enough to apply to an anticipated deterioration in the permanent effects of an injury or an occupational disease.

The expression "date of injury", as used in section 23.1 of the Act, does not include the date of recurrence of an injury.

2005-00135

The worker injured his shoulder prior to June 30, 2002, the transition date for changes to the *Workers Compensation Act*. He received temporary wage loss benefits and subsequently had surgery to his shoulder after the transition date. The Board concluded the worker's injury had recurred on the date of the surgery. The worker's appeal was allowed. The worker's disability had not recurred after the transition date, as his medical condition had never resolved or stabilized. Therefore, the worker's average earnings (used in calculating his wage loss benefits) should have been determined under the former version of the Act.

2.15. Who May Request Review (section 96.3)

2010-01230

This decision considers whether the appellant was a "dependant" of the deceased worker who was "directly affected" by the decision of the Board to award spousal survivor's benefits to the worker's common-law spouse. This determination was necessary to decide whether the appellant had the right under section 96.3 of the *Workers Compensation Act* to request that the Review Division review the Board's decision to award a spousal survivor's pension to the worker's common law spouse.

2005-06063

This decision outlines the test for determining whether a party is "directly affected" under section 96.3(3) of the *Workers Compensation Act* and thus has standing to request a review of an inspection report issued by the Board. The party is only required to have a real personal involvement in the matter. It is not necessary for the worker to be employed by the employer at the time the inspection report is issued.

2.16. Review Division Jurisdiction

2.16.1. Scope of Review

2014-01756 (also indexed under "1.23.2. Administrative Penalties")

This decision is noteworthy for its discussion of a review officer's authority to issue new contravention orders. The *Workers Compensation Act* does not grant review officers explicit jurisdiction to substitute one contravention order for another.

2006-01779 (also indexed under "1.3.1.2. Whether Injury Arose out of Employment - Decisions Made Under Old Policy - Whether Injury Arose out of Employment - Cumulative Effects of Injuries" and "3.8. Legal Precedents")

(1) The jurisdiction of a review officer is limited to the decisions contained in the Board decision being reviewed, regardless of the desirability of addressing all possible matters so that parties are not required to cycle through the appellate system. (2) The Board has the jurisdiction under section 5(1) of the *Workers Compensation Act* to adjudicate entitlement arising out of the cumulative effects of prior injuries. (3) When considering an issue, it is not appropriate to ignore the reasoning of applicable court decisions raised by a party merely because section 99 of the Act provides that court decisions are not binding on the Board.

2004-04903

Pursuant to section 96.2 of the *Workers Compensation Act*, a review officer's jurisdiction is limited to matters decided by the Board in the decision under review. A review officer exceeds her jurisdiction if she makes findings about a worker's claims other than those dealt with in the decision under review.

2.16.2. Assessments

2005-00258 (also indexed under "3.5.13. WCAT Jurisdiction – Constitutional Issues")

As a result of section 96.2(2)(f) of the *Workers Compensation Act*, the Review Division does not have jurisdiction to review a Board decision regarding the application of an assessment rate for a class or subclass of employers to a particular employer, including a Board decision not to reduce the assessment rate for an employer which is a federal undertaking where it is argued that the rate for such employers should be reduced as they are not required to participate in the Act's prevention scheme. As a result of section 44 of the *Administrative Tribunals Act*, WCAT does not have jurisdiction to determine the constitutionality of a provision of the Act even where the constitutionality of the provision has already been determined by previous decisions.

2.16.3. Refusal By Board to Make Decision

2005-01772 (also indexed under "3.5.15. WCAT Jurisdiction – Refusal by Board to Make Decision")

(1) The Review Division does not have jurisdiction to review a decision by the Board to refuse to make a decision in relation to compensation and assessment matters. (2) WCAT does not have the general authority to order the board of directors to issue decisions. WCAT does have the limited authority provided by section 246(3) of the *Workers Compensation Act* to require the board of directors to make decisions in some circumstances, including to make a decision in respect of further relief of costs.

2.16.4. Breach of Natural Justice

2009-00149 (also indexed under "2.4. What Constitutes a Decision" and "3.5.4. WCAT Jurisdiction - Decisions Not Formally Communicated ")

This decision is noteworthy as it provides an analysis of why disclosure of a claim file is not an appropriate method for communication of a decision.

2004-03709 (also indexed under "2.4. What Constitutes a Decision" and "3.5.4. WCAT Jurisdiction - Decisions Not Formally Communicated")

WCAT may take jurisdiction over an issue the Board has identified and investigated but not formally communicated in its decision letter, even if the Review Division declined jurisdiction. A potential breach of natural justice at the Review Division may be remedied on appeal to WCAT.

2.16.5. Refusal to Review

2011-01582 (also indexed under "1.8. Compensable Consequences" and "1.16.7.3. Specific Permanent Disabilities - Psychological Impairment")

Policy items #22.33 and #22.35 of the *Rehabilitation Services and Claims Manual, Volume II* do not preclude the Board from adjudicating a worker's diagnosed pain disorder, where it has previously accepted a permanent chronic pain condition. A refusal by the Board to adjudicate a worker's claim for a pain disorder in these circumstances constitutes an implicit denial of the claim for pain disorder. Such a decision is reviewable by the Review Division.

2004-00999 (also indexed under "3.5.12. WCAT Jurisdiction – Vocational Rehabilitation")

WCAT has the jurisdiction to hear an appeal of a Review Division finding, which declined to review a letter of a vocational rehabilitation consultant, because the appeal is limited to the narrow question of whether the review officer correctly declined to conduct a review and does not address the merits of the vocational rehabilitation decision.

2.16.6. Permanent Disability Awards

2005-02770 (also indexed under "1.12.2.1. Average Earnings - Calculating Average Earnings – General Rule", "1.16.4. Permanent Disability Awards - Average Earnings" and "3.5.10.2. WCAT Jurisdiction – Permanent Disability Awards - Average Earnings")

Where the Board has set a worker's long term wage rate at the ten week wage rate review it no longer has the authority to change the long term wage rate for purposes of calculating the worker's permanent disability award. Therefore, the Review Division does not have the jurisdiction to review such permanent disability award decisions where the only issue on review is the wage rate used by the Board.

2.17. Costs (section 100)

2004-06308 (also indexed under "3.18. Costs and Expenses")

In relation to a Board matter or a Review Division proceeding, and pursuant to section 100 of the *Workers Compensation Act* and Board policy item #100.40 of the *Rehabilitation Services and Claims Manual, Volumes I and II*, neither the Review Division nor WCAT have the authority to order the Board to pay a party's legal expenses. The 2001 decision of the British Columbia Court of Appeal in *Van Unen v. British Columbia (Workers' Compensation Board)* on this same issue no longer applies to the current statutory scheme.

2.18. Former Medical Review Panel

2006-02341 (also indexed under "2.5.2. Board Changing Board Decisions - Reconsideration")

The effect of the amendments to the *Workers Compensation Act* occasioned by the *Workers Compensation Amendment Act (No. 2), 2002* is that Medical Review Panel certificates may not be reconsidered on the basis of significant new evidence.

2006-00854

The Board must not read into a Medical Review Panel certificate more than is either certified or may be reasonably inferred from the issues and certificate when read as a whole.

2005-06751

A Medical Review Panel found that the worker's symptoms were not caused by his work. Subsequent medical resonance imaging investigations suggested the worker's symptoms were related to a work injury. The Board denied the worker's request to consider the new medical evidence on the basis that it was bound by the MRP certificate. The panel agreed that the MRP certificate was binding on the Board. However, there was no evidence the Board had turned its mind to the question of whether the new medical evidence warranted a reconvening of the MRP or the establishment of a new MRP. The panel referred these questions to the Board for determination.

3. WCAT PROCEDURAL ISSUES

3.1. Standing to Appeal

2016-01148 (also indexed under "3.13.8. Right to be Heard")

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

2006-03078

This decision is noteworthy for its discussion of the circumstances in which a dependant of a deceased worker, as opposed to the deceased worker's estate, has standing to initiate and/or pursue an appeal at WCAT.

3.2. Precedent Panel Decisions

2007-04002 (also indexed under "1.19.1.1. Protection of Benefits – Interest on Retroactive Changes to Benefits - General")

As ordered by the British Columbia Supreme Court on judicial review, a WCAT precedent panel reconsidered their prior precedent panel decision, *WCAT-2005-03622-RB* dated July 8, 2005, concerning the payment of interest on retroactive compensation benefits. The precedent panel declined to initiate a referral of the new interest policy to the WCAT chair under section 251 of the *Workers Compensation Act*. The worker had originally appealed the Board officer's decision on the payment of interest to the (former) Review Board, and the appeal had been transferred to WCAT for completion following the March 3, 2003 changes to the Act. The precedent panel referred the Board decision back to the Board under section 38(2) of the transitional provisions of Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*. The precedent panel directed the Board to make a fresh decision concerning the worker's entitlement to interest in light of the court decision and any further policy direction which might be provided by the board of directors.

2005-06624 (also indexed under "3.5.10.1. WCAT Jurisdiction - Permanent Disability Awards - Scheduled Awards")

A precedent panel was assigned to determine whether, in applying policy items #75 and #76 of the Permanent Disability Evaluation Schedule in the *Rehabilitation Services and Claims Manual, Volume II* concerning the lumbar spine, WCAT has broad jurisdiction to consider the worker's appeal based on the maximum of 24% (the global range interpretation), or limited jurisdiction to consider only the portion of the award pertaining to loss of flexion for which a range in excess of 5% is provided (the local range interpretation). The panel concluded that the global range interpretation is correct because it best fits with item #39.10 of the *Rehabilitation Services and Claims Manual, Volume I*, the wording in the Schedule, sections 23(1) and 23(2) of the *Workers Compensation Act*, the reasoning expressed by the core reviewer, the statements of the Minister regarding the intent of section 239(2)(c), and section 8 of the *Interpretation Act*. The local range interpretation would unduly restrict appeal rights. The panel found that the global range interpretation applies to items #75 and #76 of the Schedule contained in RSCM II.

3.3. Application of Board Policy

3.3.1. Effect of Policy Deletion

2006-01932 (also indexed under "1.2. Whether Person is an Employer")

The guidance formerly provided in policy item #111.40 of the *Rehabilitation Services and Claims Manual, Volume II* and Decision 169 of the *Workers' Compensation Reporter* with regard to the determination of employer status in a section 257 application is no longer available with the deletion and retirement of the policy and Decision. However, the reasoning can still be considered in the absence of any new policy. The policy and decision provided that a party to a section 257 (then section 11) determination cannot claim to be an independent operator when the obligations of an employer under the Act are being considered, and then claim to be an employer in respect of the same time period when there subsequently appears to be some advantage in that position.

3.4. Lawfulness of Board Policy Determinations (section 251)

2014-03154 (also indexed under "1.16.7.1. Specific Permanent Disabilities - Chronic Pain")

Policy item #39.12, as it relates to non-specific chronic pain awards, is not patently unreasonable under section 251(1) of the *Workers Compensation Act*. Policy item #39.12 states in part that the Board will not award an enhancement factor in relation to a chronic pain award.

2011-02362 (also indexed under "1.21. Assessments" and "2.5.2. Reconsiderations")

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

2011-00833 (also indexed under "1.16.6. Permanent Disability Awards - Loss of Earnings Awards")

Portions of item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* are so patently unreasonable that the policy is not capable of being supported by the *Workers Compensation Act* and its regulations and should not be applied. Specifically, the inclusion of the phrase "an occupation of a similar type or nature" in the policy is patently unreasonable because the result is to add a restriction to entitlement to loss of earnings awards that is not consistent with or contemplated by section 23 of the Act. Section 23 only contemplates that a worker's occupation at the time of injury and ability to adapt to another suitable occupation be considered. Pursuant to section 251 of the Act the policy is referred to the board of directors.

2007-03809

Elements of item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) are so patently unreasonable that the policy is not capable of being supported by the *Workers Compensation Act* and its regulations. Specifically, the definition of "occupation" and its use in the three so exceptional criteria in item #40.00 of the RSCM II are patently unreasonable because those elements of the policy only consider the essential skills of the worker's occupation at the time of the injury and whether the worker is able to perform the essential skills of the occupation. They fail to take into account the physical requirements of the occupation and the worker's ability to perform the physical requirements of the occupation. Also, the element of item #40.00 that divides the process for adjudicating loss of earnings award entitlement into two stages is not patently unreasonable.

2006-01687 (also indexed under "1.16.6. Permanent Disability Awards - Loss of Earnings Awards", "1.18. Retirement Benefits", and "2.2.1.1. Board Policy - Creating Policy – Fixed Rules")

Section 251 referral to the chair. The worker was awarded a loss of earnings pension payable until he retires at age 70. The issue was whether the fixed rule in policy item #40.20 of the *Rehabilitation Services and Claims Manual, Volume I*, that payments under the rule of 15ths will not be made to workers who receive loss of earnings pensions beyond age 65, is patently unreasonable under section 23 of the *Workers Compensation Act*. The board of directors can establish policies that constitute fixed rules provided those policies are within the objectives of the Act and their authority under the Act. The current section 82 grants the board of directors broad authority to set compensation policies. Given that payments under the rule of 15ths appear to constitute a retirement benefit that is additional to the compensation for permanent disability established under section 23, and the fact that there is a legitimate rationale for the framework established under item #40.20, the impugned policy does not unlawfully fetter the discretion granted under section 23 or involve a patently unreasonable application of section 23.

2005-06524 (also indexed under "1.16.7.1. Specific Permanent Disabilities - Chronic Pain")

Section 251 referral to the chair. Policy item #39.01 of the *Rehabilitation Services and Claims Manual, Volume I* can rationally be supported by former section 23 and is not patently unreasonable under the *Workers Compensation Act.* The policy takes the degree or extent of injury into account by establishing the threshold criteria for a worker becoming eligible for a chronic pain award. Section 23(1) has a long history of being viewed as establishing a method for determining impairment of earning capacity based on averages rather than the circumstances of individual workers, which is justified on the basis of presumed loss of earning capacity. The broad discretion granted under section 23(3) of the Act and the related policies in RSCM I enable decision-makers to apply the projected loss of earnings method when the 2.5% award does not adequately compensate the worker for his or her impairment of earning capacity.

2005-05843 (also indexed under "1.17. Period of Payment" and "2.14.2. Transition Issues - Meaning of 'Recurrence of Disability'")

Pursuant to section 251(8) of the *Workers Compensation Act*, WCAT does not have the authority to refuse to apply a policy of the Board where the board of directors has decided that the policy is not patently unreasonable and must be applied. Policy item #1.00(4) of the *Rehabilitation Services and Claims Manual, Volume I and II,* now item #1.03(b)(4), is broad enough to apply to an anticipated deterioration in the permanent effects of an injury or an occupational disease. The expression "date of injury", as used in section 23.1 of the Act, does not include the date of recurrence of an injury.

2005-04492 (also indexed under "1.10.1. Compensation in Fatal Cases - Entitlement to, and Calculation of, Compensation for Dependents" and "1.10.2. Compensation in Fatal Cases - Spouses Living Separate and Apart")

Section 251 referral to the Chair. Whether policy in items #55.40 and #59.22 of *Rehabilitation Services and Claims Manual, Volume I*, which deal with dependent children's benefits, are patently unreasonable. The worker had sons with his former common law spouse, and was living separate and apart from the children and their mother at the time of his compensable death. The children's mother was not a dependent spouse for the purposes of section 17. The impugned element of item #55.40 provides that section 17(9) is applicable to this situation. Chair concluded that the impugned element of item #55.40 is patently unreasonable because section 17(9) does not apply when there is no dependent spouse. Item #59.22, which applies to orphans and other dependent children, should be applied to the appeal before the vice chair because it is consistent with section 17(3)(f) and not patently unreasonable.

2005-01710 (also indexed under "1.20. Recurrence of Injury" and "2.14.2. Transition Issues - Meaning of 'Recurrence of Disability'')

Note: This decision of the Chair was provided to the Board pursuant to section 251(5) of the *Workers Compensation Act*. In response, and pursuant to section 251(6) of the Act, the Board determined that policy item #1.03(b)(4) of the *Rehabilitation Services and Claims Manual, Volume I and II* was not patently unreasonable and must be applied by the WCAT. The Board's decision can be found on WCAT's website. In *Cowburn v. Worker's Compensation Board of British Columbia* (2006 BCSC 722), a judicial review from a Review Division decision, the British Columbia Supreme Court concluded that the board of directors' policy on recurrence of disability in item #1.03(b)(4) is a patently unreasonable interpretation of the Act. The court's decision may be found on the BCSC website at: http://www.courts.gov.bc.ca/jdb-txt/sc/06/07/2006bcsc0722.htm.

The element of item #1.03(b)(4) of the RSCM I and II that characterizes a reopening of a worker's claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" was referred to the Chair under section 251(2) of the Act. In this decision the Chair concluded that the policy is so patently unreasonable that it is not capable of being supported by the Act. Thus, section 35.1(8) of the Act cannot be rationally interpreted to mean that there is a "recurrence" when a permanent disability for which a pension was granted under the former Act permanently gets worse or deteriorates after June 30, 2002.

2003-01800 (also indexed under "1.12.5.1. Average Earnings – Historical Versions of Act - Use of Class Averages")

Item #67.21 of the *Rehabilitation Services and Claims Manual, Volume I*, which deals with the use of class averages for setting wage rates, is not patently unreasonable since it does not set out an inflexible rule. Accordingly, pursuant to section 251(4) of the *Workers Compensation Act*, the panel must apply the policy in rendering a decision on the worker's appeal.

3.5. WCAT Jurisdiction

For questions relating to WCAT's jurisdiction in respect of transitional appeals, see "Transitional Appeals" below.

3.5.1. Effect of a Prior WCAT Decision on Jurisdiction

2007-01040

The reconsideration panel provides a discussion of the binding effect of a previous WCAT decision on a subsequent WCAT panel. The subsequent panel had relied upon new medical evidence in refusing to be bound by a prior WCAT decision. This was patently unreasonable and the decision was set aside as void.

3.5.2. Reducing/Removing Appellant's Entitlement on Appeal

2008-01391

This decision is noteworthy because it provides an analysis of the jurisdiction of the Review Division and WCAT to decrease a permanent partial disability award where such an award is appealed, but entitlement to an award for loss of range of motion to the cervical spine is not raised in the Request for Review.

2004-06118 (also indexed under “1.22. Relief of Costs”)

Where a party has been partially successful in a lower decision, the party cannot assume that there is no “risk” in pursuing an appeal. Where an employer obtains a favourable relief of costs decision from the Board, but only receives relief for a portion of the worker’s claim, and then the employer appeals, WCAT has the authority to reweigh the evidence and find that the employer is not entitled to any relief of costs.

3.5.3. Adjudicating New Diagnosis

2006-01155 (also indexed under “1.7.3. Specific Injuries - Chemical Sensitivity”)

This decision is noteworthy as it provides an overview of WCAT’s jurisdiction to consider a new diagnosis and gives a detailed analysis of a chemical sensitivity claim.

2004-04309

Jurisdiction of WCAT to consider a new diagnosis on appeal, which is different than the one addressed in the decision under appeal. Application for reconsideration denied because the WCAT panel did not exceed its jurisdiction in making a decision on a new diagnosis raised on appeal where the range of symptoms addressed by the two diagnoses are similar in nature.

3.5.4. Decisions Not Formally Communicated

2009-00149 (also indexed under "2.4. What Constitutes a Decision" and "2.16.4. Review Division Jurisdiction - Breach of Natural Justice”)

This decision is noteworthy as it provides an analysis of why disclosure of a claim file is not an appropriate method for communication of a decision.

2004-03709 (also indexed under “2.4. What Constitutes a ‘Decision’” and “2.16.4. Review Division Jurisdiction - Breach of Natural Justice”)

WCAT may take jurisdiction over an issue the Board has identified and investigated but not formally communicated in its decision letter, even if the Review Division declined jurisdiction. A potential breach of natural justice at the Review Division may be remedied on appeal to WCAT.

3.5.5. Findings of Fact

2009-02750

This decision considers whether or not the determination of the worker's restrictions and limitations were factual matters that were material to the worker’s increased permanent disability award and thus appealable to WCAT.

2008-00343

This decision is noteworthy for its analysis of the effect on a subsequent WCAT panel of the findings made in prior Review Division and WCAT decisions as they relate to a worker’s entitlement to a loss of earnings award.

2007-03064

This decision is noteworthy for its discussion of whether a prior WCAT panel made findings of fact and, if so, whether they were binding on subsequent decision makers, including this WCAT panel.

2007-00430 (also indexed under "2.4. What Constitutes a Decision")

This decision is noteworthy as the three person (non-precedent) panel considers the fundamental question of whether a statement by a Board officer is merely a finding of fact that cannot be the subject of a review or appeal, or whether that statement is a decision that can be the subject of a review or appeal.

2006-02105 (also indexed under "1.16.5. Permanent Disability Awards - Retirement Age")

A letter from the Board communicating a finding of fact that will affect entitlement to benefits at a future date is not a reviewable decision that may be appealed to WCAT. The Board may change such findings of fact before a decision affecting entitlement to benefits has been made. Thus a letter advising a worker, who was 65 years of age on the date of injury, that his retirement date would be two years after the injury was not a decision but, rather, a finding of fact.

2006-01737

Findings of fact are not decisions for the purpose of the reconsideration, reopening, review and appeal provisions of the *Workers Compensation Act*. WCAT does not have jurisdiction to hear appeals from findings of fact. There is a right to request a review and to appeal any entitlement decisions that flow from findings of fact.

3.5.6. Matters Not Addressed By Board

2011-02557 (also indexed under "3.10. Matters Referred Back to Board")

This decision considers WCAT's jurisdiction over a new matter not yet decided by the Board, and the impact of the panel's discretion to invoke section 246(3) of the *Workers Compensation Act* or not.

2006-03799

A WCAT panel may proceed to address a related facet of causation even if it had not been expressly addressed in a prior decision of the Board, as long as no further evidence was required and there were no natural justice concerns. While a panel may elect to first obtain a determination by a Board officer under section 246(3) of the *Workers Compensation Act*, it is not a statutory prerequisite to the WCAT panel taking jurisdiction.

3.5.7. Review Division Decisions

2006-03016

WCAT has jurisdiction to hear an appeal from a decision by the Review Division dealing only with the implementation a previous Review Division decision directing the Board to reimburse the worker for the expense incurred in obtaining an expert opinion where the expert opinion was tendered before the Review Division and the substantive issue is not before WCAT. The Review Division decision did not involve the "conduct of a review" at the Review Division.

3.5.8. Medical Conditions not Formally Accepted

2003-02677

The panel concluded that it had jurisdiction to consider a condition, even though it was not dealt with in the decision letter being appealed, since the medical reports clearly identified two conditions and the worker initiated a claim for a symptom complex that could have been caused by either or both conditions.

3.5.9. Application for Reopening

2003-04322 (also indexed under "2.5.1. Board Changing Board Decisions - Reopenings")

The panel considers whether a general request for benefits, which does not specify any of the grounds for reopening a claim, constitutes an "application" within the meaning of section 96(2) of the *Workers Compensation Act*. This affects whether a matter is reviewable by the Review Division or appealable directly to WCAT.

3.5.10. Permanent Disability Awards

3.5.10.1. Scheduled Awards (section 239(2)(c))

A1700289

Where the Permanent Disability Evaluation Schedule (PDES) specifically identifies the pathophysiology underlying an impairment, a permanent partial disability award for a similar impairment that does not result from that pathophysiology is not a scheduled award, and section 239(2)(c) of the *Workers Compensation Act* does not apply. However, the PDES may still be used as a guide for determining the amount of the award on a judgment basis.

2005-06624 (also indexed under "3.2. Precedent Panel Decisions")

A precedent panel was assigned to determine whether, in applying policy items #75 and #76 of the Permanent Disability Evaluation Schedule (the Schedule) in the *Rehabilitation Services and Claims Manual, Volume II* concerning the lumbar spine, WCAT has broad jurisdiction to consider the worker's appeal based on the maximum of 24% (the global range interpretation), or limited jurisdiction to consider only the portion of the award pertaining to loss of flexion for which a range in excess of 5% is provided (the local range interpretation). The panel concluded that the global range interpretation is correct because it best fits with item #39.10 of the *Rehabilitation Services and Claims Manual, Volume I*, the wording in the Schedule, sections 23(1) and 23(2) of the *Workers Compensation Act*, the reasoning expressed by the core reviewer, the statements of the Minister regarding the intent of section 239(2)(c), and section 8 of the *Interpretation Act*. The local range interpretation would unduly restrict appeal rights. The panel found that the global range interpretation applies to items #75 and #76 of the Schedule contained in RSCM II.

2005-06121

WCAT has jurisdiction to consider appeals of decisions by the Review Division with respect to the degree of knee ligament laxity as the total impairment may exceed 5% if a worker has laxity in more than one knee ligament.

2005-06031

Where a worker has a loss of function in multiple fingers, WCAT has jurisdiction over all the fingers where the combined upper end of the range of motion value for all the measurably impaired joints exceeds 5%. In determining whether a worker can return to his pre-injury or similar employment, decision-makers should look to the National Occupational Classification (NOC) code groupings, as directed in Practice Directive #46. When all the occupations in the NOC code groupings require heavy lifting, and the worker can no longer do heavy lifting, the first two requirements in policy item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* are met. A worker does not experience a significant loss of earnings if he is provided with an alternate job which will net him more income in the long-term.

2005-02034

Although WCAT's jurisdiction over scheduled awards is limited by section 239(2)(c) of the *Workers Compensation Act*, WCAT maintains jurisdiction over other aspects of a permanent disability award decision under section 23(1) of the Act, including chronic pain, whether the worker is entitled to a loss of earnings permanent disability award, and other variables which have not been included in the scheduled percentage.

2004-04324 (also indexed under "1.16.7.1. Specific Permanent Disabilities - Chronic Pain")

A chronic pain award is not a "scheduled" award pursuant to the "Permanent Disability Evaluation Schedule" contemplated by section 23(2) of the *Workers Compensation Act*. Therefore, WCAT has jurisdiction to hear appeals of chronic pain decisions.

2004-02598 (also indexed under "1.16.2.3. Permanent Disability Awards – Loss of Function Awards - Enhancement and Devaluation")

WCAT's jurisdiction over a Review Division decision where the worker injures his thumb and one or more fingers, and pursuant to item #39.24, the Board adds an "enhancement factor" which is normally equivalent to 100% of the lesser of the two disabilities. Because the amount of an enhancement factor is subject to discretion, it was not a "specified percentage" captured by section 239(2)(c). Since this worker had suffered greater loss of range of motion to his thumb as compared to his finger, WCAT's jurisdiction was limited to the thumb only

3.5.10.2. Average Earnings

2005-02770 (also indexed under "1.12.2.1. Average Earnings - Calculating Average Earnings - Long Term", "1.16.4. Permanent Disability Awards - Average Earnings" and "2.16.6. Review Division Jurisdiction - Permanent Disability Awards")

Where the Board has set a worker's long term wage rate at the ten week wage rate review it no longer has the authority to change the long term wage rate for purposes of calculating the worker's permanent disability award. Therefore, the Review Division does not have the jurisdiction to review such permanent disability award decisions where the only issue on review is the wage rate used by the Board.

2005-00077

In accordance with the principles of fairness underpinning transitional law, a permanent disability award decision made by the Board in relation to a worker who is injured prior to June 30, 2002 but whose disability first occurs after June 30, 2002 (transition period workers) includes a decision about the worker's permanent disability award wage rate. Therefore, WCAT has jurisdiction over the wage rate on appeals relating to permanent disability awards for transition period workers.

3.5.10.3. Occupational Noise-Induced Hearing Loss

2005-01943 (also indexed under "1.16.7.2. Specific Permanent Disabilities - Hearing")

Schedule D of the *Workers Compensation Act* is not a "rating schedule" compiled under section 23(2) of the Act. Therefore section 239(2)(c) of the Act does not limit WCAT's jurisdiction to hear appeals from decisions relating to occupational noise-induced hearing loss permanent disability awards where Schedule D of the Act is used to determine the worker's award

3.5.11. Effect of Previous Decisions

2006-02475

The original WCAT panel's use of the term *res judicata* was not necessary to its conclusion on jurisdiction. The original panel's conclusion is supported by the limits on the authority of the disability awards officer to assess the worker's disability related to the conditions accepted under the claim, and the general 75-day time limit on the reconsideration authority of the Board in section 96(5)(a) of the Act; the conclusion is also consistent with item #14.30 of WCAT's *Manual of Rules of Practice and Procedure*. Tribunals are not bound by the concept of res judicata. There was no jurisdictional error in the WCAT decision.

3.5.12. Vocational Rehabilitation

2010-00396 (also indexed under"2.5.3. Decisions Based on Fraud and Misrepresentation")

Section 239(2)(b) of the *Workers' Compensation Act* precludes WCAT from hearing an appeal of a decision of the Board to set aside a previous decision to grant vocational rehabilitation and to declare an overpayment under section 96(7) of the Act.

2009-00113

This decision is noteworthy as it provides an analysis of whether WCAT has jurisdiction to consider an appeal regarding income continuity benefits in light of section 239(2)(b) of the *Workers Compensation Act*.

2006-00480

WCAT does not have jurisdiction to hear appeals from decisions by the Review Division respecting matters referred to in section 16 of the *Workers Compensation Act*, that is, vocational rehabilitation. This limitation on WCAT's jurisdiction applies to appeals brought by both workers and employers. The language of section 241(1) of the Act does not support a finding that WCAT has jurisdiction over vocational rehabilitation matters by workers but not employers.

2005-04320 (also indexed under "1.19.1.1. Protection of Benefits - Interest on Retroactive Changes to Benefits - General" and "3.18. Costs and Expenses")

WCAT's jurisdiction is established by statute, in this case, section 239 of the *Workers Compensation Act*. WCAT has no jurisdiction to address the awarding of interest in relation to a matter over which WCAT has no jurisdiction, such as vocational rehabilitation assistance. In any event, there is no statutory entitlement to interest on retroactive benefits except in the limited situations expressly addressed in the Act or Board policy. Section 6(c) of the *Workers Compensation Act Appeal Regulation*, allowing WCAT to award costs in exceptional circumstances, must be read within the context of the clear limitations on the authority of WCAT contained in the Act. When WCAT does not have jurisdiction over a matter, such as vocational rehabilitation assistance, WCAT cannot hear an appeal on the issue of legal fees alone.

2004-06588 (also indexed under "1.16.6. Permanent Disability Awards - Loss of Earnings Awards")

WCAT's lack of jurisdiction over appeals from vocational rehabilitation decisions under section 16 of the *Workers Compensation Act* does not prevent WCAT from considering vocational rehabilitation evidence for the purpose of adjudicating other aspects of a worker's claim.

2004-00999 (also indexed under "2.16.5. Review Division Jurisdiction - Refusal to Review")

WCAT has the jurisdiction to hear an appeal of a Review Division finding, which declined to review a letter of a vocational rehabilitation consultant, because the appeal is limited to the narrow question of whether the review officer correctly declined to conduct a review and does not address the merits of the vocational rehabilitation decision.

3.5.13. Constitutional Issues

A1603799

The worker was employed by a BC corporation installing satellite television systems under a contract with a national corporation, which in turn contracted with a national telecommunications company. The worker filed a discriminatory action complaint against both the BC corporation and the national corporation. The WCAT panel concluded that since the constitutional question in the appeal concerned division of powers, not the *Canada Charter of Rights and Freedoms*, WCAT's common law jurisdiction to consider constitutional questions was not limited by section 45 of the *Administrative Tribunals Act*. The panel found that labour relations, including discriminatory action complaints under the *Workers Compensation Act* (Act), are generally within provincial constitutional authority, but that authority may be curtailed where it intrudes into the core operations of the federal telecommunications power. Both the provincial and national corporations performed 95% of their work for two federally regulated telecommunications companies; consequently, both were integral to the core operations of those companies. Accordingly, Part 3 of the Act did not apply to them.

A1603743 (also indexed under "1.1. Whether Person is a Worker", "1.3.2.1. Whether Injury Arose out of Employment (section 5(1)) – Decisions Made Under Current Policy - General") and "1.4.2. Travelling Workers")

Non-resident flight crew employed by a foreign airline that does not fly between British Columbia destinations, who are injured while on a layover in British Columbia do not have sufficient connection to a British Columbia industry to be "workers" within the meaning of Part 1 of the *Workers Compensation Act*, which does not apply to them as a matter of constitutional law.

A1603250

WCAT may consider a constitutional question that does not involve the *Canadian Charter of Rights and Freedoms* (Charter). WCAT does not have authority to invalidate legislation or subordinate legislation generally, but may only determine that it is invalid and therefore inapplicable in the particular case. A Charter values analysis applies to discretionary decision-making and statutory interpretation but does not empower WCAT do indirectly what it has no authority to do directly by applying the Charter.

2005-00258 (also indexed under "2.16.2. Review Division Jurisdiction – Assessments")

As a result of section 96.2(2)(f) of the *Workers Compensation Act*, the Review Division does not have jurisdiction to review a Board decision regarding the application of an assessment rate for a class or subclass of employers to a particular employer, including a Board decision not to reduce the assessment rate for an employer which is a federal undertaking where it is argued that the rate for such employers should be reduced as they are not required to participate in the Act's prevention scheme. As a result of section 44 of the *Administrative Tribunals Act*, WCAT does not have jurisdiction to determine the constitutionality of a provision of the Act even where the constitutionality of the provision has already been determined by previous decisions.

3.5.14. Refusals by Review Division to Extend Time to Request a Review

2009-00141

This decision is noteworthy as it sets out that WCAT lacks jurisdiction to hear an appeal from a determination by the Review Division with respect to whether or not a request for review was filed within the 90 day time limit in section 96.2(3) of the *Workers Compensation Act* in the context of the chief review officer (or delegate) making a decision under section 96.2(4) of the Act.

2005-03420

By virtue of section 239(2)(a) of the *Workers Compensation Act* and section 4(b) of the *Workers Compensation Act Appeal Regulation*, WCAT does not have the jurisdiction to hear appeals from decisions by the Review Division refusing to extend the 90-day time limit for workers to request a review of a Board decision from the Review Division. The statutory scheme is unequivocal in this respect.

3.5.15. Refusal by Board to Make Decision

2006-04203

This decision is noteworthy as it reconciles two lines of WCAT decisions relating to the jurisdiction to review a Board officer's refusal to render a further decision.

2005-01772 (also indexed under "2.16.3. Review Division Jurisdiction - Refusal By Board to Make Decisions")

The Review Division does not have jurisdiction to review a decision by the Board to refuse to make a decision in relation to compensation and assessment matters. WCAT does not have the general authority to order the board of directors to issue decisions. WCAT does have the limited authority provided by section 246(3) of the *Workers Compensation Act* to require the board of directors to make decisions in some circumstances, including to make a decision in respect of further relief of costs.

3.5.16. Review Division Referrals To Board

2004-03138

A worker applied for an extension of time to appeal a review officer's decision. In that decision, the review officer found that the disability awards officer erred in considering herself bound by the prior wage rate decision, and found that the worker was entitled to a section 23(1) pension. She returned the file back to the Board with directions as to the manner in which to calculate the worker's wage rate for pension purposes. The issue was whether WCAT had jurisdiction to hear an appeal of the review officer's directions which accompanied the referral back to the Board under section 96.4(8), and if so, whether an extension of time to appeal the review officer's decision should be granted.

3.5.17. Reconsidering Appeal Division Decisions

2008-00457 (also indexed under "3.13.3. WCAT Reconsiderations - Appeal Division Decisions")

WCAT does not have the authority to set aside and reconsider a previous Appeal Division decision on the basis of jurisdictional error (common law grounds). Item #15.24 of the *Manual of Rules of Practice and Procedure* is amended accordingly.

2008-00031 (also indexed under "3.13.3. WCAT Reconsiderations - Appeal Division Decisions")

WCAT does not have the authority to reconsider and set aside a seized Appeal Division decision which was issued after March 3, 2003 on the basis of jurisdictional error (common law grounds).

2007-02083 (also indexed under "3.13.3. WCAT Reconsiderations - Appeal Division Decisions")

WCAT does not have the authority to set aside and reconsider a previous Appeal Division decision that was issued prior to March 3, 2003, when the Appeal Division ceased to exist (transition date), on the basis of jurisdictional error (common law grounds).

3.5.18. Certifications to Court (sections 10 and 257)

2007-02502 (also indexed under "3.12. Certifications to Court (sections 10 and 257)"

This decision is noteworthy because it explains the difference between the jurisdiction of WCAT and that of the court in section 257 of the *Workers Compensation Act* determinations.

3.5.19. Equitable Remedies

2008-00639 (also indexed under "1.21.1. Assessments - Responsibility to Register with Board")

This decision is noteworthy for its analysis of the responsibility on an employer to register with the Board. Where the employer believes that the Board not to levy penalties or interest on employers who voluntarily registered, it is doubtful that WCAT has the authority to provide relief in the nature of promissory estoppel or equitable estoppel.

3.5.20. Administrative Penalties

A1900153

WCAT does not have jurisdiction to hear an appeal from the decision of a review officer concerning a citation penalty imposed under section 196.1 of the *Workers Compensation Act*.

2008-02706

This decision is noteworthy as it considers whether the WCAT has jurisdiction to consider an appeal of a decision by a review officer regarding a refusal by the Board to impose an administrative penalty under Part 3 of the *Workers Compensation Act*.

3.5.21. Stay of Decision under Section 244

A1606855

In an application for a stay pursuant to item #8.3 of the *Manual of Rules of Practice and Procedure*, the question of whether a party will suffer serious harm if the stay is not granted concerns the nature rather than the magnitude of the potential harm. Serious harm may be harm that cannot be quantified in monetary terms, or that cannot be cured. A partial stay of a remedy may be granted in order to achieve a balance of convenience between the parties.

3.6. Evidence

3.6.1. General

2012-02521 (also indexed under "3.13.4. Procedural Fairness")

This decision is noteworthy for its analysis of cross-examination as one of several means of obtaining evidence and the use of cross-examination in relation to the duty to act fairly under section 58(2)(b) of the *Administrative Tribunals Act.*

2005-05582

This decision is noteworthy for its analysis of how testimonial evidence provided in hindsight is considered speculative in nature.

3.6.2. Burden of Proof (sections 250(4) and 99(3))

2006-03504 (also found in "1.21.3. Assessments - Industry Classification" and "2.6.1. Evidence - Burden of Proof")

The employer bears the onus of providing evidence to the Board when disputing its industry classification. Evidence from financial statements and news releases may be sufficient to demonstrate an employer is engaging in mineral exploration activities for the purposes of determining its industry classification.

2004-00793 (also indexed under "2.6.1. Evidence – Burden of Proof")

Description of the tests in section 250(4) and section 99, and their application to speculative possibilities.

3.6.3. Obligations of Parties To Provide Evidence

A1603334 (also indexed under "1.16.5. Retirement Age" and "1.17. Period of Payment (s. 23.1)")

This decision concluded that changes made to item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II*, effective June 1, 2014, did not establish a strict requirement for independently verifiable evidence that a worker would have retired later than age 65. Although item #41.00 creates a clear preference for independently verifiable evidence, where such evidence is not available, the Board must consider other relevant information.

2014-00467 (also indexed under "1.16.5. Retirement Age" and "1.17. Period of Payment (s. 23.1)")

In considering the worker's argument that his permanent disability award should not terminate when he turns 65, WCAT interpreted policy item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II* to mean that independently verifiable evidence is required to confirm a worker's subjective statement regarding his or her intention to work past age 65 and to establish the worker's later retirement date, but if such evidence is not available, a determination will be made on the available evidence, including the worker's statements.

2004-05845

This was a reconsideration of a prior WCAT decision which denied the appeal on the basis of insufficient medical evidence. The reconsideration panel held that parties to an appeal have an obligation to provide sufficient evidence to enable WCAT to make a decision. Although WCAT has the discretion to request further evidence from parties and to seek independent medical advice it does not have an obligation to do so. Failure to do so is not a lack of procedural fairness or other common law error of law going to jurisdiction.

As a result of the B.C. Court of Appeal's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, decisions in the Noteworthy Decisions Index that discuss WCAT's jurisdiction to reconsider a prior decision for jurisdictional error are no longer noteworthy for this point. However, these decisions remain noteworthy for the other points set out in the noteworthy summary. For a summary of the *Fraser Health* decision, click here: http://www.wcat.bc.ca/appeals/after/JRSummaries/Fraser+Health+Authority+(BCCA)+(summary)+22_12_2014.pdf

3.6.4. Orders to Obtain Evidence (WCAT Orders)

2007-02935 (also indexed under "1.5. Section 5(4) Presumption")

This decision is noteworthy as it illustrates the application of the presumption in section 5(4) of the *Workers Compensation Act* that is, where an injury or death is caused by an accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment and vice versa. This decision evaluates what would be evidence to the contrary, and explains the difference between speculation and evidence. It also illustrates when a subpoena (order) to obtain records from the Board and the police will be issued.

3.6.5. Credibility

2008-02078 (also indexed under "3.6.6. Evidence - Expert Evidence")

This decision is noteworthy as it provides an example of how to weigh conflicting medical opinions and address credibility issues.

2007-03458

This decision is noteworthy for its analysis of a worker's credibility where he could not clearly recall the item he was lifting in the workplace at the time he felt a pinching pain in the back of his neck.

2005-05961 (also indexed under "1.12.1. Average Earnings - General")

Primarily on the basis of an assessment of credibility, the panel found that the worker was not employed by his wife under a contract of service during the one year prior to the date of his injury claim. It also found that, as required by policy item #66.00 of the *Rehabilitation Services and Claims Manual, Volume II*, there was insufficient verified earnings information from an independent source to set a wage rate on the worker's claim.

2004-04784

The test for determining the credibility of a witness' evidence is "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". A stricter standard should not be applied.

3.6.6. Expert Evidence

2008-02078 (also indexed under "3.6.5. Evidence - Credibility")

This decision is noteworthy as it provides an example of how to weigh conflicting medical opinions and address credibility issues.

2007-02600 (also indexed under "1.16.7.2. Specific Permanent Disabilities - Hearing")

This decision is noteworthy because it provides an analysis of how to address conflicting medical evidence in determining a worker's entitlement to a permanent disability award for noise-induced hearing loss.

2007-02032

This decision is noteworthy because of its analysis of expert evidence in the context of determining whether a worker sustained a personal injury arising out of and in the course of employment.

2007-00171

This decision is noteworthy as an example of how to assess the relative merits of expert evidence when determining whether a worker is entitled to an additional permanent disability award for chronic pain pursuant to section 23(1) of the *Workers Compensation Act* and item #39.01 of the *Rehabilitation Services and Claims Manual, Volume I.*

2006-01456

This decision is noteworthy for the discussion of the factors to consider in weighing unopposed expert opinions. If a medical opinion takes into account all available evidence, includes persuasive analysis and explanation, addresses the question to be answered and is unopposed by any other medical opinion, it will be considered to be relevant and entitled to significant weight.

2006-00337

This decision is noteworthy because it provides an analysis of how to weigh the medical evidence in circumstances where there are conflicting medical diagnoses.

2006-00107 (also indexed under "2.5.1. Board Changing Board Decisions - Reopenings")

The Board accepted the worker's claim for psychological symptoms resulting from a motor vehicle accident. The worker returned to work but stopped working four months later. The Board denied the worker's request to reopen the claim. The worker presented a medical legal opinion by his treating psychiatrist stating that his inability to work was caused by post-traumatic stress disorder resulting from the accident. The panel preferred the opinion of an independent psychologist as it was based on a comprehensive interview with the worker, psychological testing, and a review of the medical information on file. The worker's appeal was denied.

3.6.7. Witnesses

2006-02602 (also indexed under "1.12.1. Average Earnings - General")

(1) Where a party wants WCAT to require adverse witnesses to attend an oral hearing for cross-examination, there is no breach of procedural fairness if the panel does not subpoena a witness if the worker did not make an express request that a specific witness be compelled to attend the hearing. (2) Even if a party presents arguments focusing on a particular option under a section of the *Workers Compensation Act*, WCAT has a duty to consider the full range of options permitted by the section and there is no obligation to provide reasons that expressly addressed each of the options.

3.6.8. Surveillance

2005-00581

There was no invasion of privacy where a worker was videotaped riding a lawnmower on her own property because the videotape was taken from a public place. The fact that the worker was on private property at the time of that filming does not raise legal or policy questions such that the panel should not view or give weight to the surveillance videotape. The worker could not demand privacy or be surprised that the Board would take steps to ascertain the validity of her claim when she is seeking a pension from the Board on the basis of her inability to work.

3.7. Returning Matter to Board to Determine Amount of Benefits

2006-04061

The obligation for WCAT to address an issue does not require, in all circumstances, that the WCAT decision provide a final resolution of all such issues so as to avoid the need for further adjudication by the Board in implementing the WCAT decision.

3.8. Legal Precedents (section 250(1))

2006-01779 (also indexed under "1.3.1.2. Whether Injury Arose out of Employment - Decisions Made Under Old Policy - Cumulative Effects of Injuries" and "2.16.1. Review Division Jurisdiction - Scope of Review")

(1) The jurisdiction of a review officer is limited to the decisions contained in the Board decision being reviewed, regardless of the desirability of addressing all possible matters so that parties are not required to cycle through the appellate system. (2) The Board has the jurisdiction under section 5(1) of the *Workers Compensation Act* to adjudicate entitlement arising out of the cumulative effects of prior injuries. (3) When considering an issue, it is not appropriate to ignore the reasoning of applicable court decisions raised by a party merely because section 99 of the Act provides that court decisions are not binding on the Board.

3.9. Summary Dismissal of Appeal

3.9.1. Abandonment of Appeal

2005-06660

The worker requested reconsideration of a decision by WCAT that he had abandoned his appeal. The worker claimed he had asked for his oral hearing to be rescheduled. However, WCAT documented that the worker had only raised the possibility of rescheduling the hearing. The panel denied the request for reconsideration. In the circumstances, it was not unfair for WCAT to proceed with the scheduled oral hearing date. Although the worker wrote to WCAT to explain his failure to attend the hearing, WCAT received his letter after the deadline date.

3.9.2. Frivolous, Vexatious, or Trivial (ATA section 31(1)(c))

2005-00929

Although the amount of money at issue in an appeal may clearly be trivial and worthy of summary dismissal under section 31(1)(c) of the *Administrative Tribunals Act*, the appeal is not trivial or frivolous if it also involves the denial of a party's right of review or appeal.

3.9.3. Failure to Diligently Pursue an Appeal or Comply with WCAT Order (ATA section 31(1)(e))

2007-02651

This decision is noteworthy as it illustrates a situation where, following a no show at an oral hearing, the appellant's appeal was dismissed for failure both to comply with an implicit order of the WCAT to attend the oral hearing, and to diligently pursue the appeal.

3.9.4. No Reasonable Prospect of Success (ATA section 31(1)(f))

2013-00190 (also indexed under "1.16.6. Loss of Earnings Awards" and "2.6.2. Relying on Previous Findings of Fact")

Findings of fact made in the course of determining whether a worker is entitled to a loss of earnings assessment are not binding in the subsequent determination of whether the worker is entitled to a loss of earnings award. Therefore, these findings of fact are not appealable to WCAT.

3.9.5. Appeal Substance Resolved in Other Proceeding (ATA section 31(1)(g))

2012-00586

This decision is noteworthy for its analysis and application of *British Columbia (Workers' Compensation Board) v. Figliola* in circumstances where the issue(s) before WCAT may have already been dealt with appropriately in other proceedings.

2008-03676

This decision is noteworthy as it provides an analysis of WCAT's jurisdiction to summarily dismiss an appeal under section 31(1)(g) of the *Administrative Tribunals Act* where the substance of the application has been appropriately dealt with in another proceeding.

2005-05280

A decision of the Board constitutes a "proceeding" under section 31(1)(g) of the *Administrative Tribunals Act*; therefore an application for appeal to WCAT may be dismissed if an intervening decision of the Board makes the issue before WCAT moot.

3.10. Matters Referred Back to Board (section 246(3))

2011-02557 (also indexed under "3.5.6. Matters Not Addressed By Board")

This decision considers WCAT's jurisdiction over a new matter not yet decided by the Board, and the impact of the panel's discretion to invoke section 246(3) of the *Workers Compensation Act* or not.

2006-03220

This decision is noteworthy for its discussion of the limits to the Review Division and WCAT's jurisdiction. As a result of a referral back to the Board under section 246(3) of the *Workers Compensation Act* the Board addressed matters outside of the scope of the referral. The WCAT panel does not have jurisdiction over such matters.

2006-01889

This decision is noteworthy as an example of a matter referred back to the Board under section 246(3) of the *Workers Compensation Act* and then returned to the WCAT for completion.

2004-02435

This decision is noteworthy as an example of WCAT's use of the authority provided to it by section 246(3) of the *Workers Compensation Act* to suspend appeals in order to refer to the Board an issue that the Board should have adjudicated.

2003-04166

The panel referred this matter back to the Board pursuant to section 246(3) of the *Workers Compensation Act* for determination since the worker's entitlement was only considered in relation to his physical disability, despite the fact that the Board had also accepted that the worker sustained a compensable psychological injury.

3.11. Suspension of WCAT Appeal (Pending Board Decision) (section 252(1))

2005-05595

This decision is noteworthy because it illustrates the use of section 252(1) of the *Workers Compensation Act* to suspend an appeal to WCAT pending a decision respecting a matter related to the appeal.

3.12. Certifications to Court (sections 10 and 257)

Noteworthy decisions involving section 257 certifications to court in which the noteworthy substance of the decision is worker or employer status can be found above in sections "Whether a Person is a Worker" and "Whether a Person is an Employer". The decisions in this section primarily address procedural or jurisdictional questions arising from section 257 certifications.

2007-02502 (also indexed under "3.5.18. WCAT Jurisdiction – Certifications to the Court")

This decision is noteworthy because it explains the difference between the jurisdiction of WCAT and that of the court in section 257 of the *Workers Compensation Act* determinations.

2006-03916

A preliminary issue was raised in this section 257 application regarding the duty on the Appeal Division to invite participation by third parties who might be named as defendants in a legal action. Given the evidence before Appeal Division that the plaintiff was contemplating legal action and the prospect that this could lead to a section 11 (now section 257) application, the Appeal Division should have invited the third parties/defendants to participate as interested persons. On the facts of this case, although the third parties/defendants could have asserted their interest in participating in the proceeding, they did not have a duty to apply for interested party status until the worker brought her legal action

2006-01356

WCAT has jurisdiction to certify to the court under section 257 of the *Workers Compensation Act* in a legal action involving a federal employee.

2005-05495

When a legal action is adjourned before examinations for discovery have been performed, WCAT may, if necessary, require a party to the action to be examined under oath, pursuant to section 246 and 247 of the *Workers Compensation Act*.

2005-03639

In this section 257 determination, the panel could not make a determination concerning the status of one of the defendants because it was not clear from the incomplete transcript of the examination for discovery whether relevant information was being withheld. Complete transcripts should be provided when they are not too lengthy and deal with relevant matters.

2005-02939

Section 42 of the transitional provisions in the *Workers Compensation Amendment Act, (No. 2), 2002* read in conjunction with section 250 of the *Workers Compensation Act*, requires WCAT to apply the current policies of the board of directors to all new WCAT appeals. There is no provision to apply the former policies of the board of governors in effect at the time of the accident to new applications under section 257 of the Act. However, there is a strong presumption against a retroactive interpretation of the Act. Policies in effect at the time of the accident should be applied in new applications under section 257, notwithstanding the wording of section 42.

2003-03322

Section 11 determination where the accident occurred in Alberta - neither the Board nor WCAT has the obligation or jurisdiction to determine the relevance of a section 11 determination in a civil action before deciding whether to make the section 11 determination, particularly where this would involve a decision as to the law of which province is applicable to the action.

3.13. WCAT Reconsiderations

3.13.1. New Evidence (section 256)

2007-01893

This reconsideration decision is noteworthy because of its determination that, for purposes of meeting the requirements of section 256(3) of the *Workers Compensation Act*, new medical evidence is not “substantial” if it is based upon different facts than those which formed the basis of the original panel’s decision and if it is ambiguous in terms of the degree to which it supports a finding that the worker’s problems were due to his employment.

2006-02643

This was a reconsideration of a prior WCAT decision on new evidence grounds. New evidence does not have to be factual in order to meet the criteria under section 256 of the *Workers Compensation Act*. A new medical opinion may also be considered if it could not have been obtained prior to the original WCAT decision. New evidence is material if it is relevant to the issue before the original panel. New evidence is substantial if it has weight and supports a different conclusion than that reached by the original panel – it does not need to provide a new diagnosis.

2005-05949

This was a reconsideration on common law grounds of a prior WCAT reconsideration decision on new evidence grounds. The original reconsideration panel did not err in its interpretation or application of the reasonable diligence requirement in section 256 of the *Workers Compensation Act*, nor in its conclusion that the worker and his counsel ought to have marshalled all of the evidence that was available in support of the appeal. In applying the reasonable diligence test, the original reconsideration panel compared the worker's actions to that of a reasonable person, and its decision that the worker had not taken the steps that would have been taken by a reasonable appellant did not give rise to a reasonable apprehension of bias.

2005-05311 (also indexed under "3.13.8. WCAT Reconsiderations - Right to be Heard")

Where the issue under appeal is one of causation, a panel does not have an obligation to notify a party regarding any concerns the panel may have regarding the weight to be given to certain evidence. A reconsideration panel cannot reweigh the evidence before the original panel; the inquiry is whether the decision was based on a reasoned consideration of relevant evidence. A medical report which is written subsequent to the decision under reconsideration is not new evidence if it relates to evidence which existed at the time of that decision.

As a result of the B.C. Court of Appeal's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, decisions in the Noteworthy Decisions Index that discuss WCAT's jurisdiction to reconsider a prior decision for jurisdictional error are no longer noteworthy for this point. However, these decisions remain noteworthy for the other points set out in the noteworthy summary. For a summary of the *Fraser Health* decision, click here: http://www.wcat.bc.ca/appeals/after/JRSummaries/Fraser+Health+Authority+(BCCA)+(summary)+22_12_2014.pdf

2003-01120

The panel found that the requirements for a reconsideration were not met, specifically the due diligence requirement, since the "new evidence" submitted existed at the time of the Appeal Division hearing and a reasonable appellant would have provided it to the panel at that time.

2003-01116

The panel found that the requirements for a reconsideration were not met, specifically the due diligence requirement, since the "new evidence" submitted could have been obtained at the time of the hearing and a reasonable person would have provided it to the Appeal Division panel since it was germane to the question before that panel.

3.13.2. Unrepresented Parties

2006-02601 (also indexed under "3.17. Withdrawing a WCAT Appeal")

WCAT does not have an obligation to enquire as to whether an unrepresented party understands the significance of the withdrawal of an appeal or to provide advice. WCAT is only obliged to follow fair procedures in accepting the withdrawal of an appeal.

3.13.3. Appeal Division Decisions

2008-00457 (also indexed under "3.5.17. WCAT Jurisdiction - Reconsidering Appeal Division Decisions")

WCAT does not have the authority to set aside and reconsider a previous Appeal Division decision on the basis of jurisdictional error (common law grounds). Item #15.24 of the *Manual of Rules of Practice and Procedure* is amended accordingly.

2008-00031 (also indexed under "3.5.17. WCAT Jurisdiction - Reconsidering Appeal Division Decisions")

WCAT does not have the authority to reconsider and set aside a seized Appeal Division decision which was issued after March 3, 2003 on the basis of jurisdictional error (common law grounds).

2007-02083 (also indexed under "3.5.17. WCAT Jurisdiction - Reconsidering Appeal Division Decisions")

WCAT does not have the authority to set aside and reconsider a previous Appeal Division decision that was issued prior to March 3, 2003, when the Appeal Division ceased to exist (transition date), on the basis of jurisdictional error (common law grounds).

3.13.4. Procedural Fairness

2012-02521 (also indexed under "3.6.1. Evidence – General")

This decision is noteworthy for its analysis of cross-examination as one of several means of obtaining evidence and the use of cross-examination in relation to the duty to act fairly under section 58(2)(b) of the *Administrative Tribunals Act.*

3.13.5. General Test for Procedural Fairness

2004-03571

Whether an alleged defect in procedure is sufficient to constitute a breach of natural justice almost always depends on all of the circumstances; it requires an assessment of the procedures and safeguards required in a particular situation. On judicial review the test for establishing whether a breach of natural justice had occurred is whether the process was unfair. Although not necessary to its decision, the panel further noted that section 58 of the *Administrative Tribunals Act*, *2004*, stated that in a judicial review proceeding questions about the application of the rules of natural justice must be decided having regard to whether, in all the circumstances, the tribunal acted fairly.

3.13.6. Curing Procedural Unfairness

2005-06225

The Board imposed an administrative penalty against the employer for violations of the *Occupational Health and Safety Regulation*. The panel held that as proceedings before WCAT are in the nature of a rehearing, any procedural injustice or unfairness that may have occurred in earlier Board proceedings is rectified. The panel further held that, beyond providing full disclosure of the information and evidence upon which the penalty was imposed, neither the Board nor WCAT is obliged to provide the employer with information that would assist in the employer's defence.

3.13.7. Raising Procedural Fairness Issues

2007-00655

This reconsideration decision is noteworthy because it illustrates that a party should raise any concern regarding a possible breach of procedural fairness or natural justice at the earliest practicable opportunity. Otherwise, WCAT may find that the party has waived the right to raise such an objection after the decision has been issued.

2006-03001 (also indexed under "3.13.10. WCAT Reconsiderations - Bias")

A party that alleges bias on the part of a WCAT panel must communicate its objection as soon as practicable or WCAT will consider the party has waived its right to object on this basis.

3.13.8. Right to be Heard

2016-01148 (also indexed under "3.1. Standing to Appeal")

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

2015-03772

In a reconsideration application, WCAT has the jurisdiction to address the question of whether the panel's decision not to exercise its discretionary power to obtain further evidence was a breach of procedural fairness. The decision whether to exercise the panel's discretionary authority to obtain further evidence in an appeal is better characterized as a question of procedural fairness rather than a question of substance; consequently, it falls within the scope of WCAT's reconsideration jurisdiction following the decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal 2014 BCCA 499* (affirmed, *Workers' Compensation Appeal Tribunal v. Fraser Health Authority* 2016 SCC 25).

2007-00293

This decision is noteworthy as a reconsideration panel sets aside the original WCAT decision on the basis that the original panel did not address the request for an oral hearing and, thus, did not consider the important issue of the worker's right to be heard adequately, or at all.

2006-02698

This application was allowed on the basis that the original panel breached the rules of natural justice with respect to the worker's right to be heard. Although there is no obligation on a decision-maker to identify each piece of evidence it has considered, there will be circumstances where a failure to identify a piece of evidence will lead to the conclusion that the evidence was not considered. In this case, the original panel did not acknowledge the existence of evidence on noise exposure that had been provided by the worker and that challenged similar evidence the Board had relied on in its decision to deny the worker's claim.

2006-01738

This decision is noteworthy for its analysis of the factors to be considered when determining whether a worker's credibility is in issue when determining whether to hold an oral hearing.

2006-00208

This was a reconsideration of a prior WCAT decision. WCAT must provide adequate reasons to explain why an oral hearing has not been held if a party to an appeal has requested one. Otherwise, there is a breach of procedural fairness. Failure to acknowledge a request for an oral hearing is a failure to exercise a discretion.

2005-06073

The worker suffered a back injury and received a permanent disability award on a functional impairment basis, but not a loss of earnings basis. The Review Division referred the matter back to the Board to conduct loss of earnings and employability assessments. The worker appealed to WCAT on another issue. The original WCAT panel found that, as the Review Division had mistakenly not been informed that an employability assessment had already been conducted, the matter should not be referred back to the Board. The reconsideration panel held that the original panel had acted unfairly by not notifying the worker that the loss of earnings aspect would be addressed. This aspect of the decision was set aside as void.

2005-05311 (also indexed under "3.13.1. WCAT Reconsiderations - New Evidence")

Where the issue under appeal is one of causation, a panel does not have an obligation to notify a party regarding any concerns the panel may have regarding the weight to be given to certain evidence. A reconsideration panel cannot reweigh the evidence before the original panel; the inquiry is whether the decision was based on a reasoned consideration of relevant evidence. A medical report which is written subsequent to the decision under reconsideration is not new evidence if it relates to evidence which existed at the time of that decision.

As a result of the B.C. Court of Appeal's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, decisions in the Noteworthy Decisions Index that discuss WCAT's jurisdiction to reconsider a prior decision for jurisdictional error are no longer noteworthy for this point. However, these decisions remain noteworthy for the other points set out in the noteworthy summary. For a summary of the *Fraser Health* decision, click here: http://www.wcat.bc.ca/appeals/after/JRSummaries/Fraser+Health+Authority+(BCCA)+(summary)+22_12_2014.pdf

2005-04726

At the oral hearing, the original panel explained that it had been prevented from viewing video surveillance tapes of the worker due to a failure of the Board to furnish them to WCAT prior to the hearing, and that it would be viewing the videotapes after the hearing. The worker addressed this evidence at the hearing and did not at that time request that the hearing be reconvened once the panel viewed the videotapes. While it may be desirable for a panel to inform a worker of its preliminary views regarding this evidence so that he might then respond to them, the failure to do so does not involve a breach of procedural fairness, particularly where the worker was represented and was aware of the evidence. There was no breach of natural justice or procedural fairness in the original panel proceeding to view the videotape evidence subsequent to the oral hearing, and then making a decision without reconvening the hearing.

2005-04555

The employer requested reconsideration of a decision denying the employer's application for an extension of time to appeal a decision of the former Review Board. The employer had received a letter from WCAT that led it to believe it would have the opportunity to provide further submissions before the appeal was decided. WCAT subsequently informed the employers' adviser that the application had been transferred to a panel for a decision. The employer took no further steps to indicate it wished to provide further submissions before the decision was made. The reconsideration panel denied the application. The communication of information to the employers' adviser could reasonably be viewed as communication to the employer. The employer did not meet its obligation under section 256 of the *Workers Compensation Act* to exercise reasonable diligence in providing evidence to WCAT. WCAT was not obliged to seek clarification of any submissions made by the employer.

2005-04517

A panel must include all written documentation in its consideration, including attachments to the notice of appeal, even if an appellant fails to draw attention to the evidence in the oral hearing. Failing to acknowledge evidence which is directly relevant to the essential issue in the appeal is a breach of the worker's right to be heard.

3.13.9. Right to Notice

2006-01332 (also indexed under "3.15. Abandoning a WCAT Appeal")

This was a reconsideration of a registry decision to consider a worker's appeal abandoned. The worker filed his notice of appeal – part 1 with the former Review Board, which advised him that he was required to submit a notice of appeal – part 2 by April 8, 2003 or his appeal would be treated as abandoned. He was not advised that WCAT would require compliance with same. Some communication was required from either the Review Board or WCAT about the status of the deadline in light of the March 3, 2003 statutory changes to the appeal bodies, in order for this deadline to provide sufficient basis for treating the worker's appeal as abandoned. The reconsideration was allowed on the basis of a breach of procedural fairness.

3.13.10. Bias

2006-02462

This reconsideration decision is noteworthy because it provides an analysis of the employer's allegation of reasonable apprehension of basis on the part of the original panel because she had been the decision maker on a prior Review Board panel involving the same worker and claim. A reasonable person, properly informed and viewing the circumstances realistically and practically, would not conclude that the decision-maker might be prone to bias.

2006-03001 (also indexed under "3.13.7. WCAT Reconsiderations - Raising Procedural Fairness Issues")

A party that alleges bias on the part of a WCAT panel must communicate its objection as soon as practicable or WCAT will consider the party has waived its right to object on this basis.

2006-02830

The fact that a panel has previously decided similar issues raised in an appeal, or has obtained evidence to assist with full consideration of the issues under appeal, does not raise a reasonable apprehension that the panel is biased so long as there is evidence that the panel is approaching the issues with an open mind.

2006-01413 (also indexed under "2.14.1. Transition Issues - Meaning of 'Disability First Occurs'")

There was no indication the panel had taken a relevant policy into account - policy item #1.00 of the *Rehabilitation Services and Claims Manual, Volume I* – in deciding if the current or former provisions of the *Workers Compensation Act* and related policy applied to the claim. The other aspects of the reconsideration were denied. Although the panel's decision on her jurisdiction over lumbar spine impairment was wrong, she provided alternative reasons. The panel did not pre-judge the appeal by alerting the parties to a previous decision she had made on the issue of jurisdiction.

As a result of the B.C. Court of Appeal's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, decisions in the Noteworthy Decisions Index that discuss WCAT's jurisdiction to reconsider a prior decision for jurisdictional error are no longer noteworthy for this point. However, these decisions remain noteworthy for the other points set out in the noteworthy summary. For a summary of the *Fraser Health* decision, click here: http://www.wcat.bc.ca/appeals/after/JRSummaries/Fraser+Health+Authority+(BCCA)+(summary)+22_12_2014.pdf

2006-01106

The worker's counsel alleged that the vice chair assigned to a reconsideration application was biased. A reasonable apprehension of bias does not arise based on the fact that the worker's lawyer in the current application for reconsideration represents a different client in another case who is seeking reconsideration and judicial review of one of the prior decisions of the same vice chair.

2005-00892 (also indexed under "2.9. Mediation")

The worker appealed a decision by the Board to dismiss his complaint under section 151 of the *Workers Compensation Act*. The worker and the employer had attempted mediation with the Board. The substance of the employer's settlement offer was in the material before the panel. The panel decided not to refer the appeal for reassignment to another panel. The employer did not participate in the appeal and the worker did not object to her deciding the appeal. The panel was satisfied that in deciding the merits of the case, she was able to ignore the substance of the parties' settlement discussions.

2004-03794

Bias should not be alleged unless there is a sound basis for the allegation and some evidence to support it. Prior experience in workers' compensation proceedings is an asset for a vice chair, rather than a reason for disqualification. Where credibility is not in issue, and it is possible for the panel to hear the oral evidence given below, an oral hearing is not necessary. A panel does not make a patently unreasonable error of law if it does not refer to every piece of evidence before it as long as it is clear from the decision that it did not ignore important evidence without explanation. While the Appeal Division was an inquiry body, it did not commit an error of law going to jurisdiction by basing its decision on the medical evidence placed before it, rather than requesting new evidence, even though the medical evidence was dated.

As a result of the B.C. Court of Appeal's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, decisions in the Noteworthy Decisions Index that discuss WCAT's jurisdiction to reconsider a prior decision for jurisdictional error are no longer noteworthy for this point. However, these decisions remain noteworthy for the other points set out in the noteworthy summary. For a summary of the *Fraser Health* decision, click here: http://www.wcat.bc.ca/appeals/after/JRSummaries/Fraser+Health+Authority+(BCCA)+(summary)+22_12_2014.pdf

3.13.11 Appointment of reconsideration panel

2015-01946

This decision is noteworthy for its conclusion that on an application for reconsideration on the grounds of jurisdictional defect, the chair of WCAT may appoint a different panel than the panel that heard the original appeal when the original panel is no longer available.

3.14. WCAT Extensions of Time (section 243(3))

3.14.1. WCAT's Statutory Discretion

2008-00058

Section 243(3) of the *Workers Compensation Act* contains a residual discretion to deny an extension of time application even when the requirements of sections 243(3) (a) and (b) of the Act had been met. The original panel's statutory interpretation of the word "may" in section 243(3) was not patently unreasonable.

3.14.2. Never Received Decision

2003-03842

The worker sought an extension of the 30 day statutory time limit to appeal a finding of the Review Board. The extension of time was granted as the panel was satisfied that the worker did not receive the finding when it was originally mailed to him and, accordingly, the presumption in section 221(2) of the *Workers Compensation Act* had been rebutted.

3.14.3. Decision Mailed to Wrong Address

2003-01810

The worker sought an extension of the 30 day statutory time limit to appeal a finding of the Review Board. The extension of time was granted since, even though the worker had provided a change of address, the signed original Review Board finding was mailed to the worker's former address.

3.14.4. Late Mailing of Decision

2009-02847

This decision considers whether special circumstances existed that precluded the filing of a notice of appeal on time where there was some question as to when the decision under review was received by the worker, but no argument that it was received within the statutory appeal period.

2005-04706

Where a decision is sent out late and the worker appeals within 30 days of her receipt of the decision, an extension of time may be granted. A worker should not be deprived of the full 30 day statutory appeal period in which to consider her options or seek advice before initiating an appeal. The requirements for the exercise of discretion in section 243(3) of the *Workers Compensation Act* are met: the late mailing constitutes special circumstances which precluded the initiation of the appeal within the statutory time period.

3.14.5. Where Telephone Notice of Intent to Appeal Provided

2004-01294

Extension of time to appeal granted where the worker provided telephone notice of intent to appeal but failed to submit a completed written notice of appeal within 21 days.

3.14.6. Evidence Appears After Appeal Period Expires

2004-00433

The employer sought an extension of time to appeal the denial of relief of claim costs under section 39(1)(e) of the *Workers Compensation Act*. The extension of time was granted as special circumstances precluded the filing of a timely appeal since the new medical evidence to support the appeal did not come into existence until after the 30 day appeal period had expired.

3.14.7. Fraud or Misrepresentation At Issue in Underlying Claim

2004-00230

The worker sought an extension of the 30 day statutory time limit to appeal a finding of a review officer. The extension of time was denied because there was no evidence that the worker intended to appeal within the 30 day statutory time limit. However, the panel recommended that the Board consider the claim under section 96(7) of the *Workers Compensation Act* and item #C14-104.01, which allows the Board to set aside a decision that resulted from fraud or misrepresentation (with no time limit).

3.14.8. Acts or Omissions of Representative

2007-00880

The reconsideration panel set aside as void a decision which denied an extension of time application on the basis that the original panel considered that there were different standards expected from legal counsel as opposed to lay representatives when filing a notice of appeal within time. It is the conduct of the applicant, not the representative, that is paramount and, thus, the factors the original panel took into account were predominantly irrelevant and thus the decision was patently unreasonable.

2003-04175

This decision sets out factors to be considered on applications under section 243(3) of the *Workers Compensation Act* for extending the time to appeal to WCAT where the delay by the applicant involves the acts or omissions of the applicant's representative. In this case, the appeal was filed eight days late as a result of an omission by the worker's representative. The application was granted.

3.14.9. Confusion Over Length of Time to Appeal

2003-04156

The worker's application for an extension of the 30 day statutory time limit to appeal two findings of the Review Division was denied. The panel concluded that although the worker was confused about the time frame, the information and process for appealing to WCAT provided by the Review Division was sufficient to enable the worker to initiate her appeals to WCAT in a timely manner.

3.14.10. Request for Reconsideration by Review Division filed within time

A1605218

A written request for reconsideration of a Review Division decision is not a notice of appeal for the purpose of Rule 5.1.1 of the *Manual of Rules of Practice and Procedure* but represents a written expression of disagreement with the Review Division decision that, if received by the Review Division within the time limit for an appeal may be considered special circumstances that precluded the timely filing of an appeal.

3.15. Abandoning a WCAT Appeal

2006-01332 (also indexed under "3.13.9. WCAT Reconsiderations - Right to Notice")

This was a reconsideration of a registry decision to consider a worker's appeal abandoned. The worker filed his notice of appeal – part 1 with the former Review Board, which advised him that he was required to submit a notice of appeal – part 2 by April 8, 2003 or his appeal would be treated as abandoned. He was not advised that WCAT would require compliance with same. Some communication was required from either the Review Board or WCAT about the status of the deadline in light of the March 3, 2003 statutory changes to the appeal bodies, in order for this deadline to provide sufficient basis for treating the worker's appeal as abandoned. The reconsideration was allowed on the basis of a breach of procedural fairness.

2006-01331

This was a reconsideration of a registry decision to consider a worker's appeal abandoned. The worker filed his notice of appeal – part 1 with the Review Board and was given a deadline for filing his notice of appeal – part 2. He was later advised that, due to changes in the appellate structure, his appeal would be considered by WCAT instead, but that he still had to file his notice of appeal – part 2 by the same deadline. When he failed to meet the deadline and provided no explanation for this failure, WCAT treated his appeal as abandoned. In these circumstances, WCAT had jurisdiction to find that the worker's appeal was abandoned. His request for reconsideration of the WCAT decision was denied.

2004-01441

At issue in this case was whether the worker was deemed to have abandoned his appeal when he failed to attend the oral hearing. The panel concluded that the appeal was deemed to have been abandoned by the worker as the failure to appeal was not due to a personal emergency or other justification as contemplated in item #9.23 of the *Manual of Rules of Practice and Procedure*.

3.16. Applications to WCAT to Stay an Appealed Decision (section 244)

2009-03197

This decision found that a request to WCAT to a stay an order of the Board may be dismissed if the application for the stay is not made until several months after an appeal was filed with WCAT, and sufficient reasons for the delay are not provided.

2008-03843 (also indexed under "1.23.1. Occupational Health and Safety - Discriminatory Actions")

This decision is noteworthy as it provides an analysis of the criteria WCAT takes into consideration when determining whether to issue a stay under section 244 of the *Workers Compensation Act* pending an employer's appeal of a discriminatory action decision.

2006-02784

This decision is noteworthy as an example of the application of the criteria in the WCAT's *Manual of Rules of Practice and Procedure* for granting a stay of a decision of the Board with respect to a claims cost levy pending the outcome of an appeal to the WCAT. In this case, WCAT granted a stay.

2006-00583

This decision is noteworthy as an example of the factors considered when a party appealing to WCAT requests a stay of a decision of the Board. In this case, WCAT did not grant a stay.

2005-00527

This decision is noteworthy as an example of the analysis used to determine whether to grant a stay pending an appeal under policy item #5.40 of the WCAT *Manual of Rules of Practice and Procedure* and section 244 of the *Workers Compensation Act*. In this case, WCAT did not grant a stay.

2003-02653

The appellant corporation is appealing a decision by an assessment officer. This decision deals with the request by the appellant for a stay of the assessment officer's decision pending a decision on the appeal.

2003-00697

The claimant alleged that the employer unlawfully terminated his employment contrary to section 151 of the *Workers Compensation Act*. This decision deals with the employer's request for a stay of the case officer's order pending a decision on the appeal.

3.17. Withdrawing a WCAT Appeal

2006-02601 (also indexed under "3.13.2. WCAT Reconsiderations - Unrepresented Parties")

WCAT does not have an obligation to enquire as to whether an unrepresented party understands the significance of the withdrawal of an appeal or to provide advice. WCAT is only obliged to follow fair procedures in accepting the withdrawal of an appeal.

2003-02715

The panel, applying item #5.60 of the *Manual of Rules of Practice and Procedure*, declined to grant a withdrawal for one of the decision letters being appealed finding that the totality of the evidence must be considered in this case as the evidence in the two claim files had substantive differences. Therefore, the decision letter which the worker's representative sought to withdraw was relevant and ought to be considered.

3.18. Costs and Expenses

2013-02405

This decision is noteworthy for its analysis of the factors that WCAT will take into account when considering a request for reimbursement of an expert opinion where there is no Board tariff or fee schedule.

2011-01673A

This decision provides guidance regarding reimbursement of appeal expenses. In particular, parties should have reference to the WCAT *Manual of Rules of Practice and Procedure* and the WCAT website, which contains information regarding reimbursement of appeal expenses and the Board's fee schedules.

2010-02437 (also indexed under "2.7 Federal Employees")

This decision considers the application of section 6 of the *Workers Compensation Act Appeal Regulation* to parties whose claims are made under the *Government Employees Compensation Act.*

2010-00928

This decision addresses the importance of parties providing invoices to support a request that WCAT order the reimbursement of expenses, in this case for an occupational therapist's report, as well as providing submissions if an amount above tariff is being requested.

2007-01419

This decision is noteworthy as it determines what expenses associated with the attendance of an orthopaedic surgeon as an expert witness at an oral hearing may be reimbursed.

2007-00475

WCAT has the authority to grant reimbursement of expenses under section 7 of the *Workers Compensation Act Appeal Regulation* in connection with a summary decision regarding a request by the appellant to withdraw the appeal.

2006-02532

This application to reconsider a WCAT decision was allowed on the basis that the original panel issued a patently unreasonable decision. The original panel either failed to properly consider and apply the law as it related to the issue of appeal expenses or, alternatively, failed to provide adequate reasons such that it could be determined whether the panel applied the correct legal test.

2006-01608

The Board should reimburse workers for the expense of a general practitioner's attendance at a WCAT hearing at an amount equivalent to the Board tariff fee for a medical legal report.

2005-04320 (also indexed under "1.19.1.1. Protection of Benefits - Interest on Retroactive Changes to Benefits - General" and "3.5.12. WCAT Jurisdiction - Vocational Rehabilitation")

WCAT's jurisdiction is established by statute, in this case, section 239 of the *Workers Compensation Act*. WCAT has no jurisdiction to address the awarding of interest in relation to a matter over which WCAT has no jurisdiction, such as vocational rehabilitation assistance. In any event, there is no statutory entitlement to interest on retroactive benefits except in the limited situations expressly addressed in the Act or Board policy. Section 6(c) of the *Workers Compensation Act Appeal Regulation*, allowing WCAT to award costs in exceptional circumstances, must be read within the context of the clear limitations on the authority of WCAT contained in the Act. When WCAT does not have jurisdiction over a matter, such as vocational rehabilitation assistance, WCAT cannot hear an appeal on the issue of legal fees alone.

2004-06308 (also indexed under "2.17. Costs")

In relation to a Board matter or a Review Division proceeding, and pursuant to section 100 of the *Workers Compensation Act* and Board policy item #100.40 of the *Rehabilitation Services and Claims Manual, Volumes I and II*, neither the Review Division nor WCAT have the authority to order the Board to pay a party's legal expenses. The 2001 decision of the British Columbia Court of Appeal in *Van Unen v. British Columbia (Workers' Compensation Board)* on this same issue no longer applies to the current statutory scheme.

3.19. Transitional Appeals

2005-02568

WCAT does not have jurisdiction over relief of cost issues in appeals transferred from the Review Board on March 3, 2003. Under former section 90 of the *Workers Compensation Act*, it was not possible for the employer's appeal to the Review Board to include the issue of relief of costs. Section 38(1) of the *Workers Compensation Amendment Act (No. 2), 2002* does not expressly provide for WCAT to address issues that were not within the Review Board's jurisdiction before the appeal was transferred on March 3, 2003. Accordingly, when the appeal was transferred to WCAT on March 3, 2003, it did not include an appeal on relief of costs.

2004-04880

Whether the former s. 96(6) requirement to establish grounds for appeal, of an error of law or fact or contravention of a published policy, in certain employer appeals applies to transitional appeals. Grounds need not be established for appeals filed on or after March 3, 2004 (whether filed within the time limit for such appeals under s. 41 of Bill 63's transitional provisions, or for which an extension of time to appeal is granted pursuant to s. 2(2) of the Transitional Review and Appeal Regulation). However, the grounds apply to appeals filed to the Appeal Division prior to March 3, 2003, which were transferred to WCAT for completion under s. 39 of Bill 63's transitional provisions.

2004-03980

Given that the worker had initiated an appeal of a 1994 Review Board finding to the Appeal Division in 1995 and had, in essence, abandoned that appeal, she could not now appeal to WCAT because s. 2(2) of the Transitional Review and Appeal Regulation only provides an appeal right to a person who has not previously exercised a right of appeal.

2003-01132

The panel referred this matter back to the Board with directions to determine whether the worker's diagnosed carpal tunnel syndrome was caused by his employment activities. The original decision only considered the initial diagnosis of bilateral wrist and elbow tendonitis and failed to consider the second condition.

4. LIST OF DECISIONS INDEXED

The number in parentheses after a decision indicates the number of subject categories the decision is indexed in. The decisions highlighted in yellow have been added to the index since the last index update.

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16. 2003-02653	16. 2004-05255	16. 2005-06031	15. 2006-03220
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