

Decision of the Chair, Workers' Compensation Appeal Tribunal

Number: 27

Date: December 1, 2020

Manual of Rules of Practice and Procedure (MRPP) Amendments

1. Under section 280 of the *Workers Compensation Act (WCA)* the chair is responsible for the general operation of the Workers' Compensation Appeal Tribunal (WCAT).
2. The chair's authority includes responsibility, among other things, for:
 - establishing any rules, forms, practices and procedures required for the efficient and cost effective conduct of appeals to WCAT;
 - making accessible to the public any rules, forms, practices and procedures established by the chair; and,
 - establishing administrative practices and procedures for the effective operation of WCAT.
3. Under section 11 of the *Administrative Tribunals Act (ATA)*, WCAT has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.
4. Under section 13 of the ATA, WCAT may issue practice directives consistent with the ATA, the WCA, their regulations and any rules of practice and procedure made by WCAT.
5. Pursuant to the chair's authority and after a period of consultation, the chair approves amendments or replacements to the following items in the WCAT Manual of Rules of Practice and Procedure, as set out in Appendix A: 3.2.2 (Orders under Part 3 (Occupational Health and Safety)), 3.4.1 (Constitutional Questions), 4.9 (Federally Regulated Workers), 5.1.3.1 (Withdrawal of Incomplete Appeal), 5.3 (Service and Delivery of Documents), 6.6.7 (Participation by the Board), 7.5 (Appeal Method), 8.2.2 (Special Circumstances Precluded), 8.5 (Withdrawals), 9.3.3 (Panel Site Visit), and 11.4.2 (Evidence Received in Confidence), 11.5.2 (Credibility and Reliability), 14.2.4 (Participation in Oral Hearings by Telephone), 13.1.1 (Submission Process), 16.1.3.1 (Reimbursement of Expenses for Expert Evidence), 16.1.3.1 (Attendance of an Expert at an Oral Hearing), 18 (Certificates to Court), 21.1.2 (Duties of a Party).
6. These rules of practice and procedure are effective December 1, 2020, and remain in effect until their amendment, replacement or revocation by the chair.

Andrew Pendray
Chair, Workers' Compensation Appeal Tribunal

Signed at Richmond, British Columbia, this 1st day of December, 2020

Appendix A

3.2.2 Orders under the Occupational Health and Safety Provisions

Any decision respecting an order under the OHS provisions, other than those set out in 3.1.3 above, is not appealable to WCAT [s. 288(2)(b)].

Orders that are not appealable to WCAT include:

- a) An order concerning the placement of a condition on the use of a certificate under section 96(1)(b) ~~is not appealable to WCAT;~~
- b) An order imposing an administrative penalty under section 94(1) (Administrative penalties – OHS citations).

3.4.1 Constitutional Questions

WCAT has jurisdiction over constitutional questions including application of Canadian Charter of Rights and Freedoms issues [s. 296 WCA,].

“Constitutional questions” are defined by the ATA as questions requiring notice to the Attorneys General of Canada and British Columbia under section 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. That Act requires notice where the constitutional validity or applicability of any law (including a regulation) is challenged, or where an application is made under section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

The party who raises a constitutional question may give the notice required by section 8 of the *Constitutional Question Act*. If the party who raises the question fails or refuses to give the required notice, WCAT may do so.

At any stage of an appeal, on the request of a party or on its own initiative, WCAT may refer a constitutional question raised in the appeal to the court in the form of a stated case. On the request of the Attorney General, WCAT must refer that question to the court in the form of a stated case [s. 45(2) ATA]. A stated case must be brought on for hearing as soon as practicable [s. 45(5) ATA]. Subject to the direction of the court, WCAT must, to the extent it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case, suspend the appeal as it relates to the stated case and reserve its decision until the opinion of the court has been given, and decide the appeal in accordance with the opinion [s. 45(4) ATA].

4.9 ~~Federally Regulated Workers~~ Employed by the Government of Canada and Federal Government Bodies

The *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 (GECA) does not contain an appeal provision. However, section 4(2) of the GECA provides that ~~federally regulated workers~~ employees of the Government of Canada, and members, officers or employees of any department, corporation or other body that is established to perform a function or duty on the Government of Canada’s behalf are entitled to receive compensation under the same provisions as are provided by provincial law. Accordingly, ~~federally regulated~~ federal government workers and their employers have the same appeal rights as provincially regulated workers and employers.

Suspension of all or part of an appeal under section 45(4)(b) may interrupt the statutory 180-day time frame for decision making.

5.1.3.1 Withdrawal of Incomplete Appeal

RULE: An appellant may withdraw an incomplete appeal at any time. WCAT will close the appeal and take no further action. If the appellant later wishes to pursue the appeal, they must apply for an extension of time to appeal (see s. 293(3) and 8.2 to 8.2.3 and 8.5).

An incomplete appeal is an appeal that has not met the requirements of section 292(2).

~~Parties to a withdrawn appeal may request reimbursement of expenses associated with obtaining or producing evidence that was submitted to WCAT with respect to the appeal. In deciding whether to reimburse the expenses, WCAT will apply the criteria set out in 16.1.3.~~

5.3 Service and Delivery of Documents

Section 344 sets out the principles that WCAT must apply with respect to the service and delivery of documents:

- 1) A document that must be served on or sent to a person may be
 - a) personally served on the person,
 - b) sent by mail to the person's last known address, or
 - c) transmitted electronically, by facsimile transmission or otherwise, to the address or number requested by the person.
- 2) If a document is sent by mail, the document is deemed to have been received on the 8th day after it was mailed.
- 3) If a document is transmitted electronically, the document is deemed to have been received when the person transmitting the document receives an electronic acknowledgement of the transmission.

Although WCAT may serve documents by fax or electronic transmission, WCAT will normally do so only when a party requests [s. 344(1)(c)].

Where a document is transmitted by fax, the page or printout of the electronic record the fax machine produces that identifies the document, shows the number dialled and that the fax was successfully sent, or a printout of an electronic transmission, will normally be proof of delivery or service.

Where a document is transmitted electronically other than by fax, a printout of an electronic acknowledgement of the transmission that identifies the document and intended recipient will normally be proof of delivery or service.

If a decision is served or sent by personal service, fax, or by electronic transmission, the time period runs from the date of service and the eight days for mailing does not apply. The presumption of service in sections 344(2) and (3) does not apply if the party receives the document late because they were absent, in an accident, ill or for another cause beyond their control, so long as they act in good faith [s. 344(4)].

Proceedings are not invalidated due to irregular service if the party to be served knew about the content of the document within the time allowed for service, the party consents, or they are not prejudiced, or the prejudice can be cured by other means [s. 344(5)]. Where service under section 344(1) is impractical, WCAT may notify parties of a hearing by public advertisement or other means [s. 344(6)].

If the last day for filing an appeal or document falls on a weekend or public holiday, the time for filing is extended to the first business day when WCAT's offices are open [s. 25, Interpretation Act, R.S.B.C. 1996, c. 238].

7.5 Appeal Method

WCAT may conduct an appeal in the manner it considers necessary, that is by oral hearing or written submissions. Oral hearings may be conducted in person, by teleconference, videoconference, or any other electronic means [s. 297(1)].

RULE: WCAT will normally grant ~~the appellant's~~ a party's request for an oral hearing where the appeal involves a significant issue of credibility, where there are significant factual issues in dispute, and/or where there are other compelling reasons for convening an oral hearing (e.g. where an unrepresented appellant has difficulty communicating in writing or in English).

WCAT will normally conduct an appeal by written submissions where the issues are largely medical, legal, or policy based, and credibility is not at issue.

WCAT will normally conduct applications for an extension of time to appeal (8.2), a stay of decision (8.3), a certification to court (17), and a reconsideration (20.2 to 20.3.2) by written submissions.

For appeals in the regular stream, the registrar's office will determine at the outset whether the appeal will proceed by written submissions or oral hearing. The panel assigned to hear the appeal makes the ultimate decision regarding the appeal method. For appeals in the specialty stream, the panel will determine the appeal method at the outset (7.1).

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

8.2.2 Special Circumstances Precluded

Special circumstances must preclude filing the appeal on time. The dictionary definition of "special" includes "unusual," "uncommon," "exceptional," and "extraordinary." In the context of section 293(3)(a), "preclude" does not mean "absolutely prevent." It may include "prevent," "hinder," "impede," or "delay." When deciding an extension of time application, panels will not consider the merits of the appeal.

The special circumstances test in section 293(3)(a) is only applicable to the failure to file the appeal on time. It does not apply to any subsequent delay after the time to appeal expired.

In determining whether special circumstances precluded the filing of the appeal on time, the chair may consider a number of factors, including:

- a) the date on which the applicant actually received the decision under appeal;
- b) if there was a delay in the applicant receiving the decision, the reason for the delay;
- c) whether the applicant was aware of the right to appeal and the time limit for initiating the appeal;
- d) Whether there was a clear and significant error of fact, law, or policy in the decision of which the applicant could not reasonably have been aware;
- e) whether the applicant has obtained significant new evidence that would support the appeal which, when the time limit to appeal expired, either did not exist or existed but was not discovered and could not through the exercise of reasonable diligence have been discovered; and,
- f) whether the applicant took all reasonable steps to ensure a timely appeal.

8.5 Withdrawals

RULE: An appellant may withdraw an appeal by right at any time before the appeal has been assigned to a panel.

After assignment, WCAT will decide whether to allow a request for withdrawal. The request for withdrawal will normally be granted.

Requests for withdrawal must be made in writing, or in person at an oral hearing.

This rule applies to appeals that have met the requirements of section 292 (see Rule 5.1.3.1 with respect to withdrawal of appeals that have not met the requirements of section 292). Withdrawing an appeal does not extend the time limit for filing the appeal. An appellant who withdraws an appeal before the appeal has been assigned to a panel, and who later wishes to pursue the appeal must apply for an extension of time to appeal (see section 293(3)).

In deciding whether to accept a request for withdrawal after assignment of the appeal to a panel, the panel may consider whether there is evidence of:

- a) Fraud or misrepresentation on the part of the appellant;
- b) An error of law or policy within the scope of the appeal which resulted in the appellant being entitled to benefits they would not be entitled to but for the error; or
- c) Any other circumstance that could result in an injustice.

Parties to a withdrawn appeal may request reimbursement of expenses associated with obtaining or producing evidence that was submitted to WCAT with respect to the appeal. In deciding whether to reimburse the expenses, WCAT will apply the criteria set out in 16.1.3.

WCAT's decision to accept the withdrawal of an appeal that has ~~met the requirements of section 292(2)~~ been assigned to a panel is final and conclusive. If the appellant later wishes to pursue the appeal, they must apply for reconsideration of the withdrawal decision (20.2 to 20.3.2).

9.3.3 Panel Site Visit

Rule: Where the panel concludes that a site visit is necessary, participating parties and their representatives must be invited to attend.

The panel may receive comments and submissions from the parties during the site visit or may convene or reconvene an oral hearing for submissions on the relevance or significance of the matters observed during the site visit. Generally, no voice recording will be made of the site visit or of any comments or submissions the parties make during the site visit.

The purpose of the site visit should be to better appreciate the evidence and not to gather evidence. If the purpose of a site visit would be to gather evidence, the panel should ask the Board to obtain the evidence through further investigation (see item 9.3.1).

11.4.2 Evidence Received in Confidence

Panels may direct that all or part of the evidence, either oral or written, be received in confidence to the exclusion of parties, on terms the panel considers necessary, in the interests of the proper administration of justice [s. 42 ATA].

The rules of procedural fairness will almost always be paramount in WCAT proceedings. Thus, only in extraordinary circumstances, such as issues of national security where the evidence is relevant to an ongoing law enforcement investigation, or where another statute expressly so allows, would a panel receive evidence in confidence.

11.5.2 Credibility

As the British Columbia Court of Appeal said in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, "...the real test of the truth of the story of a witness ... must be 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."

Credibility is concerned with the truthfulness of a person's testimony. However, credibility is not the same as reliability, which is concerned with the accuracy of a person's testimony. Thus, a credible witness may give unreliable testimony. The credibility of a witness will affect the weight given to that person's testimony. Panels must consider whether a witness' evidence is internally consistent, logical, and consistent with prior statements of that same witness. Panels should allow witnesses to comment upon earlier inconsistent statements. For example, where a worker's evidence at an oral hearing is inconsistent with statements attributed to the worker in the claim file, the panel should allow the worker to comment on the inconsistency.

11.5.3 Reliability

~~The concept of credibility includes reliability. The reliability of a witness' evidence will also have a bearing on the weight a panel may give to that person's testimony.~~ Reliability is concerned with the objective accuracy of a person's testimony. Panels must consider whether a witness' evidence is externally consistent with the other evidence, that is, consistent with the proven or undisputed facts in the case. This involves consideration of what is most reasonable and probable when the case is viewed as a whole.

In oral hearings, panels should allow witnesses to comment on externally inconsistent evidence. For example, where a worker's evidence regarding an injury is significantly or materially inconsistent with that of a supervisor, the panel should allow the worker and the supervisor to comment on the inconsistency where it is relevant to the matter before WCAT.

13.1.1 Submission Process

a) *WCAT will give the appellant 21 days to provide a submission (which may include evidence not previously submitted) in addition to the information contained in their notice of appeal.*

b) *Within the 21-day period, the appellant may request additional time, ~~with reasons~~. If the appellant neither files a submission nor requests more time within the 21-day period, they lose the right to provide a submission and their notice of appeal will be considered as their submission, subject to WCAT's discretion to accept late submissions (13.1.4).*

c) *~~If a party requires~~ The appellant may request additional time of 14 days or less, by telephone or in writing without making a request to extend the time for decision under section 306(6). they may request that by telephone. Requests for more than 14 additional days (up to a maximum of 45 days) must be made in writing and provide reasons. Reasons for which WCAT may give additional time include:*

d) *The appellant may request additional time of up to 45 days in writing. Requests for additional time of more than 14 days will be considered as requests for delay under section 306(5)(b), and such requests must provide reasons. Reasons for which WCAT may give additional time include:*

- i) *complexity of the issues under appeal;*
- ii) *need to seek additional medical or other evidence;*
- iii) *need to interview witnesses and provides adequate reasons for requiring more time to do so;*
- iv) *need to seek representation;*
- v) *personal or family health problems, bereavement, or other emergencies;*
- vi) *pre-arranged vacation; or,*
- vii) *current labour relations dispute which severely limits opportunity to participate.*

e) *The maximum additional time for submissions that WCAT will give at the appellant's request is 45 days [s. 306(6)]. Any additional time runs from the end of the initial 21-day period for submissions.*

f) *WCAT will give the respondent 21 days to provide a submission.*

g) *If the chair has not extended the time for decision under section 306(6), the respondent may, within the 21-day period, request additional time of up to 14 days by telephone or in writing.*

h) *If WCAT the chair has extended the time for decision under section 306(6) WCAT will give the respondent additional time upon request, and the chair will extend the time for decision by the same amount. only if WCAT gave the appellant additional time. The respondent must specify the amount of additional time they are requesting but need not provide reasons. The maximum additional time that WCAT will give to the respondent can be no greater than the amount of additional time WCAT gave to the appellant under section 306(6) [s.306(7)]*

~~g) — The maximum additional time that WCAT will give at the respondent's request can be no greater than the amount of additional time WCAT gave to the appellant [s. 306(7)]. WCAT cannot otherwise grant a respondent additional time.~~

j) Whether or not the appellant provided a submission, any submission from the respondent will be disclosed to the appellant with 14 days for rebuttal.

j) WCAT cannot give additional time for rebuttal. The appellant should not submit additional evidence on rebuttal. If the appellant submits additional evidence on rebuttal, WCAT will decide whether to accept the evidence, and determine the procedure for disclosure of the material to the other party. The appellant who submitted additional evidence on rebuttal will not normally be given a final opportunity to respond.

14.2.4 Attendance by Telephone, Videoconference or Other Electronic Means

The panel may permit a party or parties, their representatives, or witnesses to attend an oral hearing by telephone, videoconference, or other electronic means. In exercising its discretion to permit a person to attend an oral hearing by telephone, the panel may consider:

- a) the person's location;
- b) the difficulty and/or expense associated with travelling to attend the oral hearing;
- c) whether not permitting a person to attend by telephone, videoconference, or other means is likely to result in postponement of the oral hearing;
- d) whether permitting a person to attend by telephone, videoconference, or other electronic means is likely to unreasonably limit the ability of a party to cross-examine the person;
- e) the person's preference to attend by telephone, videoconference or other electronic means.
- f) any other fact or circumstance the panel considers relevant to the exercise of its discretion.

16.1.3.1 Reimbursement of Expenses for Expert Evidence

WCAT may direct reimbursement for different types of expert evidence (11.6). Most commonly, this involves additional medical evidence obtained for an appeal. It may also include other forms of expert evidence such as ergonomic assessments, employability assessments and functional capacity assessments.

When seeking reimbursement of an expert opinion, in addition to the opinion, the requesting party must also provide a copy of their request and the expert's bill or account. Where practicable, the expert's bill or account must itemize the time and expenses incurred in rendering the opinion.

With respect to medical-legal reports and opinions WCAT will usually order reimbursement at the rates established by the Doctors of BC Fees for Uninsured Services – Scale A. WCAT will usually order reimbursement of expert opinions at the rate established by the Board for the same or similar expenses. The balance is the responsibility of the party who obtained the report. Current information on Board and other fee schedules can be found on WCAT's website at www.wcat.bc.ca. Click on the "Appeal Expenses" link on the left-hand side bar.

If there is no Board fee schedule for the same or similar expenses, WCAT will generally consider any fee schedule or similar document published by the professional association governing the expert's area of practice, if applicable.

A WCAT panel has the discretion to award reimbursement of an expert opinion in an amount greater than the fee schedule but will do so only in limited circumstances. If the bill or account exceeds the Board fee schedule, the party seeking reimbursement of the full amount must explain the reasons the account exceeds the fee schedule and why the panel should order reimbursement of the full amount. In the absence of a request and a satisfactory explanation of the circumstances, WCAT will limit reimbursement to the fee schedule amount.

Examples of the limited circumstances include:

- The issue being addressed is unusually complex.
- The expert was required to review a significant body of evidence and it was reasonable to do so.
- The expert has a high level of expertise in a unique area and it was reasonable to engage such an expert.
- There is limited availability of experts in the geographical area and it was reasonable to engage such an expert.
- The expert was required, for the purposes of providing the opinion, to test or examine parties or witnesses.

In each case, even if the circumstances above exist, the principle of proportionality must be taken into account in determining whether to award reimbursement of an expert opinion in an amount greater than the fee schedule.

16.1.3.1.1 Attendance of an Expert at an Oral Hearing

WCAT will generally order reimbursement of the expense for attendance of an expert at an oral hearing, regardless of the result in the appeal where:

- a) the attendance of the expert was useful or helpful to the consideration of the appeal;
- b) it was reasonable for the party to have the expert attend the oral hearing to give evidence in connection with the appeal; or,
- c) WCAT ordered the attendance of the expert.

The current Board fee schedule does not include an item for attendance of an expert at an oral hearing. WCAT will be guided by the BCMA Guide to Fees—Medical-Legal Matters, Doctors of BC Fees for Uninsured Services - Scale B. WCAT may decline to order reimbursement of this expense if the expert's written report was not provided to WCAT at least 21 days prior to the hearing (11.6).

18 CERTIFICATES TO COURT—~~SECTION 257 APPLICATIONS~~

~~18.1—General~~

~~Section 257 authorizes WCAT to provide a certificate to court in a legal action. WCAT may determine a matter which is relevant to a legal action and is within the jurisdiction of the Board. This may include determining whether:~~

- ~~a) a person was a worker at the time the cause of action arose;~~

~~b) — the injury, disability or death suffered by a worker arose out of and in the course of the worker's employment;~~

~~c) — an employer or the employer's servant or agent was employed by another employer at the time the cause of action arose;~~

~~d) — an employer was engaged in an industry within the meaning of the WCA at the time the cause of action arose.~~

~~WCAT may provide a certificate even though no party to the legal action has applied for workers' compensation benefits, or registered with the Board as an employer, and there has been no decision by a Board officer or a review officer. WCAT will consider all of the evidence and argument afresh regardless of a prior decision by a Board officer or a review officer. There is no appeal from the matters determined in a section 257 certificate.~~

~~18.2 — Processing Applications~~

~~WCAT will notify all parties to the legal action, and any affected persons, of the section 257 application and give them an opportunity to provide submissions. Section 257 applications will normally be considered by written submissions.~~

~~Where the Board (or a Workers Compensation Board of another jurisdiction) is subrogated to the rights of the worker or the dependent, WCAT must be satisfied that the Board has given its authorization for the legal action to proceed.~~

~~WCAT will follow its usual processes for considering appeals as set out in this MRPP insofar as they are applicable to section 257 applications. These are the modifications to those usual processes which WCAT will follow on section 257 applications.~~

~~18.3 — Standing to Make Application~~

~~Any time after a legal action has been commenced, the court or any party to a legal action may request a certificate under section 257.~~

~~—— 18.3.1 Interested Persons~~

~~Other persons who might be directly and adversely affected by the section 257 determination may be given standing to participate in the application even though they are not parties in the legal action. This would include, for example, the alleged employer of a party who is alleged to have been a worker at the time of the injury, or parties in related legal actions.~~

~~—— 18.3.2 Timing of Application~~

~~There is no time limit to apply for a certificate under section 257. WCAT will accept an application any time after a legal action has been commenced.~~

~~WCAT will normally address section 257 applications on a first come, first served basis. WCAT may address an application on a priority basis where exceptional circumstances are demonstrated and the parties are ready to proceed. WCAT requires at least 180 days from the date of application to complete a section 257 determination. The onus is on the parties to bring their application at least 180 days in advance of the trial date (or an earlier date by which the determination is required for pre-trial purposes) to leave adequate time for submissions by the parties and for WCAT to render its decision.~~

~~—— 18.3.3 Pleading a Defence under Section 10~~

~~WCAT will consider an application for a certificate under section 257 without requiring a defence under section 10 to be pleaded in the legal action. However, pleading such a defence may still be necessary for the purposes of the legal action.~~

~~18.3.4 Application for Compensation~~

~~Plaintiffs/claimants should file an Application for Compensation with the Board on a provisional basis pending the outcome of any section 257 application. This protects the plaintiff's/claimant's right to proceed with a workers' compensation claim should the legal action ultimately be barred and does not prejudice the plaintiff/claimant in the legal action.~~

~~The general requirement of section 55 is that an application for compensation be filed within one year of the date of injury, death or disablement from occupational disease.~~

~~18.3.5 Representative Authorizations~~

~~Where a party to a legal action is represented by counsel, WCAT will not normally require any other form of representative authorization (6.3.1).~~

~~18.4 Initiating the Application for Certification~~

~~The WCAT application form for a section 257 certificate is accessible on the WCAT website.~~

~~**RULE:**~~

~~**a) An application for a section 257 certificate must be made in writing to WCAT and copied to the other named parties. WCAT will not consider a section 257 application without a written request.**~~

~~**b) The application must be accompanied by a copy of the Notice of Civil Claim/Notice of Claim (and any other pleadings) filed in the legal action.**~~

~~**c) The applicant must identify the persons for whom section 257 determinations are sought.**~~

~~**d) The application must specify the determinations requested.**~~

~~Failure to meet these requirements may result in WCAT closing the application as incomplete.~~

~~18.4.1 Other Necessary Information~~

~~For WCAT to process the application, the following information must also be provided:~~

~~a) the birth date(s), current address(es) and personal health numbers or social insurance number(s) of the parties to the legal action;~~

~~b) any claim numbers for related Board claims or claims established in other jurisdictions;~~

~~c) the names and current addresses of the employer(s) of all plaintiffs, defendants and third parties at the time the cause of action arose;~~

~~d) current or past Board registration numbers of any employer or person with personal optional protection coverage;~~

~~e) the identity of other related legal actions arising from the same event (including a copy of a notice filed under section 103 of the Insurance (Vehicle) Regulation in lieu of filing a Part 7 action) and the names and current addresses of counsel representing the parties in them;~~

f) ~~the names and current addresses of other persons involved in the same event who have outstanding claims with the insurer but are not named in this or a related action;~~

g) ~~copies of the following documents:~~

- i) ~~any statements made to ICBC, another insurer, or the police (in motor vehicle accident cases);~~
- ii) ~~transcripts of Examinations for Discovery, if held (0);~~
- iii) ~~any third party pleadings;~~
- iv) ~~any relevant affidavits and motions filed in the legal action;~~
- v) ~~any section 103 Notice sent to ICBC; and,~~
- vi) ~~Notice of Trial (if scheduled).~~

~~18.4.2 Related Appeals or Legal Actions~~

Practice Directive

~~Where there is a related legal action arising from the same event, WCAT will invite the parties to that action, and any additional affected parties, either to participate in the proceeding before WCAT or to make a separate application for a section 257 determination. In the latter case WCAT will process the applications jointly. One panel will consider all applications together and will normally issue one decision addressing all applications. However, the panel will issue a separate section 257 certificate for each legal action.~~

~~Where there is an appeal pending before WCAT that addresses the same matters as the section 257 application, one panel will consider the section 257 application and the appeal at the same time.~~

18.5 ~~Written Submissions and Correspondence~~

~~RULE: Parties to the legal action must provide copies of their submissions and correspondence (except for examination for discovery transcripts – see 0) to the other parties and to all other persons participating in the section 257 application at the same time as they send those documents to WCAT.~~

~~18.5.1 Transcripts of Examinations for Discovery~~

~~RULE: Where a party to the legal action submits a transcript of an examination for discovery, the party is not required to provide a courtesy copy of the transcript to any other party to the legal action. This rule does not apply to interested persons (0).~~

~~Parties to the legal action that are participating in the section 257 application must provide WCAT with a complete copy of any transcript of an examination for discovery conducted in the legal action. The party is not required to provide a copy of the transcript to any other party to the legal action; they are responsible for obtaining their own.~~

~~If there are persons participating in the section 257 application that are not parties to the legal action (0), at WCAT's request the party submitting the transcript must provide a copy of the transcript to each participating person.~~

~~Portions of a transcript may contain information about the person examined that is both irrelevant to the section 257 determinations requested and personal. Before disclosing the transcript to any person participating in the section 257 application who is not a party to the legal action, WCAT will notify the person examined, or their authorized representative. WCAT will give that person an~~

~~opportunity to request that WCAT sever material from the transcript on the basis that it is irrelevant and involves a significant privacy concern (1).~~

~~18.5.2 Evidence and Written Submissions~~

~~The applicant and respondent must identify the determinations requested, set out the factual background, and provide all the evidence and argument necessary to WCAT's consideration of the issues. Parties should not assume that WCAT will carry out any further investigations and should not omit any evidence, although the panel may undertake further inquiries if the panel considers this necessary.~~

~~Evidence may be submitted in any form including handwritten statements of witnesses, business records, sworn affidavits, transcripts of evidence given under oath at an examination for discovery, or testimony at an oral hearing before WCAT. While the strict rules of evidence do not apply, the form of the evidence may affect the weight given to it (see 1).~~

~~WCAT will normally give each party and participating person 21 days to provide submissions. A shorter time frame may be required if the application is being expedited, for example for an impending trial date. WCAT may extend the time in appropriate circumstances.~~

~~18.5.3 Disclosure of Existing Board Files~~

~~If the Board has established a file, it will be accessible to the WCAT panel. WCAT will provide disclosure of selected relevant documents to the parties. Upon written request from a participating employer, WCAT will ask the Board to provide full disclosure of an employee's claim file. Parties may obtain full disclosure of the Board file by writing to the Board's legal department.~~

~~18.6 Withdrawal of Application~~

~~An applicant may withdraw a section 257 application by right at any time. This does not affect the right of the applicant, or any other party to the legal action, to reapply for a section 257 certificate in the future.~~

~~18.7 Decision~~

~~The panel will issue both a certificate and written reasons for its decision. Section 253(4) does not apply to a section 257 application.~~

~~WCAT will provide an unentered copy of the written decision and certificate to all parties to the legal action, all persons invited to participate in the section 257 application, and the Board. WCAT files the certificate and decision in the court registry if the legal action has been brought in British Columbia. WCAT provides entered copies of the certificate and decision only to the parties to the legal action.~~

~~If the legal action has been brought outside of British Columbia, the applicant is responsible for filing the WCAT certificate and decision in the appropriate court registry.~~

~~WCAT's section 257 file is not normally forwarded to the Board even if there is a Board file. It is stored at WCAT.~~

~~18.7.1 Expenses and Costs~~

~~Expenses and costs are normally matters to be determined in the legal action. Thus WCAT normally will not award expenses or costs in a section 257 application. (1)~~

18.8—Effect on the Legal Action

~~WCAT does not determine the effect of the section 257 certificate on the legal action, that is, whether a legal action is barred pursuant to section 10. Following a section 257 certificate, a party may apply to the court in accordance with the Supreme Court Civil Rules to determine whether the action should be dismissed based on section 10 and the findings contained in the certificate.~~

18.1 Introduction

The Workers Compensation Act in section 311 gives WCAT the power to make determination(s) and provide a certificate to a court in certain matters which are relevant to a court action and that are within the jurisdiction of the Board (3.1.5). WCAT also provides reasons for its determination(s).

18.2 Jurisdiction

18.2.1 General

In order for WCAT to certify a matter to court, there must be a court action concerning a personal injury, death, or a disability caused by occupational disease. If there is no court action, WCAT has no jurisdiction to determine any matters and there cannot be an application for certification to court.

As was pointed out by the BC Supreme Court, an application "... is not a separate proceeding. It is a step within the action that is mandated by legislation." (Hommel v. Cooke et al., 2005 BCSC 658).

Thus, the nature of a proceeding for a certification to court is two-fold. While it is a step in the underlying court action, the Act states that it is also treated as an appeal. The Act provides that Part 7 ("Appeals to Appeal Tribunal" including the provisions dealing with WCAT, appeal rights, appeal procedure, and other general items) applies to certificates to court as if the proceedings were an appeal. The only provision of Part 7 of the Act that does not apply is the time for making a final decision on the application (17.1.1).

18.2.2 Definition of Court and Action

The Act provides that "court" includes the Civil Resolution Tribunal. As well, the Act provides that "action" includes proceedings brought before the Civil Resolution Tribunal. Typically, aside from the Civil Resolution Tribunal, applications involve court actions before the Provincial Court of B.C. or the Supreme Court of B.C. A court may also include a court outside of the province, such as the equivalent superior trial court in another province.

18.2.3 Scope of Determination(s)

WCAT may determine any matter that is relevant to the court action and that is within the jurisdiction of the Board. This may include determining, at the time the cause of action arose:

- a) was the party a worker,
- b) if so, did any injury, death or disability arise out of, and in the course of, the worker's employment,
- c) was the other party an employer engaged in an industry within the meaning of the compensation provisions,

- d) if so, did any action or conduct of the employer, or its servant or agent, which caused the alleged breach of duty of care, arise out of and in the course of employment within the scope of the compensation provisions,
- e) was the other party a worker,
- f) if so, did any action or conduct of that worker, which caused the alleged breach of duty of care, arise out of and in the course of employment within the scope of the compensation provisions.

WCAT can make determinations about persons who have not applied for compensation from the Board as a worker or dependent or who have not registered with the Board as an employer.

18.3 Who May Apply

The Act provides that the court, on its own motion, or a party to the court action may request that WCAT make a determination(s).

Although the Act states that the matter determined by WCAT must be within the jurisdiction of the Board, there is no requirement that an applicant have an application for compensation or be receiving benefits from the Board. As well, there is no requirement that an applicant be registered with the Board as an employer (18.4).

More than one party to the legal action may request that WCAT make a determination(s) and initiate an application for a certificate to court. Alternatively, a respondent may identify additional issues for certification on an application in which they are participating (18.6.5.1).

18.3.1 Deceased Person – Standing of Estate

The estate of a deceased worker or employer may initiate, participate in, or continue an application for a certificate to court. If the identity of the estate’s representative needs to be established, the documentation noted in item #4.6 is required (4.6).

18.3.2 Who May Respond

A person who has standing to initiate an application for a certificate to court has standing to respond, that is, be a respondent, to the application. In other words, any other parties to the court action may respond to an application by another party to the court action.

18.4 Preliminary Matters

18.4.1 Court Action Prohibited (Statutory Bar)

Section 127 of the Act prohibits a worker (or family member or dependant) from filing a court action against their employer, another employer, or another worker for a breach of duty of care or other cause of action, for injury, disablement, or death, where the action or conduct causing the breach of duty of care or other cause of action arose out of and in the course of employment.

While WCAT does not determine whether a court action is prohibited or “barred” under section 127, a party may apply to the court to determine whether the action should be dismissed based on section 127.

As a preliminary matter, WCAT does not require that a defence under section 127 be raised in the court action for an application to proceed. However, raising such a defence may still be necessary for the purposes of the court action.

18.4.2 Application for Compensation

As noted above in item #18.4, there is no requirement that an applicant have an application for compensation or be receiving benefits from the Board. However, plaintiffs (or those parties initiating the court action) should consider filing an Application for Compensation with the Board on a provisional basis pending the outcome of any application to WCAT. This protects the plaintiff's (or party's) right to proceed with a workers' compensation claim should the court action ultimately be prohibited under section 127. As well, there are time limits for filing an application for compensation contained in the Act [s. 151].

18.4.3 Registration with the Board as an Employer

As noted above in items #18.2.3 and #18.3, there is no requirement that an applicant be registered with the Board as an employer.

18.5 How to Apply

There is no time limit to apply for a certificate. WCAT will accept an application any time after a court action is commenced.

RULE: An application must be initiated by filing a notice of application with WCAT.

A notice of application must [s. 292(2)]:

- a) **be in the form authorized by WCAT's rules. A specific application form for certificates to court is accessible on the WCAT website,**
- b) **identify the court action, the court registry and the registration number (or other information to identify the specific level of court and associated file number), whether the court action concerns a personal injury, death, or a disability caused by occupational disease (including the date of accident, injury or death), and whether a trial or hearing date is set in the action,**
- c) **include a copy of the Notice of Civil Claim/Notice of Claim (and any other pleadings or relevant documents) filed in the court action,**
- d) **state the determination(s) requested and the person(s) for whom the determination(s) are sought (including their respective status (if any) in the court action),**
- e) **include information about each party named in the court action, as well as their alleged employer (if any),**
- f) **identify any related court action(s) (if any) arising out of the same accident/incident and whether a certificate is required for those action(s),**
- g) **include information on the applicant's readiness to proceed with the application (18.8.2),**
- h) **contain the name, address and telephone number of the applicant, and if the applicant has an agent to act on their behalf in respect of the application, the name of the agent and a telephone number at which the agent may be contacted during regular business hours,**
- i) **include an address for delivery of notices in respect of the application,**
- j) **be signed by the applicant or the applicant's agent, and**

The applicant must send a copy of the application to the other parties in the court action, and advise WCAT that they have done so.

An agent may act on behalf of more than one applicant. In that case, the notice of application must identify each applicant that the agent acts on behalf of and the respective status of each applicant in the court action.

WCAT also seeks information on the notice of application about the applicant's preference for the method of hearing and information to support disclosure of relevant Board claim files (if any).

If the notice of application is deficient, WCAT will allow a reasonable time for it to be corrected [s. 292(3)]. If the applicant does not correct the deficiencies within the time allowed, WCAT will close the application as incomplete and take no further action. If the applicant later wishes to pursue an application, they must make a new application.

18.5.1 Initiating an Application

18.5.1.1 Notice of Application Must Be in Writing

RULE: An applicant must initiate the application for a certificate to court in the prescribed form. This may be done by delivering, mailing, sending by facsimile transmission (fax), or sending by electronic mail or other electronic means (email) to WCAT a completed notice of application form containing the required information in English.

An applicant must meet the requirements noted in item #18.6 or WCAT will not consider an application to be initiated.

Telephone notification is not sufficient to initiate an application. WCAT will not accept telephone notice of intent to file an application.

Where the application is initiated by fax or email, it is not necessary to send WCAT the original document. Where the applicant also sends the original document, WCAT will verify the receipt of the fax or email (along with the received date) and destroy the original document. WCAT notice of application forms are accessible on the WCAT website.

18.5.1.2 Incomplete Notice of Application

RULE: Where the notice of application does not meet the requirements of item #18.6, the appellant must provide a complete notice of application within the time WCAT subsequently allows (normally 21 days).

Where an applicant does not provide the required information by the date WCAT subsequently allows, WCAT will treat the application as incomplete and as not initiated. WCAT will close the application and take no further action. If the applicant later wishes to pursue an application, they must make a new application (18.9).

18.5.1.3 Determination(s) Requested

RULE: To meet the requirements of item #18.6, it is sufficient for the applicant to provide a brief statement of the determination(s) requested. The applicant should state the determination(s) requested and the person(s) for whom the determination(s) are sought (including their respective status in the court action). If a determination is requested concerning the status of a person who is not a party to the court action, an explanation should be provided as to why this is relevant to the court action.

18.5.2 Authorizations

18.5.2.1 For Representatives to Act

RULE: Applicants or their representatives may initiate an application. The WCAT notice of application form includes authorization for the representative to act.

The WCAT authorization of representative form for applications for certificates to court is accessible on the WCAT website.

Where a party (see item #18.6.6) is represented by a lawyer (legal counsel) in the court action, WCAT will not normally require any other form of representative authorization (6.3.1). However, WCAT may require an authorization from a representative (including a lawyer) of an interested person.

18.5.2.2 For WCAT to Obtain Evidence

RULE: By signing the WCAT notice of application or notice of participation form, whether they are the applicant or the respondent, a person or entity authorizes WCAT to obtain additional evidence, such as medical records or employment records, with respect to them.

18.5.3 Service and Delivery of Documents

WCAT's rule on the obligation of parties to advise WCAT of any change of address applies to applications for certificates to court (5.3.1). As well, WCAT's practice directive on what steps WCAT will take when mail to a party is returned as undeliverable applies to applications for certificates to court (5.3.2).

18.5.3.1 Service and Delivery of Documents by WCAT to Parties

Section 344 of the Act sets out the principles that WCAT must apply with respect to the service and delivery of documents. WCAT's general practice on the service and delivery of documents applies to the service and delivery of documents related to applications for a certificate to court (5.3).

18.5.3.2 Service and Delivery of Forms, Correspondence, Submissions, and Evidence by Representatives on Other Participants

RULE: All participating parties and interested person(s) who are represented must provide copies of their forms, correspondence, submissions and evidence to all other participating parties and interested person(s) at the same time as they send those documents to WCAT. The only exception to this is copies of a transcript for examination for discovery (18.10.1).

18.5.3.3 Service and Delivery of Forms, Correspondence, Submissions, and Evidence by Parties to WCAT

WCAT accepts service, delivery, and filing of forms, correspondence, submissions, documents and other evidence from parties and interested person(s), as well as their representatives through delivery, mail, facsimile transmission, or other electronic means. The latest information on how to file material with WCAT is available on WCAT's website.

Where a form or document is filed with WCAT by fax or other electronic means, it is not necessary to send WCAT the original document. Where the party or interested person also sends the original document, WCAT will verify the receipt of the fax or email (along with the received date) and destroy the original document.

As WCAT primarily operates in an electronic environment, parties and interested person(s), particularly representatives, are encouraged to file forms, documents, submissions, and evidence to WCAT through electronic means. Further information specific to the submissions and evidence process is discussed in item #18.10.

18.6 Registration of Applications

18.6.1 Registration

The registrar's office will register applications and screen them for compliance with preliminary requirements. When registering an application, the registrar's office will determine whether:

- a) the notice of application is complete;
- b) additional information is required;
- c) notification of the Board of the application is required (where it appears the Board may be subrogated, or for purposes of disclosure of any associated claim file(s));
- d) the application should be placed in the holding period (18.8.2);
- e) the application should be dismissed under section 31(1) of the ATA or deemed withdrawn (18.9.2.2).

18.6.2 Acknowledging Receipt

WCAT's practice regarding acknowledgment of receipt of appeals applies to receipt of applications for a certificate to court (6.2).

18.6.3 Representatives

Section 32 of the ATA allows a party to be represented by counsel or a lay agent (6.3).

18.6.4 Board Notification

The Registrar's office will notify the Board during the registration of an application in the circumstances outlined below.

18.6.4.1 Board Subrogation to Rights of Worker to Pursue Court Action

The Act provides that where a worker has claimed compensation, the Board is subrogated to the rights of the worker to pursue a court action [s.130(2)]. The Board has exclusive jurisdiction to determine whether to maintain an action or compromise the right of action and the Board's decision is final and conclusive.

Where WCAT receives an application and the registrar's office determines that the plaintiff or initiating party in the court action has received workers' compensation benefits, WCAT will notify the Board that it appears that the Board is subrogated to the rights of the worker to pursue a court action. WCAT will ask the Board to confirm whether it has authorized the worker to pursue the court action. If the Board notifies WCAT that the court action is not authorized, WCAT may dismiss the application (see items #18.9 and #8.1).

18.6.4.2 Disclosure of Board Claim Files

As soon as practicable, WCAT must notify the Board of an application for the purposes of facilitating the Board's obligation to provide copies of relevant claim files [s. 295(2)]. The registrar's office will notify the Board of an application once the application is determined to be complete and valid, all necessary information is received from the parties to the court action, and any participating respondents and interested persons (if any) are identified.

The Board must, as soon as practicable, provide WCAT and any participating parties with a copy of its records respecting the matter. In applications for certificates to court, the “matter” includes any claim files established for any of the parties to the court action and for whom a determination is requested. Disclosure of the claim files for the purpose of complying with the requirements of procedural fairness is authorized under the Act as being necessary to the discharge of WCAT’s obligations (see items #1.5.3.1 and #6.4). The WCAT panel will determine the extent of disclosure to be provided to a participating interested person.

18.6.5 Notification of Respondents

WCAT will notify respondents, that is, any other party to the court action, of the application and ask them to complete and return a notice of participation if they wish to participate.

18.6.5.1 Participating Respondents

See items #6.5.1 and #1.5.3.1 of the MRPP for the entitlement of participating respondents to an application for a certificate to court.

A respondent may identify additional issues for certification by WCAT without making a separate application.

18.6.5.2 Non-Participating Respondents

If a respondent(s) does not submit a notice of participation, WCAT will provide no further information or notices concerning the application, apart from a copy of the final certificate.

18.6.6 Notification of Interested Person(s)

Other persons or entities who might be directly affected by WCAT’s determination(s) may be given notice of and standing to participate in the application, even though they are not parties in the court action.

In considering whether to notify and invite an interested person, the panel will consider whether the person’s or entity’s legal and/or financial interests are directly affected or whether the application prejudicially affects the person or entity.

Examples of an interested person or entity may include the alleged employer of a party who is alleged to have been a worker at the time of the injury, a party in a related legal action, and a potential party to a legal action arising from the same event.

The notification of the application and invitation to participate for interested person(s) will be completed by the Registrar’s office at the direction of the assigned panel.

If an interested person(s) does not submit a notice of participation, WCAT will provide no further information or notices concerning the application, apart from a copy of the final certificate and determination(s).

18.6.7 Participating Person/Representative Group

See item #6.6 for WCAT’s authority to request any person or representative group to participate in an application.

18.7 Preliminary Processes

18.7.1 Usual Processes Apply

WCAT will follow its usual processes for considering appeals as set out in this MRPP as far as they are applicable. Where there is a different process for applications for certificates to court, WCAT's processes are outlined in this item.

18.7.2 Streaming: Specialty

The registrar's office will assign each application to the specialty stream and each application will be assigned to a panel at the outset (7.1). The panel will determine the appeal method, who to notify and invite to participate, and other matters.

18.7.3 Joining Applications

Item #7.2 discusses WCAT's authority to order that related matters be considered together in one hearing under the Act, as well as WCAT's authority under the Administrative Tribunals Act to combine matters, hear them at the same time, or one immediately after the other, or delay processing one or more matters until another of them has been determined.

18.7.3.1 Related Court Actions

Practice Directive

Where there is a related court action arising from the same event or incident, WCAT will normally notify the parties to that action, as well as any other persons or entities as directed by the assigned panel, about the current application and invite them to either participate in the current application or to make a separate application (such as where there are additional determination(s) not requested in the current application).

Where a separate application is initiated, WCAT will normally process them together. Generally, one panel will be assigned to the applications and one decision addressing all applications and determinations requested will be issued. However, WCAT will issue a separate certificate for each court action.

A related court action may include any action filed against the Insurance Corporation of British Columbia (ICBC) under Part 7 of the Insurance (Vehicle) Regulation.

18.7.3.2 Related Appeals

Where there is an appeal filed or pending before WCAT that addresses the same matter as the application, one panel may consider both matters (the appeal and the application) depending on such factors as whether both matters raise similar issues, their respective methods of hearing, their stages in the appeal and application process, and the effect on the statutory time frame for making a decision on the appeal.

18.8 Order of Processing

While no statutory time frame applies to the decision-making process for applications, WCAT recognizes that an orderly process is required to provide timely decisions to applicants, while being cognizant of WCAT's overall resources and obligations under the Act. As well, WCAT respects that the parties may require time to collect the evidence and make submissions and/or prepare for an oral hearing in support of their application. Moreover, given that the application is a step in a court action being heard by another body, there may be timelines, rules, and processes (including settlement discussions, dispute resolution, or mediation) in the court action causing the

parties to either require priority processing of the application, to put the application on hold for a specified time period, or to withdraw the application.

18.8.1 General

In order to achieve orderly processing of applications, WCAT will distinguish between applications in which the parties are ready to proceed and those in which the parties wish to defer providing evidence and submissions on applications until a later date. WCAT will allow parties to proceed with their applications, or to place their applications “on hold” if additional time is required before proceeding. If a party fails to “reactivate” the application after the holding period has expired, WCAT may deem the application withdrawn (18.9.2.2).

Also, WCAT will consider requests for priority processing in exceptional circumstances (18.8.3).

In general, WCAT will focus its attention on applications where the applicant is ready to proceed. The position of an application in WCAT’s processing queue will generally be based on the date of advice from the parties that they are ready to proceed, irrespective of the date the application was initiated.

In processing applications where the parties advise that they are ready to proceed, WCAT cannot guarantee that the application will be immediately dealt with, as the Registrar’s office must take into account the volume of priority applications, the overall volume of applications, and the volume of statutory time-frame appeals and other applications.

18.8.2 Holding Period

Practice Directive

WCAT may put applications on hold where the parties are not ready to proceed with the application, either on a voluntary basis or on WCAT’s initiative where a party has failed to respond to WCAT’s request for submissions. However, the following guidelines apply and WCAT may deem an application withdrawn after the expiry of the holding period.

As well, the holding period should not be used to seek additional time periods of short duration in order to gather evidence or conduct examinations for discovery, when WCAT has requested submissions. In that case, the party should request additional time for submissions with reasons. WCAT will consider those reasons and WCAT will set time frames for the further processing of the application.

How to place an application on hold

An application may be placed on hold in the following circumstances:

a) By applicant when new application made

When an application is made, the applicant will be asked to identify whether the application should be considered on hold, or whether WCAT should proceed with inviting submissions. The applicant will not need to provide reasons. Only the applicant has the right to request that the application be placed on hold without reasons when the application is made.

b) By applicant at any time during processing of application

As well, at any time during the processing of an application, the applicant may request the application be put on hold. However, as the processing may have already begun, the applicant will be asked for reasons to support their request.

c) By respondent at any time during processing of application

The respondent may request that an application be placed on hold once it is initiated and considered complete; however, the respondent must provide reasons for the request, as well as state the time required. Consideration will be given to factors such as the date scheduled for a further examination for discovery, or the dates on which additional evidence was requested and the reasons for delay in obtaining such evidence.

d) By WCAT

An application may be placed on hold by WCAT if:

- i. an applicant fails to provide their written evidence and submissions within 21 days of being requested by WCAT to do so, and does not request additional time; or
- ii. an applicant fails to provide their evidence and submissions within the additional time granted by WCAT.

Objections to an application being placed on hold

Where a party has requested that an application be placed on hold, the other party may make written submissions objecting to this on the basis that the other party is not exercising reasonable diligence in pursuing the application.

In considering such a request, WCAT may ask the other party to advise of the steps taken to prepare for the application and any reasons for delay. Consideration will be given to the amount of time which has elapsed since the application was initiated, and the time when WCAT will likely be able to proceed with the application.

Application confirmed on hold and further steps

If an application is placed on hold, WCAT will confirm this in writing and will defer the further processing of the application, including scheduling of an oral hearing or requesting written submissions concerning the application.

The application will be placed on hold for an initial period of one year. During this time, it is open to the parties to advise WCAT at any time that they are ready to proceed (reactivation of the application) or whether the application should be deemed withdrawn (18.9.2.2). During this initial period, WCAT will not make any contact with the parties and the onus is on the parties to contact WCAT if their situation changes and they are ready to proceed or need to withdraw the application.

After the initial holding period expires, WCAT will inquire with the applicant as to whether they are ready to proceed (reactivation of the application) or whether the application should be put on hold for a further year. If a further holding period is required, reasons should be provided. If no response is received, WCAT will deem the application withdrawn (18.9.2.2).

After the expiry of the second holding period, WCAT will notify the applicant that the application will be deemed withdrawn unless submissions are received within 21 days (18.9.2.2). Submissions should address whether the application should be re-activated, whether there are exceptional circumstances warranting a further holding period (as opposed to a new application), or whether the application should be deemed withdrawn. If no response is received, WCAT will deem the application withdrawn.

Reactivation

If a party advises that they are ready to proceed with the application, it is reactivated and WCAT will proceed with the application. The position of an application in WCAT's processing queue will generally be based on the date the parties advise parties that they are ready to proceed, irrespective of the date the application was initiated.

18.8.3 Request for Priority Processing

WCAT may give priority to an application where exceptional circumstances are demonstrated and the parties are ready to proceed.

Where a party is requesting priority processing for exceptional circumstances based on an impending trial, court, or hearing date or where a determination(s) is required for pre-trial purposes, the party should make such a request a minimum of 8 months prior to that trial, court, or hearing or prior to the date that the determination(s) is required. WCAT may grant or deny such a request based on factors outlined in item #18.8.1, as well as the need to leave adequate time for the submissions and/or WCAT hearing process, as well as for WCAT to render its determination(s). If the request is not made within the minimum time period, WCAT will generally deny the request.

18.9 Summary Decisions

The guidelines in item #1 of the MRPP on summary decisions apply to applications. This includes WCAT's authority to dismiss all or part of an application. However, as there is no time limit for applying for a certification, the guidelines on extending the time to appeal do not apply.

18.9.1 Stay of Decision

As noted in item #8.3, unless WCAT orders otherwise, an application does not operate as a stay or affect the operation of a decision or order under appeal. While there is no "decision" or "order" under appeal in an application to WCAT for a certification to court, there may be decisions or orders in an associated Board compensation or other files. In those circumstances, unless WCAT orders otherwise, the filing of an application does not operate as a stay or affect the operation of those decisions or orders.

As well, once an application is filed with WCAT, it does not automatically operate as a stay of the court action. It is up to the parties to the court action to apply to the court for a stay of proceedings.

18.9.2 Withdrawals

18.9.2.1 Withdrawal by Applicant

An applicant may withdraw an application at any time. This does not affect the right of the applicant (or any other party to the legal action) to make a new application in the future, provided that the court action is in process (18.9.2.3).

18.9.2.2 Deemed Withdrawal

WCAT will not dismiss an application on a summary basis due to a failure to diligently pursue the application. Instead, the holding period may be utilized (18.8.2).

However, if the party fails to respond to WCAT's notice upon the expiry of the initial or any additional holding period, WCAT will deem an application withdrawn.

Following any deemed withdrawal, it will remain open to any party to the court action or the court to initiate a new request to WCAT for a certificate provided that the court action is in process (18.9.2.3).

18.9.2.3 Effect of New Application

When a new application is made after the original application was withdrawn by a party or WCAT deemed the original application withdrawn, the new application is treated as a new one for the purposes of the order of processing (18.8).

18.10 Written Submissions and Evidence

If a panel decides that an application will proceed by written submissions, the panel will review any Board file(s), written evidence and argument submitted by the parties and interested person(s), and any further evidence the panel obtains (see item #1 on evidence and items #13.2 and #14.7 on new evidence obtained by the panel).

As applications are placed in the specialty stream, the panel will decide the procedure and due dates to be set for obtaining submissions and/or evidence.

All participating parties and interested person(s) who are represented must provide copies of their forms, correspondence, submissions and evidence to all other participating parties and interested person(s) at the same time as they send those documents to WCAT (18.5.3.2).

Evidence may be submitted in any form including handwritten statements of witnesses, business records, sworn affidavits, or transcripts of evidence given under oath at an examination for discovery (18.10.1). Evidence and submissions should not contain irrelevant personal information and identifiers, particularly of interested persons who are not parties to the court action (13.3).

RULE: An application will be placed on hold if an applicant fails to provide their written evidence and submissions within any timelines set by WCAT and does not request additional time; or an applicant fails to provide their evidence and submissions within the additional time granted by WCAT (18.8.2).

18.10.1 Transcripts of Examinations for Discovery

Evidence in an application may be submitted in the form of a transcript of evidence given under oath at an examination for discovery.

The discovery process generally occurs at the Supreme Court of BC (or an equivalent superior court outside of B.C.) and is a way for the parties to discover the other side's view of what happened in the case. The examination for discovery is a meeting where one party asks an opposing party a series of questions. A court reporter attends and the Supreme Court of B.C. (or equivalent) has rules about how to arrange the examinations, what questions may be asked, and how to obtain a transcript (or written record of the questions and answers given) of the examination for discovery.

RULE: Participating parties to the court action must provide WCAT with a complete copy of a transcript of an examination for discovery if one is conducted in the legal action. WCAT accepts electronic copies of the transcript. However, participating parties to the court action are not required to provide a courtesy copy of the transcript to any other party to the legal action or to a participating interested person(s). Participating parties are responsible for obtaining their own copy of the transcript (18.5.3.2).

If there are participating interested person(s) in the application, WCAT will notify the person examined, or their authorized representative, that the examination may be disclosed to persons who are not parties to the legal action. WCAT will give the person examined an opportunity to request that WCAT sever material from the transcript on the basis that it is irrelevant and involves a significant privacy concern (1).

Once submissions are obtained on whether material should be severed or not, WCAT may request the party submitting the transcript to provide a copy of the transcript in full to each participating interested person(s) or WCAT will provide a redacted copy to the participating interested person(s).

18.10.2 Copies of WCAT Decisions, Board Policies and Court Decisions

WCAT does not require copies of previous WCAT decisions and/or WorkSafeBC policies to be included with any written submissions. A correctly identified citation of the relevant decision(s) and/or policy is sufficient.

Citations from publicly accessible website should be provided for court decisions, or copies should be provided of the court decisions.

18.11 Oral Hearings

If a panel decides that an application will proceed by way of an oral hearing, item #1 applies to the scheduling and procedure of that oral hearing.

18.12 Confidentiality

The confidentiality obligations and guidelines in item #1 apply to WCAT's processing and deciding of applications. The only exception is the retention of the material once WCAT issues a certificate and determination(s) (18.4).

18.13 Expenses and Costs

Expenses and costs are normally addressed by the court in the court action. WCAT does not normally award expenses or costs in an application (1).

18.14 WCAT Determination(s)

The general principles contained in items #17.2 and #17.4.2 about the written decision apply to WCAT certificates to court.

WCAT will issue both a certificate and determination(s), provide a copy to all parties to the legal action, any identified interested person(s) or groups, and the Board.

WCAT files the certificate and determination(s) with the court, if it is based in British Columbia. If the court action is taking place outside of British Columbia, the applicant is responsible for filing the certificate and determination(s) with the appropriate court. WCAT provides a copy of the filed certification and determination(s) only to the parties to the court action.

After the certificate and determination(s) are filed with the court, WCAT makes the determination(s) and certificate publicly available. Names and other identifying information are not removed, given that court documents are publicly available.

WCAT retains the material related to the application and does not forward any material to the Board for placement on the Board's file in relation to claims by any parties to the court action (15.1.1).

18.14.1 Effect of Determination(s) on Court Action

WCAT does not determine the effect of the certificate on the court action, particularly whether a court action is prohibited or “barred” under section 127. Following the issuance of a section 257 certificate, a party may apply to the court to determine whether the action should be dismissed based on section 127 and the findings contained in WCAT’s certificate.

18.14.2 Post-Determination

Post-determination communications should be in writing and directed to TCO. See item #1 for further information. This includes requests for additional determination(s) where WCAT has issued a certificate and determination(s) in a matter.

21.1.2 Duties of a Party

j) A party should not attempt to contact a panel directly outside the normal hearing process, unless the panel invites or instructs them to do so. A party who wishes to communicate with a panel should do so through the registry. Due to internet security concerns, a party should not contact WCAT by e-mail, except through the email address designated by WCAT for filing forms, documents, and submissions.