

Decision of the Chair, Workers' Compensation Appeal Tribunal

Number: 31
Date: March 8, 2022
Subject: Manual of Rules of Practice and Procedure (MRPP) Revisions

1. Under section 280 of the *Workers Compensation Act*, RSBC 2019, c 1 (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, the amendments to the *Manual of Rules of Practice and Procedure* (MRPP) attached as Appendix A are approved as amendments and replacements of items in the MRPP.
6. These rules of practice and procedure take effect on March 8, 2022, and remain in effect until their amendment, replacement, or revocation by the chair.

Luningning Alcuityas-Imperial, Chair
Workers' Compensation Appeal Tribunal

Signed at Richmond, British Columbia, as of March 8, 2022

APPENDIX A

Deletions are struck through. Additions are underlined.

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.~~

3.4.2 Human Rights Code

~~WCAT has jurisdiction to apply the *Human Rights Code*, R.S.B.C. 1996, c. 210 [s. 296 WCA].~~

3.4.1 Constitutional Questions and Human Rights Code

WCAT has jurisdiction to decide constitutional issues including application of *Canadian Charter of Rights and Freedoms (Charter): Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, *R v. Conway*, 2010 SCC 22. WCAT also has jurisdiction to apply the *Human Rights Code*, R.S.B.C. 1996, c. 210 [s. 296 WCA].

WCAT can determine if a law or a policy of the board of directors of the Board is inapplicable on constitutional grounds in the particular matter before it, but cannot make a general declaration of constitutional invalidity.

WCAT may grant *Charter* remedies that are linked to a matter properly before it, and that are expressly or impliedly authorized by the WCA or other applicable legislation.

See item 5.1.6 Procedure – Constitutional Issues and *Human Rights Code*.

5.1.6 Procedure – Constitutional Issues and *Human Rights Code*

5.1.6.1 Who May Raise Constitutional Issues

Any party to an appeal can raise a constitutional issue. A WCAT panel may also raise a constitutional issue on its own initiative. A party or WCAT may raise a constitutional issue on appeal to WCAT, regardless of whether the issue was raised at the Review Division.

5.1.6.2 When to Raise Constitutional or Human Rights Code Issues

Rule: A party who intends to raise a constitutional issue and/or to ask WCAT to apply the *Human Rights Code* must state their intention to do so and describe the constitutional issue and/or application of the *Human Rights Code* as soon as it is reasonably practicable to do so. Failure to comply with this rule may result in WCAT refusing to address the constitutional issue and/or apply the *Human Rights Code*.

5.1.6.3 Order of Consideration of Issues

In general, WCAT will not address constitutional issues or apply the *Human Rights Code* unless the panel assigned to the appeal determines it is necessary to do so in order to decide the appeal. A panel may consider and decide issues other than constitutional or issues requiring application of the *Human Rights Code* first. WCAT may decline to consider a constitutional issue or apply the *Human Rights Code* where the panel determines that the appeal can be properly decided without doing so.

Where a panel indicates that it will consider issues other than constitutional issues before considering a constitutional issue, the party raising the constitutional question or seeking the constitutional remedy may postpone compliance with section 8 of the *Constitutional Questions Act (CQA)* until the panel has determined whether consideration of the constitutional issue is required [see item 5.1.6.4 Compliance with *Constitutional Questions Act*]

If, after considering issues other than constitutional issues or issues requiring the application of the *Human Rights Code*, a panel determines that it is necessary to consider the constitutional and/or *Human Rights Code* issues, the parties will be given an opportunity to make submissions on those issues.

5.1.6.4 Compliance with the *Constitutional Questions Act*

The *Constitutional Question Act*, R.S.B.C., 1996, c. 68 (CQA) 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 *Charter*. Notice is not required where the remedy consists of the exclusion of evidence.

Practice Directive: A party to an appeal, who seeks to challenge the constitutional validity or applicability of a provision of the Act, regulations, or policy, or obtain a constitutional remedy as defined by the CQA, must comply with the section 8 of the CQA. In particular, the party raising the constitutional issue or seeking the

constitutional remedy must prepare and serve notice on the Attorney General of Canada and the Attorney General of British Columbia in accordance with section 8 of the CQA. Additionally, the party raising the constitutional question must promptly provide to WCAT a copy of the notice together with proof of service on the Attorney General of Canada and the Attorney General of British Columbia.

WCAT determines whether the notice complies with section 8 of the CQA. If the party fails to comply with section 8 of the CQA, the WCAT panel may:

- (a) Decline to consider the constitutional issue or provide a constitutional remedy;
- (b) Adjourn a hearing to give the party time to comply with section 8 of the CQA;
- or
- (c) Comply with section 8 of the CQA on its own initiative.

In considering whether to exercise its discretion to give the required notice, WCAT will consider whether the party seeking to raise the constitutional question has, when indicating their intention to raise a constitutional question:

- (a) Identified the specific provision of the WCA, regulations or policy they intend to challenge, or the Charter remedy they seek;
- (b) Identified the specific constitutional provision(s) they intend to rely on;
- (c) Identified any specific Charter right or freedom alleged to have been infringed or denied;
- (d) Given particulars necessary to show the point to argued on appeal; and
- (e) Explained why they are unable to provide the notice required by section 8 of the CQA.

WCAT will not normally exercise its discretion to provide notice in the absence of the above information.

If the party seeking to raise a constitutional question does not provide the notice required by the CQA, and WCAT does not exercise its discretion to do so, the constitutional question that the party identified will not be considered.

5.1.6.5 Disclosure to Attorneys General and Submission Process

Where the panel determines that it is necessary to consider a constitutional question, and if, following notice, the Attorney General of Canada or the Attorney General of British Columbia becomes a party to the appeal:

- (a) WCAT will order disclosure of the Board's records relevant to the matter under appeal to be made to the Attorney General or Attorneys General, as the case may be. WCAT will also provide to the Attorney General or the Attorneys General, relevant information from the appeal, including but not limited to submissions made by the party or parties concerning the constitutional question;
- (b) The Attorney General or Attorneys General will have 28 days from the date of disclosure to provide submissions with respect to the constitutional question;
- (c) WCAT will disclose any submission received from either Attorney General to the other parties, who will have 21 days to provide a submission on the constitutional question in response;

- (d) WCAT will disclose any submission received in response to an Attorney General's submission to the other parties, for information purposes only, except that the Attorney(s) will have 14 days to provide a rebuttal submission with respect to the application of section 1 of the Charter;
- (e) WCAT will disclose any rebuttal submission received from the Attorney(s) General to the other parties, for information only.

12.8 Other Medical Advice or Clarification

The statutory authority for seeking independent medical assistance or advice under section 302 does not prevent a panel from asking other health professionals for medical evidence or to clarify or interpret medical evidence the health professional previously provided. That evidence or clarification may be requested, for example, from a treating physician or a physician who is not on the list established by the chair under section 301(1) [s. 302(9) and 302(10)]. ~~Normally, a panel will only ask a physician employed by the Board to clarify or interpret medical evidence they have previously provided.~~

Rule: Normally, a panel will only ask a physician employed by the Board to clarify or interpret medical evidence they have previously provided.