2012

Annual Report

For the year January 1 to December 31, 2012

WCAT **Workers' Compensation Appeal Tribunal**

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

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

March 18, 2013

The Honourable Pat Bell
Minister of Jobs, Tourism and Skills Training and
Minister Responsible for Labour
Room 138 Parliament Buildings
Victoria, BC V8V 1X4

Dear Minister,

Re: The Workers' Compensation Appeal Tribunal's 2012 Annual Report

I am pleased to forward the 2012 Annual Report of the Workers' Compensation Appeal Tribunal for the year ended December 31, 2012. This report has been prepared for your review pursuant to section 234(8) of the *Workers Compensation Act.*

Yours truly,

Caroline Berkey
Chair

GLOSSARY

Act	*Workers Compensation Act*, R.S.B.C. 1996, c. 492
Administrative Tribunals Act	*Administrative Tribunals Act*, S.B.C. 2004, c. 45
Appeal Division	former Appeal Division of the Workers' Compensation Board
Board	Workers' Compensation Board, operating as WorkSafeBC
BCCAT	British Columbia Council of Administrative Tribunals
FIPPA	*Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165
GECA	*Government Employees Compensation Act*, R.S., 1985, c. G-5
MRP	former Medical Review Panel
MRPP	*Manual of Rules of Practice and Procedure*
Occupational Health and Safety Regulation	*Occupational Health and Safety Regulation*, B.C. Reg 230/2011
Review Board	former Workers' Compensation Review Board
Review Division	Review Division of the Workers' Compensation Board
RSCM I	*Rehabilitation Services and Claims Manual, Volume I*
RSCM II	*Rehabilitation Services and Claims Manual, Volume II*
WCAT	Workers' Compensation Appeal Tribunal
Workers Compensation Amendment Act (No. 2), 2002	*Workers Compensation Amendment Act (No. 2)*, 2002, S.B.C. 2002, c. 66 (Bill 63, 2002)

1. CHAIR'S MESSAGE

I am pleased to present the 2012 Annual Report for the Workers' Compensation Appeal Tribunal (WCAT). This report provides an overview of WCAT's statutory mandate. It also describes our activities over the past 12 months including appeal statistics, costs of operation, a list of our members, and summaries of WCAT decisions and judicial review decisions issued by the courts.

The *Workers Compensation Act* (Act) provides that WCAT is an independent appellate tribunal in British Columbia's workers' compensation system. We are committed to hearing appeals and applications and issuing a consistent body of high quality decisions that are timely and fair. WCAT has jurisdiction over workers' compensation matters including compensation claims, employer assessments, prevention penalties, discriminatory action claims, and certificates for the courts regarding the status under the Act of parties to litigation. Over 95% of the appeals and applications we received in 2012 were workers' and employers' appeals regarding benefits under workers' compensation claims.

WCAT is a high volume appellate tribunal. In 2012 workers and employers filed 5,065 appeals and applications. Our vice chairs decided 3,444 appeals and applications on the merits, and we addressed 972 through various summary decisions. Our intake of appeals and applications in 2012 was the highest we have received since 2007 and was 10.5% greater than our 2011 intake. Our decision output was higher this year than last year.

I would like to thank our employees and appointees who consistently demonstrate their commitment to our statutory mandate through their effort and dedication to the success of WCAT.

Caroline Berkey
Chair

2. WCAT'S ROLE WITHIN THE WORKERS' COMPENSATION SYSTEM

WCAT is an independent appeal tribunal external to the Workers' Compensation Board, operating as WorkSafeBC (Board). WCAT's mandate is to decide appeals brought by workers and employers from decisions of the Board. WCAT receives compensation, assessment, and prevention appeals from decisions of the Review Division of the Board (Review Division). WCAT also receives direct appeals from Board decisions regarding applications for reopening of compensation claims and complaints regarding discriminatory actions. In addition, it receives applications for certificates to the B.C. Supreme Court.

Some decisions of the Review Division are final and not subject to appeal to WCAT. Decisions regarding the following matters cannot be appealed to WCAT:

- vocational rehabilitation matters;
- permanent disability award commutations;
- permanent disability award decisions concerning the percentage of impairment where there is no range in the Board's rating schedule or the range does not exceed 5%;
- an employer's assessment rate group or industry group; and,
- prevention orders.

3. STATUTORY FRAMEWORK

The statutory framework governing the operation of WCAT is found in Part 4 of the *Workers Compensation Act* (Act), sections 231 to 260. Part 4 resulted from the passage of the *Workers Compensation Amendment Act (No. 2), 2002* and came into force by regulation on March 3, 2003. On December 3, 2004, Part 4 of the Act was significantly amended by sections 174 to 188 of the *Administrative Tribunals Act*. The *Administrative Tribunals Act* also added section 245.1 to Part 4 of the Act which provided that sections 1, 11, 13 to 15, 28 to 32, 35(1) to (3), 37, 38, 42, 44, 46.3, 48, 49, 52, 55 to 58, 60(a) and (b), and 61 of the *Administrative Tribunals Act* apply to WCAT.

(a) Changes in 2012

There were two changes to the *Workers Compensation Act* in 2012 as a result of the *Workers Compensation Amendment Act*, 2011, S.B.C. 2012, c. 23 (Bill 14, 2011). The first change was to section 5.1 of the Act, entitled "Mental Stress." The second change was to section 33.2 of the Act, which relates to the calculation of average earnings for apprentices and learners.

Section 5.1 was repealed and a new section substituted. The changes include: (1) the phrase “mental stress” is replaced by “mental disorder”; (2) a traumatic event no longer needs to be “sudden and unexpected,” the reaction to the traumatic event no longer must be “acute,” and the mental disorder can be a reaction to “one or more” traumatic events; (3) compensation can be paid to workers whose mental disorder “is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment”; and (4) the mental disorder diagnosis can no longer be made by a physician, but must be made by either a psychologist or psychiatrist. The new provision applies to every decision made by the Board or WCAT on or after July 1, 2012 in respect of a claim made but not finally adjudicated before July 1, 2012.

Section 33.2 was also repealed and a new section substituted. The substituted provision introduced a new basis for calculating average earnings for apprentices and learners for the period after the first ten weeks after injury to the date the worker’s injury results in a permanent disability, and in so doing increased the number of kinds of possible wage rates for apprentices and learners from two to three. No change was made to the calculation method for the first ten-week period of disability (short-term wage rate) or for the average earnings used for permanent disability. The repealed section had made no distinction between the average earnings used for permanent disability and that used for post-ten-week temporary disability. The new method uses the higher of the time of injury average earnings and the average earnings in the 12 months preceding the date of injury where a worker’s injury results in a temporary disability after the initial 10-week payment period. The new provision applies to an injury that occurs on or after July 1, 2012.

There were also amendments to the federal *Government Employees Compensation Act,* R.S., 1985, c. G-5 (GECA) in 2012. The *Jobs, Growth and Long-term Prosperity Act* (S.C. 2012, c. 19, previously Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 20, 2012 and Other Measures*), sections 420 to 426, amended the definition of “employee,” the provisions relating to the elections employees make as to whether to receive benefits or to sue third parties in certain circumstances, and the provisions relating to the subrogation rights of the federal government and federal employers. The Bill received royal assent on June 29, 2012 but the relevant sections have not yet been brought into force.

There were no changes in 2012 to the *Administrative Tribunals Act*.

(b) Timeliness

WCAT is required to decide new appeals within 180 days from the date that WCAT receives from the Board the records relating to the decision under appeal. This time frame may be extended by the chair to a maximum of 90 days if the appellant requests additional time to make submissions or submit new evidence and the chair grants to the other parties a similar opportunity. The chair may also extend time on the basis of complexity. For example, additional time may be required where a WCAT panel finds it necessary to pursue further investigations. Lastly, an appeal may be suspended, and the appeal clock stopped, if WCAT is waiting for either a pending Board determination that was requested by a WCAT panel with respect to a matter that it considers should have been, but was not, determined by the Board, a pending report from an independent health professional, or a pending Board decision respecting a matter that is related to an appeal.

The time limit for appealing a Review Division decision to WCAT is 30 days. A 90-day time limit applies to the limited matters for which there is a right of appeal directly to WCAT from a Board officer's decision. The chair or the chair's delegate has the discretion to grant an extension of time to appeal where he or she finds that special circumstances precluded the timely filing of the appeal, and an injustice would otherwise result.

In combination with the 90-day appeal period for filing a request for review by the Review Division, and the 150-day time frame for decision-making by the Review Division, the overall time frame for a matter to go through the review and appeal bodies is 15 months (apart from the time required to obtain file disclosure and any extensions or suspensions on the limited grounds permitted by the Act).

(c) Consistency

WCAT must apply the policies of the board of directors of the Board that are applicable in an appeal unless the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. Under section 251 of the Act there is a process by which issues concerning the lawfulness of policy may be referred to the chair and the board of directors of the Board for resolution. This means that all decision-makers within the workers' compensation system apply the same policy framework in making decisions.

As well, the chair has authority under section 238(6) of the Act to establish precedent panels consisting of three to seven members. A decision by a precedent panel must be followed by other WCAT panels (section 250(3)), unless the circumstances of the case are clearly distinguishable or unless, subsequent to the precedent panel's decision, a policy of the board of directors of the Board relied upon by the precedent panel has been repealed, replaced, or revised. The authority to establish precedent panels provides another means of promoting consistency in decision-making within the workers' compensation system.

(d) Finality

WCAT decisions are final and conclusive. There is no further avenue of appeal. There is a limited avenue for reconsideration on application by a party. WCAT may reconsider a decision on the basis of new evidence which is substantial and material and which did not previously exist, or which previously existed but could not have been discovered through the exercise of reasonable diligence. WCAT may also set aside a decision involving a jurisdictional defect and provide a new decision.

(e) Practice and Procedure

The rules, practices, and procedures to be followed by WCAT are established by the chair. They are found in WCAT's *Manual of Rules of Practice and Procedure* (MRPP). The MRPP is available on WCAT's website (www.wcat.bc.ca).

There were no changes to the MRPP in 2012.

4. COSTS OF OPERATION FOR THE 2012 CALENDAR YEAR

Category	Cost	
Salaries	$	8,944,928
Employee Benefits and Supplementary Salary Costs	$	2,148,705
Per Diem – Boards and Commissions	$	305,291
Travel	$	82,510
Centralized Management Support Services*	$	861,031
Professional Services	$	748,410
Information Technology and Operations	$	1,094,761
Office and Business Expenses	$	489,582
Amortization	$	41,923
TOTAL EXPENDITURES	**$**	**14,717,141**

*These charges represent building occupancy and workplace technology service charges which do not impact the WCAT operating budget but are charged directly to WorkSafeBC.

5. WCAT MEMBERS

Executive and Vice Chairs with Special Duties as of December 31, 2012		
Name	***Position***	***End of Term***
Caroline Berkey	Chair	June 30, 2015 (OIC# 512)
Jane MacFadgen	Senior Vice Chair & Registrar	February 28, 2015
Teresa White	Senior Vice Chair & Tribunal Counsel	December 31, 2014
James Sheppard	Vice Chair, Quality Assurance & Training	February 28, 2014
Lisa Hirose-Cameron	Vice Chair & Deputy Registrar	September 30, 2018
Kevin Johnson	Vice Chair & Deputy Registrar	February 28, 2014
Paul Petrie	Vice Chair & Deputy Registrar	February 28, 2016
Hélène Beauchesne	Vice Chair & Team Leader	March 31, 2014
Lesley Christensen	Vice Chair & Team Leader	February 28, 2018
Susan Marten	Vice Chair & Team Leader	February 28, 2018
Guy Riecken	Vice Chair & Team Leader	February 28, 2014

Vice Chairs as of December 31, 2012	
Name	***End of Term***
Cathy Agnew	August 31, 2015
Luningning Alcuitas-Imperial	February 29, 2016
Beatrice K. Anderson	February 28, 2018
W. J. (Bill) Baker	February 28, 2015
Sarwan Boal	February 28, 2014
Dana G. Brinley	February 28, 2015
Patricia Broad	October 31, 2014
Kate Campbell	September 5, 2014
Melissa Clarke	September 30, 2015
Daphne A. Dukelow	February 28, 2014
William J. Duncan	February 29, 2016

Vice Chairs as of December 31, 2012 (continued)	
Andrew J. M. Elliot	August 31, 2015
Warren Hoole	September 30, 2014
Nora Jackson	February 28, 2014
Cynthia J. Katramadakis	March 31, 2018
Joanne Kembel	February 28, 2015
Brian King	August 31, 2015
Rob Kyle	February 28, 2014
Randy Lane	February 28, 2015
Darrell LeHouillier	October 31, 2014
Janice A. Leroy	February 28, 2014
Shelley Lopez	September 5, 2014
Julie C. Mantini	February 28, 2014
Renee Miller	April 30, 2016
Herb Morton	February 28, 2015
Marguerite Mousseau	February 28, 2015
Elaine Murray	August 31, 2014
David Newell	January 31, 2015
Diep Nguyen	September 5, 2014
P. Michael O'Brien	February 28, 2013
Andrew Pendray	January 3, 2014
Carla Qualtrough	September 5, 2014
Michael Redmond	February 28, 2015
Dale Reid	February 28, 2016
Deirdre Rice	February 28, 2014
Simi Saini	September 5, 2014
Shannon Salter	September 5, 2014
Shelina Shivji	March 31, 2014

Vice Chairs as of December 31, 2012 (continued)	
Debbie Sigurdson	February 28, 2014
Timothy B. Skagen	March 31, 2014
Anthony F. Stevens	February 28, 2014
Allan Tuokko	April 30, 2013
Andrew J. Waldichuk	February 28, 2014
Lois J. Williams	February 28, 2016
Sherryl Yeager	February 28, 2018

Vice Chair Departures in 2012		
Name	***Original Appointment Date***	***Departure Effective Date***
Jill Callan (Chair)	January 30, 2003	June 30, 2012 (OIC# 050)
Steve Adamson	March 3, 2003	March 23, 2012
Lynn M. Wilfert	February 13, 1989	February 29, 2012
Kathryn P. Wellington	April 26, 1993	June 30, 2012

6. EDUCATION

WCAT is committed to excellence in decision-making. WCAT's MRPP sets out our guiding principles in item #1.4. WCAT strives to provide decision-making that is predictable, consistent, efficient, independent, and impartial. We also strive to provide decisions that are succinct, understandable, and consistent with the Act, policy, and WCAT precedent decisions.

WCAT recognizes that professional development is essential to achieving and maintaining the expected standards of quality in decision-making. Accordingly, WCAT has pursued an extensive program of education, training, and development, both in-house and externally, where resources permit.

In 2012, the WCAT education group organized a wide variety of educational and training sessions. Members of WCAT attended these sessions both as participants and as educators or facilitators. WCAT is registered as a continuing professional development provider with the Law Society of British Columbia.

WCAT is also represented on the Inter-Organizational Training Committee, which is composed of representatives from the Board (including the Review Division), WCAT, and the Workers' and Employers' Advisers Offices. The Committee's goal is to provide

a forum for the various divisions and agencies to cooperate with each other, to share training ideas and materials, and to organize periodic inter-organizational training sessions

The following is a list of sessions organized by WCAT for vice chairs during 2012:

1. January 12
   - CTS (case tracking system) Update
   - Oral Hearings: Controlling Proceedings, Objections, Examinations, and Cross-Examinations

2. February 2
   - Ethics and the Social Media Policy
   - New Style Guide

3. March 1
   - Decision-Writing Workshop

4. April 19
   - Policy item #40.00 in the RSCM II
   - Teachable Moments
   - Freedom of Information and Protection of Privacy
   - WorkSafeBC Business Process and Model for Adjudication of PFI and LOE Awards

5. May 10
   - Interorganizational Training Session Understanding Psychological Sequelae

6. June 14
   - Item #40.00 in the RSCM II
   - Bill 14 – Mental Stress
   - Additional Factors (Section 23(1)) Permanent Functional Impairment Awards
     - Trends in WCAT decisions
     - Medical Aspects

7. September 13
   - Policy item #40.00 (LOE) and Policy item #50.00 (Interest), RSCM II
   - Section 5.1 (mental disorders), *Workers Compensation Act*

8. October 4
   - The Use of Statutory Powers
     - Section 246(3) determinations;
     - 246(2)(d) investigations;
     - 247 orders;
     - 246(2)(c) general inquiry powers;
     - 246(2)(e) pre-hearing conferences; and,
     - 246(2)(i) request a party or representative group to participate in an appeal.
   - Health and Safety Update

9. November 48
   - Interorganizational Training Session
     Social Media
     - how social media can affect online personal and professional reputations;
     - how social media is considered by the courts; and,
     - how social media can be used as a tool for social change.

10. December 6
   - Orthopaedics

In addition, many WCAT vice chairs participated in Continuing Legal Education (CLE) sessions, including the CLE on Administrative Law held on October 26, 2012.

7. PERFORMANCE EVALUATION

Section 234(2)(b) of the Act provides the WCAT "chair is responsible for establishing quality adjudication, performance and productivity standards for members of [WCAT] and regularly evaluating the members according to those standards." Accordingly, the chair has established performance standards and a performance evaluation process. All vice chairs seeking reappointment went through the performance evaluation process in 2012. The performance of vice chairs will continue to be regularly evaluated on an ongoing basis.

8. STATISTICS

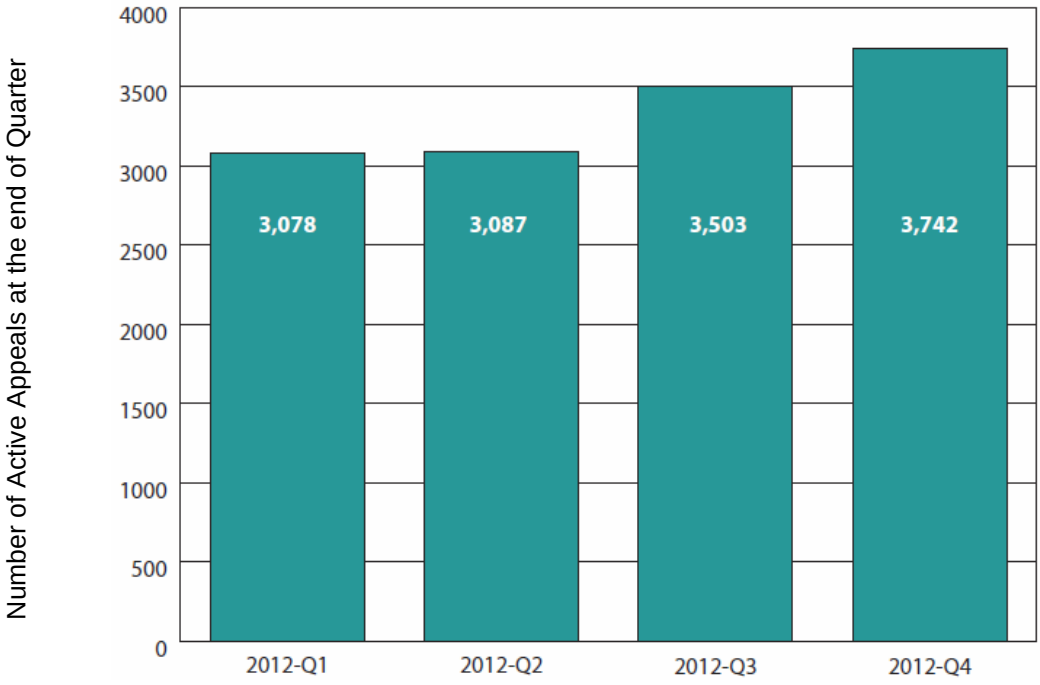
8.1 Overview of Appeals Inventory

This section contains two charts providing a high level overview of the status of our appeals inventory for 2012. WCAT records appeals by their date of initiation.

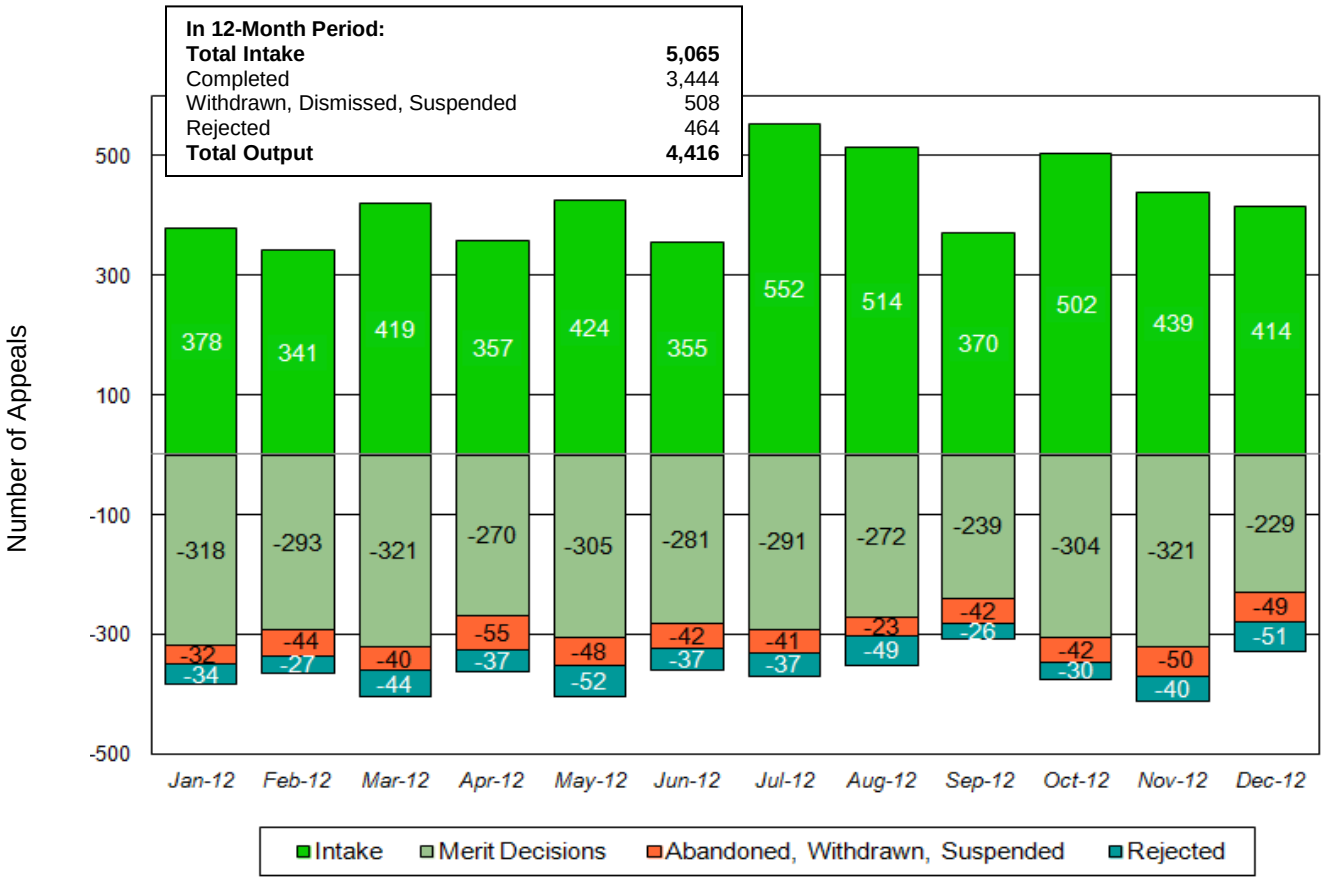
The first chart (Number of Active Appeals) provides the number of appeals in our inventory at the end of each quarter of 2012. WCAT's total active inventory at December 31, 2012 was 3,742 appeals compared to 3,084 at the end of 2011. This increase in the appeals inventory during 2012 was due to the highest level of intake of new appeals and applications since 2007, and the fact that a number of appeals were affected by changes to policy item #40.00 of the RSCM II.

The second chart (Total Intake and Output) provides monthly statistics regarding our intake of appeals (including reactivated appeals) and our output, which includes completed appeals, rejected appeals, and appeals that were dismissed, withdrawn, or suspended. We received 5,065 new appeals in 2012, representing an increase of 10.5% from the 4,583 new appeals we received in 2011. Our output in 2012 was 4,416 decisions and determinations representing an increase from the 4,212 decisions and determinations made in 2011.

WORKERS' COMPENSATION APPEAL TRIBUNAL
NUMBER OF ACTIVE APPEALS IN INVENTORY



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



8.2 Appeals and Applications

Appeals and applications are comprised of:

- appeals to WCAT from decisions made by review officers in the Review Division and direct appeals from decisions of other Board officers;
- applications for certificates for court actions; and
- applications for reconsideration of WCAT decisions.

The Act provides that parties may appeal to WCAT from compensation, assessment, and prevention decisions of the Review Division. The Act also provides that some Board decisions are appealable directly to WCAT without being reviewed by the Review Division, and that some other applications are made directly to WCAT. These direct appeals and applications include reopenings on application, discriminatory action complaints, requests for reconsideration of WCAT decisions, and applications for certificates for court actions.

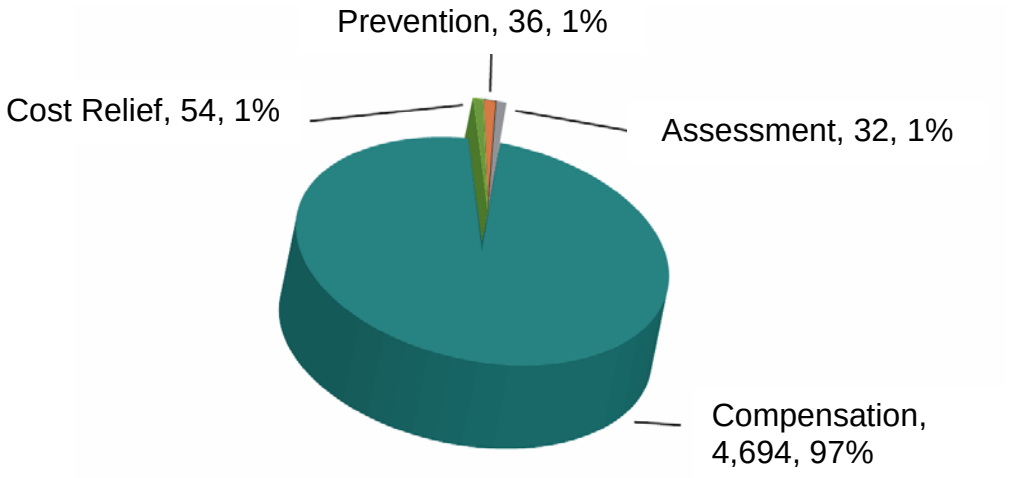
(a) Intake

WCAT received 5,065 appeals and applications in 2012. Of these, 4,816 appeals (95%) arose from decisions of Board review officers and 249 were direct.

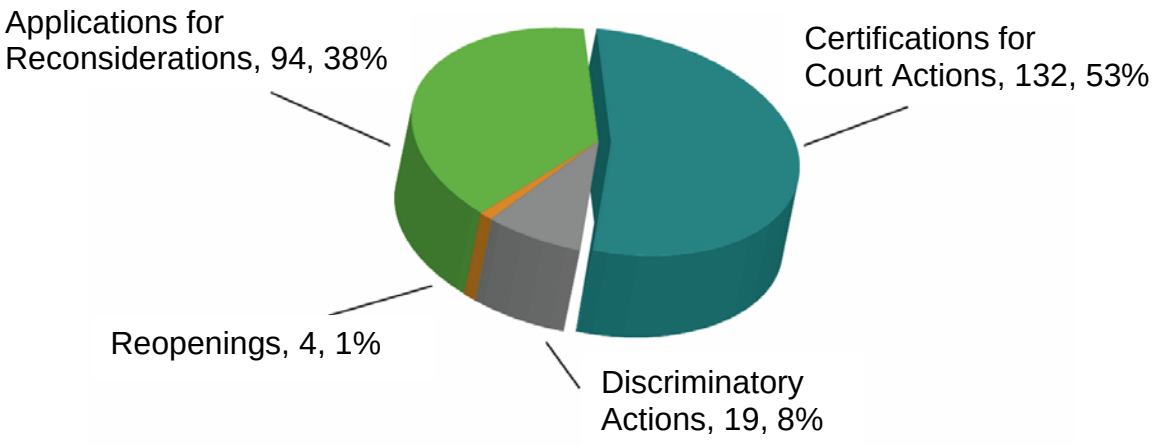
Source	Intake
Review Division	4,816
Direct	249
Total	**5,065**

The following two charts show the breakdown of the types of appeals and applications we received in 2012.

APPEALS FROM REVIEW DIVISION BY TYPE



DIRECT APPEALS AND APPLICATIONS BY TYPE



(b) Merit Decisions

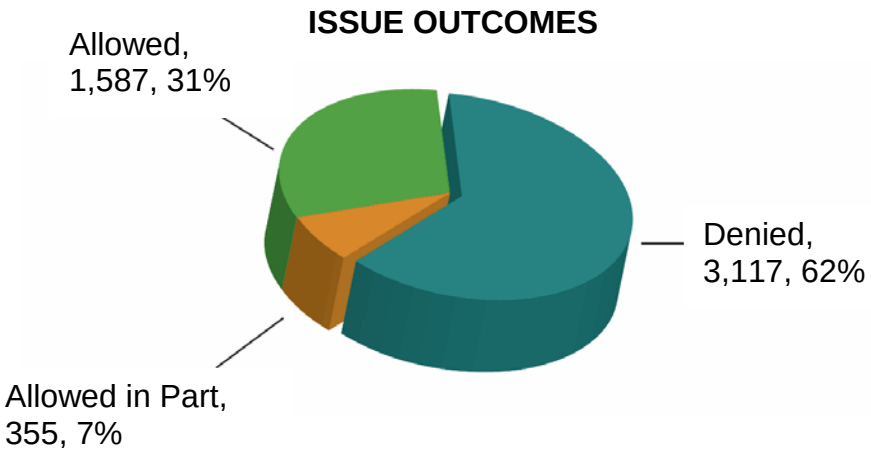
WCAT made 3,444 merit decisions on appeals and applications in 2012, 80 of which concerned applications for certificates for court actions. The remaining 3,364 merit decisions concerned appeals from decisions of the Review Division or Board officers, which may be varied, confirmed or cancelled by WCAT.

"Vary" means that WCAT varied the previous decision in whole or in part. Accordingly, whether WCAT has fully granted the remedies requested by the appellant on all issues arising under the appeal or merely changed a minor aspect of the previous decision, the decision is considered to have been "varied." "Confirm" means that WCAT agreed with all aspects of the previous decision. "Cancel" means that WCAT set aside the previous decision without a new or changed decision being provided in its place.

The table below shows the percentages of WCAT's merit decisions that varied or confirmed the decision under appeal. Appeals from Review Division decisions regarding reopenings are included as compensation appeals.

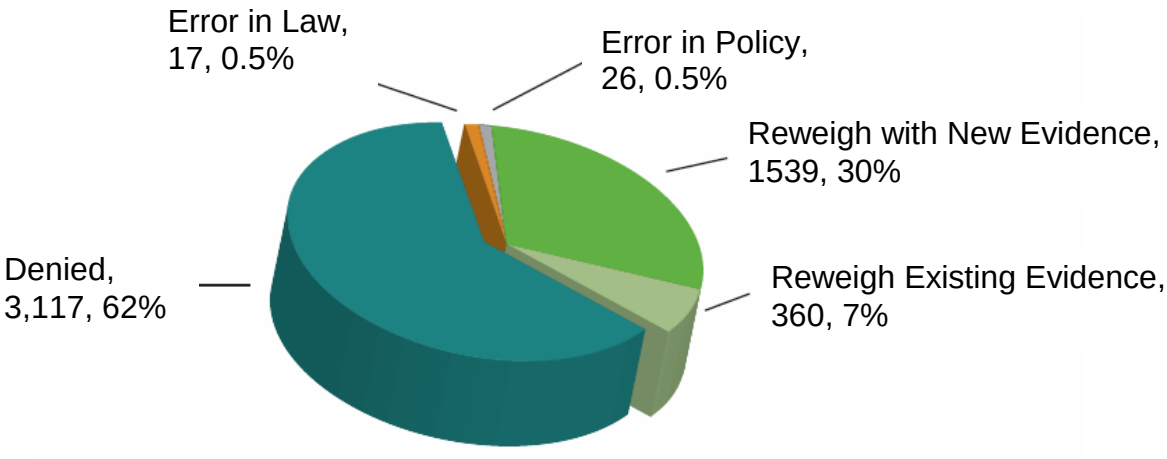
Appeals		Outcome	
Appeal Type	Number of Decisions	Varied	Confirmed
Compensation	3,223	45%	55%
Relief of Costs	48	44%	56%
Assessments	38	50%	50%
Prevention	28	39%	61%
Discriminatory Actions	25	16%	84%
Reopening on Application	2	0%	100%

An appeal may raise numerous issues and WCAT may allow or deny the appeal on each issue. In 2012, WCAT decided 5,059 issues that arose out of the 3,364 appeals that led to merit decisions. The following chart shows the percentage of issues for which the appeals were allowed, allowed in part, or denied.



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

REASONS FOR ISSUE OUTCOMES



(c) Summary Decisions

WCAT made 972 summary decisions on appeals and applications where the appeal or application was withdrawn, dismissed, suspended, or rejected. In 508 (52%) of these decisions, WCAT dismissed the appeal, confirmed that the applicant had withdrawn the appeal, or suspended the appeal. (Thirty-one of the summary decisions were suspended appeals.)

WCAT rejected 464 appeals and applications (48%) because there was no appealable issue, the decision under appeal was not appealable to WCAT, the request for reconsideration was addressed, or an extension of time was denied.

(d) Requests for Extensions of Time

WCAT decided 159 requests for extensions of time to appeal, allowing 122 and denying 37.

(e) Top Five Issue Groups for WCAT Appeals

Appeal Issue	Merit Decisions	Percentage of Total Decisions	Allowed / Allowed in Part	Denied
Section 5 – Compensation For Personal Injury	1,437	30%	34%	66%
Section 23 – Permanent Partial Disability	970	20%	49%	51%
Section 6 – Occupational Disease	470	10%	36%	64%
Section 30 – Temporary Partial Disability	413	9%	46%	54%
Section 29 – Temporary Total Disability	308	6%	38%	62%

8.3 General

(a) Appeal Paths

WCAT decides appeals and applications after an oral hearing or, if the appellant does not request an oral hearing or WCAT determines that an oral hearing is not necessary to fully and fairly consider the matter, after reading and reviewing the Board's records, any new evidence, and the submissions of the parties.

In 2012, WCAT decided a total of 3,444 merit decisions appeals and applications. WCAT decided 1,572 (46% of the total) after convening an oral hearing and decided 1,872 appeals and applications (54% of the total) by written submission.

(b) Locations of Oral Hearings

In 2012, WCAT held oral hearings in 13 locations around the province. The following table shows the number of weeks during which WCAT held oral hearings in each location.

Location	Number of Hearing Weeks
Campbell River	1
Castlegar	3
Courtenay	9
Cranbrook	3
Fort St. John	2
Kamloops	9
Kelowna	16
Nanaimo	16
Prince George	10
Terrace	5
Victoria	25
Williams Lake	2
Total outside Richmond	**101**
Richmond	246
Grand Total	**347**

(c) Appellants and Applicants

The vast majority of appeals and applications that WCAT received were from workers. The following table shows the percentage of appellants and applicants by the type of appeal or application. The percentages refer to all appeals and applications that were active at some time during 2012. The table does not include assessment or relief of costs appeals as the appellant is always the employer.

	Appellant / Applicant		
Type of Appeal or Application	**Worker**	**Employer**	**Dependant**
Compensation	92.6%	7.2%	0.2%
Direct Reopening	100%	0%	0%
Discriminatory Action	76%	24%	0%
Prevention	2%	98%	0%
Reconsideration	89.7%	9.7%	0.6%

(d) Representation

The following table shows the percentage of appeals and applications for which the appellant or applicant had a representative. Representatives may be workers' or employers' advisers, lawyers, consultants, family members, or friends. The percentages relate to all appeals and applications that were active at some time during 2012.

	Percent Represented where Appellant / Applicant is:		
Type of Appeal	**Worker**	**Employer**	**Dependant**
Assessment	NA	65%	NA
Compensation	76%	73%	71%
Direct Reopening	50%	NA	NA
Discriminatory Actions	37.5%	90%	NA
Prevention	NA	70.5%	100%
Reconsiderations	70.5%	73%	NA
Relief of Costs	NA	71%	NA

9. PRECEDENT PANEL DECISIONS

Pursuant to section 238(6) of the Act, if the chair of WCAT determines that the matters in an appeal are of special interest or significance to the workers' compensation system as a whole, the chair may appoint a panel of up to seven members to hear the appeal (a precedent panel).

Pursuant to section 250(3) of the Act, WCAT is bound by a decision of a precedent panel unless the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the precedent panel's decision or, subsequent to the precedent panel's decision, a policy of the board of directors of the Board relied upon in the precedent panel's decision was repealed, replaced, or revised.

WCAT did not issue any precedent panel decisions in 2012. No precedent panel decisions were pending at the end of 2012.

10. REFERRALS OF POLICY TO THE CHAIR (SECTION 251)

Pursuant to section 251(1) of the Act, WCAT may refuse to apply a policy of the board of directors of the Board only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If, in an appeal, a WCAT panel considers that a policy should not be applied, that issue must be referred to the chair, and the chair must determine whether the policy should be applied.

Pursuant to section 251(4) of the Act, if the chair determines that the policy should be applied, the chair must refer the matter back to the panel and the panel is bound by that determination. However, if the chair determines that the policy should not be applied, the chair must send a notice of this determination, including the chair's written reasons, to the board of directors of the Board and suspend any appeal proceedings that the chair considers to be affected by the same policy. After giving an opportunity to the parties of all affected appeals to make submissions, the board of directors has 90 days to review the policy, determine whether WCAT may refuse to apply it, and refer the matter back to WCAT. Pursuant to section 251(8), the determination of the board of directors is binding upon WCAT.

In 2012, two policies were referred to the chair. No referrals were outstanding at the end of 2012.

(a) Interest Policy (Item #50.00)

The first policy referral related to item #50.00 of the RSCM I and RSCM II (the interest policy). The interest policy limits the circumstances in which the Board will pay interest on retroactive compensation benefits to situations where "a blatant Board error" resulted in the need for the retroactive payment. In two appeals, which were heard by the chair,

the chair determined that the interest policy was so patently unreasonable that it could not be supported by the Act and its regulations (*WCAT-2012-01017* and *WCAT-2012-01018*).

The chair held that interest is not "compensation" within the meaning of section 5 of the Act and that the Board is not required to pay interest to workers, surviving spouses, and dependants in circumstances other than those specified in sections 19 and 258 of the Act. The board of directors of the Board does, however, have the broad authority under section 82 of the Act to make policies for payment of interest in circumstances beyond those prescribed by the Act. When the board of directors exercises its discretion to make a policy to pay interest in circumstances other than those set out in the Act, the policy cannot make arbitrary distinctions. The chair concluded that workers whose compensation is delayed, for reasons other than blatant Board error, experience the same loss of opportunity associated with delayed payment of compensation that is experienced by workers whose compensation is delayed due to a blatant Board error. There is no nexus between the purpose of interest and a blatant Board error that supports the distinction made by policy item #50.00. As item #50.00 focuses on the type of error, it is arbitrary, and therefore so patently unreasonable that it is not capable of being supported by the Act.

The chair referred her determination to the board of directors of the Board under section 251(5) of the Act. By letter dated July 17, 2012, the board of directors subsequently determined that item #50.00 is not patently unreasonable and that WCAT must apply it. WCAT is bound by that determination as a result of section 251(8) of the Act. The letter also advised the chair that the board of directors had directed the Policy and Regulation Division of the Board to commence a review of the interest policy.

(b) Classification Policy (AP1-37-3 (2.1))

The second policy referral related to item AP1-37.3(2.1) of the *Assessment Manual*. That policy permits the Board to withdraw an employer from a classification unit (CU) and transfer it to a new CU. The policy states that the effective date of a change in classification "…is January 1st of the year following the date on which the Board identified the [employer's] classification for evaluation…." The practical result of the policy is that an employer will be required to continue paying assessments on the basis of a superseded CU for up to one year after the classification change.

A WCAT panel determined that the policy was so patently unreasonable that it could not be supported by the Act and its regulations and referred the policy to the chair (*WCAT-2012-02540*). The referring panel found that the policy was manifestly unfair in that it forced an employer to continue to pay higher assessments than warranted once a classification error has been identified that would otherwise result in lower assessment costs.

Before the WCAT chair issued a decision in respect of the policy referral, the board of directors of the Board amended the policy by resolution 2012/10/11-03. The policy was

amended by establishing the effective date of a classification unit change as the date on which the decision was made if the change will decrease the firm's base rate. The new policy was effective October 11, 2012 and applies to all decisions, including appellate decisions, made on or after that date.

11. NOTEWORTHY WCAT DECISIONS

Noteworthy WCAT decisions are decisions that have been selected by WCAT staff because they may provide significant commentary or interpretative guidance regarding workers' compensation law or policy, or comment on important issues related to WCAT procedure. Decisions are also selected as noteworthy on the basis that they may serve as general examples of the application of provisions of the Act and regulations, the policies of the board of directors of the Board, or various adjudicative principles.

Noteworthy decisions are not binding on WCAT. Although they may be cited and followed by WCAT panels, they are not necessarily intended to become leading decisions. It is open to WCAT panels to consider any previous WCAT decision in the course of considering an appeal or application.

All WCAT decisions from 2012, including noteworthy decisions and their summaries, are publicly accessible and searchable on the WCAT website at http://www.wcat.bc.ca/search/decision_search.aspx. The website also contains a document listing all noteworthy WCAT decisions, organized by subject. The current subject categories are:

1. SUBSTANTIVE ISSUES

    1.1. Whether Person is a Worker

    1.2. Whether Person is an Employer

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

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

    1.5 Section 5(4) Presumption

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

    1.7. Specific Injuries

    1.8. Compensable Consequences (item #22.00)

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

1.10. Compensation in Fatal Cases (section 17)

1.11. Temporary Disability Benefits (sections 29 and 30)

1.12. Average Earnings

1.13. Vocational Rehabilitation (section 16)

1.14. Deductions from Compensation (section 34)

1.15. Health Care Benefits (section 21)

1.16. Permanent Disability Awards (section 23)

1.17. Period of Payment (section 23.1)

1.18. Retirement Benefits

1.19. Protection of Benefits

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

1.21. Assessments

1.22. Relief of Costs

1.23. Occupational Health and Safety

2. BOARD PROCEDURAL ISSUES

2.1. Board Jurisdiction

2.2. Board Policy

2.3. Board Practice

2.4. What Constitutes a “Decision”

2.5. Board Changing Board Decisions

2.6. Evidence

2.7. Federal Employees

2.8. Discriminatory Actions

2.9. Mediation

2.10. Applications for Compensation (section 55)

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

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

2.13. Limitation of Actions (section 10)

2.14. Transition Issues

2.15. Who May Request Review (section 96.3)

2.16. Review Division Jurisdiction

2.17. Costs (section 100)

2.18. Former Medical Review Panel

3. WCAT PROCEDURAL ISSUES

3.1. Standing to Appeal

3.2. Precedent Panel Decisions

3.3. Application of Board Policy

3.4. Lawfulness of Board Policy Determinations (section 251)

3.5. WCAT Jurisdiction

3.6. Evidence

3.7. Returning Matter to Board to Determine Amount of Benefits

3.8. Legal Precedents (section 250(1))

3.9. Summary Dismissal of Appeal

3.10. Matters Referred Back to Board (section 246(3))

3.11. Suspension of WCAT Appeal (Pending Board Decision) (section 252(1))

3.12. Certifications to Court (sections 10 and 257)

3.13. WCAT Reconsiderations

3.14. WCAT Extensions of Time (section 243(3))

3.15. Abandoning a WCAT Appeal

3.16. Applications to WCAT to Stay an Appealed Decision (section 244)

3.17. Withdrawing a WCAT Appeal

3.18. Costs and Expenses

3.19. Transitional Appeals

11.1 Select Noteworthy WCAT Decisions

WCAT issued a number of noteworthy decisions in 2012. This section provides summaries of some of those decisions.

(a) *WCAT-2012-00195*

Decision Date: January 23, 2012 **Panel: M. Redmond**

This decision is noteworthy as an example of a decision that addresses the appropriate permanent disability award for depression in cases where the evidence indicates that the depression is "severe."

The Board determined that the worker was entitled to a permanent disability award on a functional basis for his psychological impairment, calculated at 50% of total disability. The Board's Permanent Disability Evaluation Schedule (PDES) sets out four broad categories for emotional and behavioural disturbances, these being "mild," "moderate," "marked," and "extreme." "Moderate" disturbances are valued at between 30% and 70% of total disability. The worker argued that his psychological impairment should have been assessed at 100%, because the medical evidence confirmed that his condition was "severe."

WCAT noted that the term "severe," which was used by a Board psychology advisor and other physicians to describe the extent of the worker's psychological condition, is not used in the PDES and thus it would be a matter of examining the evidence to determine in which of the PDES categories the worker should be placed. The panel determined, using the Guidelines developed by the Board's Psychological Disability Awards Committee (PDAC), that the worker did not fall into the "extreme" or "marked" category.

Having determined that the worker fell into the "moderate" category, the panel referred to the PDAC Guidelines, which breaks the "moderate" category into two sub-sections. Each sub-section of the "moderate" category has four indicators, addressing vocational capacity, ability to perform activities of daily living, and ability to perform complex tasks. While the PDAC concluded that the restrictions the worker faced in performing daily life activities were not serious enough to be considered "moderate," they did not provide any reasons for that conclusion, and as a result the panel placed no weight on that part of the PDAC's decision. In contrast, the panel noted that the medical documentation of the worker's weight loss, lack of appetite, low physical energy, lack of interpersonal relationships, and limited ability to interact with others was reasonable evidence of "moderate" restrictions on his activities of daily living. This, in combination with the documentation of the worker's lack of vocational capacity and inability to perform complex tasks lead the panel to the conclusion that the worker fell into the higher sub-section of the "moderate" category. The panel concluded that the worker was entitled to an award of 70% of total disability for his psychological condition.

(b) *WCAT-2012-00357*

Decision Date: February 07, 2012 Panel: H. Beauchesne

This decision is an example of the interpretation and application of policy item #99.20 of the RSCM II when there is uncertainty regarding whether a reconsideration was undertaken by the Board within the 75-day 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.

Seventy-seven days elapsed between the date of a Board decision letter finding that the worker was entitled to temporary disability benefits and the date of a Board's decision letter advising him that his temporary disability benefits would not be extended. WCAT concluded that the second decision was a reconsideration of the first but queried whether the reconsideration was made in time. Item #99.20 of the RSCM II states that a decision is made on the date the decision is communicated to the affected person, either verbally or in writing. Where a decision is provided in writing and mailed to an affected person, the decision is deemed to have been communicated on the 8th day after it was mailed. Therefore, in this case, the reconsideration timeline starts at the end of the 8-day mailing period. However, the 8-day deemed service can be rebutted with proof of earlier service. As the worker had called the Board and discussed the first decision three days after it was issued, WCAT concluded that the first decision was communicated, and therefore made, 74 days before the second decision. WCAT found that it therefore had jurisdiction over the reconsideration decision.

In respect of the merits of the Board's reconsideration decision, WCAT determined that the worker continued to be disabled beyond the date the Board had identified. Policy item #34.32 of the RSCM II provides that "[o]nce the Board has commenced the payment of temporary disability benefits, it does not normally discontinue them, simply because, irrespective of the injury, the worker would not have been working for some

period of time." The panel noted that the worker mistakenly believed that he was not entitled to temporary disability benefits on days that he would not have been working anyway due to the weather, and that this misunderstanding led the Board to conclude that the worker's injury had resolved. However, the panel found no medical evidence to suggest that the worker was fit to return to work on the day the Board had identified or shortly thereafter. On the contrary, the panel concluded that based on the reports provided by the worker's physician, the worker continued to be disabled beyond that date and so varied the Board's decision.

(c) *WCAT-2012-00447*

Decision Date: February 15, 2012 **Panel: E. Murray**

This decision is noteworthy as an example of an analysis of the causative significance of a natural body motion, and as an example of the weighing of conflicting medical evidence. The key issue in this appeal was whether the employment activity of the worker, the removal of a metal cart from a sterilizing machine while walking backwards and turning to look behind her, was of causative significance in producing a back strain. There was no dispute that she had a back strain. In the result, WCAT agreed with the Board and the Review Division that the incident was not of causative significance.

The worker's attending physician (Dr. H) offered the opinion that the worker had been working faster than usual with her neck and torso turned as she walked backwards pulling the cart, and that this had caused her lumbosacral strain. This opinion was in contrast to the Board medical advisor's opinion that despite the temporal connection between the work activity and the onset of pain, there was less than a 50% biological plausibility that the strain injury derived "causative origins" from the work activity as described by the worker in her application for compensation and in a telephone conversation with the entitlement officer.

The panel noted that the Board medical advisor and Dr. H had relied on somewhat different non-medical facts in reaching their opinions, the most significant being that the Board medical advisor understood that the worker turned her head to "peek" where she was going, while Dr. H understood that she turned her torso and her head/neck. The panel concluded that this was a significant difference, and that it was this difference in understandings of non-medical fact that caused the conflicting conclusions that the doctors reached. The panel subsequently gave the opinion of the Board medical advisor more weight because she was satisfied that the Board medical advisor had the more accurate understanding of the mechanism of injury.

(d) *WCAT-2012-00586*

Decision Date: February 29, 2012 **Panel: S. Salter**

This decision is noteworthy for its analysis and application of the Supreme Court of Canada's decision in *British Columbia (Workers' Compensation Board) v. Figliola*

(Figliola) in circumstances where the issues before WCAT may have already been dealt with appropriately in other proceedings.

The worker's claim for low back injuries was accepted by the Board for health care benefits only. Some months later the worker's employment was terminated, and the worker applied for temporary disability benefits under his claim. Both the Board and the Review Division determined that the worker was not entitled to temporary disability benefits on the basis that the worker's injury had resolved by that time.

The worker also participated in a labour arbitration, the result of which saw the worker reinstated in an accommodated position with the employer. When the worker appealed the Review Division decision on his entitlement to wage loss benefits to WCAT, the employer argued that the issue had already been determined by the labour arbitrator, and submitted that the worker was attempting to relitigate the same issue. WCAT invited submissions on whether the worker's claim for wage loss benefits should be summarily dismissed on the basis of section 31 of the *Administrative Tribunals Act*, which provides, among other things, that a tribunal may dismiss all or part of an application if the application is frivolous, vexatious, or trivial or gives rise to an abuse of process, or if the substance of the application has been appropriately dealt with in another proceeding.

The majority of the Supreme Court of Canada in Figliola held that when interpreting provisions such as section 31 of the *Administrative Tribunals Act* it is important to consider the underlying principles, those being finality, fairness, and the integrity of the justice system, and to consider whether the previously decided legal issue was essentially the same as that being complained of to the tribunal. WCAT determined that the legal issue in the arbitration decision was whether the employer failed in its duty to accommodate the worker by terminating his employment, while the issue before WCAT was whether the worker's compensable injury had temporarily disabled the worker from his employment. As the panel concluded that the two legal issues were substantially different, it was determined that WCAT's hearing of the worker's appeal was not an attempt at relitigation, nor an abuse of process.

(e) *WCAT-2012-00718*

Decision Date: March 15, 2012 **Panel: D. Sigurdson**
B. Anderson
G. Riecken

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

The panel accepted that the worker's chronic pain was genuine and influenced his ability to accurately complete the PFI evaluation, which had measured his reduction of

range of motion impairment in his back at 9.5%. The panel determined that a scheduled award cannot be based on measurements that do not accurately estimate the degree of impairment. The panel reviewed approaches taken in other WCAT decisions where PFI evaluations were affected by pain and considered several options, including:

- Exercising its discretion under section 246(2)(d) of the Act to request the Board conduct a second PFI evaluation of the worker;
- Using the existing range of motion measurements obtained by the Board medical advisor during the PFI evaluation;
- Referring the worker to an independent health professional pursuant to section 249 of the Act to assess the residual impairment to his lumbar spine;
- Seeking an opinion from a Board disability awards medical advisor, pursuant to section 246(2)(d) of the Act, as to what the expected loss of range of motion would be given the worker's injury and the available medical evidence;
- Assessing the worker's functional impairment pursuant to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides); or
- Using medical evidence from other treating professionals regarding the worker's lumbar spine range of motion to assess his entitlement to a scheduled award.

The panel found that in this case there was sufficient evidence available to assess the worker's percentage of disability and therefore it was not necessary to refer the worker for further evaluations. This evidence showed that the worker had a "moderate reduction in range of motion." The panel was not prepared to conclude that the PFI evaluation was invalidated by the fact that the results were influenced by the worker's pain but stated that they must take this into account when considering the appropriate award. The panel emphasized that the PDES in the Board's policy manual was a guide only and that determination of a PFI is not an exact science and requires the decision maker to consider all of the evidence to estimate the impairment. The panel awarded the worker 6.0% of total disability for the loss of range of motion in his lumbar spine and 2.5% of total disability for specific and disproportionate low back chronic pain, for a total award of 8.5%.

(f) *WCAT-2012*-01017 and WCAT-2012-*01018*

Decision Date: April 18, 2012 **Panel: J. Callan**

Pursuant to section 251 of the Act, the chair determined that policy item #50.00 of the RSCM I and RSCM II is so patently unreasonable that it cannot be supported by the Act. Item #50.00 limits the circumstances in which the Board will pay interest on retroactive compensation benefits to situations where "a blatant Board error" resulted in the need for the retroactive payment.

The chair held that the Board is not required to pay interest to workers, surviving spouses, and dependants in circumstances other than those specified in sections 19 and 258 of the Act. The board of directors of the Board does, however, have the broad

authority under section 82 of the Act to make policies for payment of interest in circumstances beyond those prescribed by the Act. When the board of directors exercises its discretion to make a policy to pay interest in circumstances other than those set out in the Act, the policy cannot make arbitrary distinctions. The chair concluded that workers whose compensation is delayed for reasons other than blatant Board error experience the same loss of opportunity associated with delayed payment of compensation that is experienced by workers whose compensation is delayed due to a blatant Board error. There is no nexus between the purpose of interest and a blatant Board error that supports the distinction made by policy item #50.00. As item #50.00 focuses on the type of error it is arbitrary, and therefore so patently unreasonable that it is not capable of being supported by the Act.

The chair referred her determination to the board of directors of the Board under section 251(5) of the Act. The board of directors subsequently determined that item #50.00 is not patently unreasonable and that WCAT must apply it. WCAT is bound by that determination as a result of section 251(8) of the Act.

Note: These decisions were noteworthy in 2012. On July 17, 2012, the board of directors of WorkSafeBC issued a binding determination that policy item #50.00 is not patently unreasonable. Therefore, *WCAT-2012*-01017 and *WCAT*-2012-*01018* have been removed from the list of noteworthy decisions.

(g) *WCAT-2012-02521*

Decision Date: September 27, 2012 **Panel: W. Hoole**

This reconsideration decision is noteworthy for its analysis of the extent to which the duty of procedural fairness requires WCAT to permit cross-examination of medical experts. Although WCAT allowed the reconsideration on other grounds, the panel determined that in the circumstances of this case, the original panel's decision to deny the worker the ability to cross-examine two Board medical advisors was not procedurally unfair.

The reconsideration panel noted there are two lines of judicial decisions that address the issue of cross-examination. In some decisions, the courts have acknowledged the need to restrict the use of cross-examination in WCAT proceedings. In other, more recent decisions, the courts have found that workers' rights to procedural fairness were breached when workers were denied the opportunity to cross-examine expert witnesses at WCAT hearings. The reconsideration panel analyzed the reasoning in the more recent decisions and questioned whether adequate consideration had been given by the courts to the objectives of the Act and the statutory tools provided to aid in achieving those objectives. The requirement that appeals be completed within 180 days suggests that timeliness and efficiency are significant objectives of the Act. In addition, the legislation provides WCAT with various tools for obtaining evidence that could only be obtained through the cross-examination of witnesses in a court proceeding. The inclusion of these powers, such as the power to direct the Board to carry out

investigations on behalf of WCAT and to obtain the opinion of an independent health professional, suggests the Legislature intended to limit the use of cross-examination.

The reconsideration panel also noted that, as a practical matter, the nature of WCAT's operations militates against the regular use of cross-examination. WCAT hearings are generally brief and frequently involve unrepresented parties and there are several mechanisms for challenging expert evidence suitable to WCAT appeals that do not require the use of cross-examination. The panel concluded the intent of the legislation is to provide an accessible and fair appeal system with tools for obtaining evidence that support the timeliness and efficiency of decision-making. Although fairness will sometimes require the cross-examination of witnesses, it would be contrary to the objectives of the legislation and the overall scheme of the Act to rely extensively on this practice.

The panel concluded the court decisions should be interpreted narrowly and that fairness generally did not require the attendance of the Board medical advisors. In this case, the ease with which the opinions of the Board medical advisors could have been challenged was such that the lack of cross-examination did not jeopardize the fairness of the procedure.

12. WCAT RECONSIDERATIONS

WCAT decisions are "final and conclusive" pursuant to section 255(1) of the Act, but are subject to reconsideration based on two limited grounds:

- new evidence under section 256 of the Act; and
- jurisdictional error (i.e. breach of procedural fairness).

Applications for reconsideration involve a two-stage process. The first stage results in a written decision, issued by a WCAT panel, about whether there are grounds for reconsideration of the original decision. If the panel concludes that there are no grounds for reconsideration, WCAT takes no further action on the matter. If the panel decides that there are grounds for reconsideration, the original decision is reconsidered.

On an application to reconsider a WCAT decision on the new evidence ground, the panel will determine whether the evidence is substantial and material to the decision, and whether the evidence did not exist at the time of the hearing or did exist at that time, but was not discovered and could not through the exercise of reasonable diligence have been discovered. If the panel determines that there is new evidence that meets those criteria, WCAT will reconsider the original decision on the basis of the new evidence.

On an application to reconsider a WCAT decision on the basis of a jurisdictional error, a panel will determine whether such an error has been made. If the panel allows the

application and finds the decision void, in whole or in part, WCAT will hear the affected portions of the appeal afresh.

During 2012, WCAT received 94 applications for reconsideration and issued 64 stage one decisions. Of the stage one decisions issued, 21 determined that reconsideration grounds existed (one decision was withdrawn[1]). The outcomes of the stage one reconsideration decisions were as follows:

Type of Reconsideration	Number of Reconsideration Decisions	Allowed	Denied
Jurisdictional Error	47	18	29
New Evidence	8	2	6
Both Grounds Alleged	9	1	8
TOTAL	**64**	**21**	**43**

12.1 Reconsideration on the Basis of Jurisdictional Error

WCAT has limited authority to set aside a WCAT decision where there has been a jurisdictional error (Act, section 253.1(5)). On an application to set aside a WCAT decision, WCAT applies the test set out in section 58 of the *Administrative Tribunals Act*. This test is the same test that the courts apply to WCAT decisions on judicial review.

There are three main types of jurisdictional error:

- breaches of the common law rules of procedural fairness;
- patently unreasonable errors of fact or law or exercise of discretion in respect of matters over which WCAT has exclusive jurisdiction; and
- errors relating to matters other than the application of the rules of procedural fairness or findings of fact or law or exercise of discretion in respect of matters over which WCAT has exclusive jurisdiction.

In deciding whether WCAT has made a jurisdictional error by breaching the rules of procedural fairness, WCAT will consider whether, in all of the circumstances, WCAT acted fairly (*Administrative Tribunals Act*, section 58(2)(b)).

In deciding whether WCAT has made a jurisdictional error by making an error of fact or law or exercise of discretion, WCAT will consider whether the finding of fact or law or

[1] Withdrawn decision not included in the reconsideration table.

exercise of discretion was made in respect of a matter over which WCAT has exclusive jurisdiction (*Administrative Tribunals Act,* section 58(2)(a)). If WCAT has exclusive jurisdiction over the matter, the test is whether the finding or exercise of discretion was "patently unreasonable."

A finding of fact or law is patently unreasonable if it is not capable of being rationally supported. In most cases, a patently unreasonable finding of fact will not be established because of the way a panel has weighed the evidence, even if another panel would have reached a different conclusion. Examples of patently unreasonable findings of fact would be findings based on no evidence, or the rejection of significant undisputed evidence without explanation.

An exercise of discretion is patently unreasonable if the discretion has been exercised arbitrarily or in bad faith, for an improper purpose, based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account (*Administrative Tribunals Act,* section 58(3)).

For errors relating to matters other than the application of the rules of procedural fairness or findings of fact or law or exercise of discretion in respect of matters over which WCAT has exclusive jurisdiction, the test is whether the decision is correct (*Administrative Tribunals Act,* section 58(2)(c)).

In 2012, WCAT allowed 19 applications for reconsideration on the ground of jurisdictional error. Of those 19 allowed applications, 12 were allowed on the basis of a breach of procedural fairness, 6 were allowed on the basis of a patently unreasonable error of fact or law or exercise of discretion in respect of a matter over which WCAT has exclusive jurisdiction, and 1 was allowed on both new evidence grounds and on the basis of a patently unreasonable error.

13. JUDICIAL REVIEW OF WCAT DECISIONS

A party may apply to the B.C. Supreme Court for judicial review of a WCAT decision. On judicial review, the Court examines the decision to determine whether the decision, or the process used in making the decision, was outside of WCAT's jurisdiction. It will therefore be granted only in limited circumstances. A judicial review is not an appeal and does not involve an investigation of the merits of the decision.

Pursuant to section 57(1) of the *Administrative Tribunals Act,* an application for judicial review of a final decision of WCAT must be commenced within 60 days of the date the decision is issued. Under certain circumstances, the Court may extend the time for applying for judicial review.

13.1 Judicial Review Applications

The number of judicial review applications brought in respect of WCAT decisions decreased slightly between 2011 and 2012. In 2011, 22 judicial review applications

were served on WCAT. In 2012, 18 judicial review applications were served on WCAT. In addition, in 2012 WCAT received 2 notices of appeal to the B.C. Court of Appeal and one application for leave to appeal to the Supreme Court of Canada.

13.2 Judicial Review Decisions

The following court decisions were issued in relation to judicial review applications in respect of WCAT decisions and related appeals[2].

(a) *Johnson v. British Columbia (Workers' Compensation Board)*, SCC (January 19, 2012)

Decision under review: WCAT-2005-03622-RB

The Supreme Court of Canada dismissed the petitioner's application for leave to appeal the judgment of the B.C. Court of Appeal (2011 BCCA 255). The Court of Appeal had allowed the appeal, finding that the respondent had failed to exhaust the internal remedy available under section 251 of the Act. The underlying dispute involved the respondent's claim that policy item #50.00 of the RSCM I and RSCM II was unlawful. That policy set out the circumstances in which the Board would pay interest on retroactive benefits.

(b) *Franzke v. Workers' Compensation Appeal Tribunal*, BCCA (February 15, 2012)

Decisions under review: *WCAT-2008-00281* and *WCAT-2009-02191*

The B.C. Court of Appeal dismissed the petitioner's application for an extension of time to file a notice of appeal of the decision of the B.C. Supreme Court (2011 BCSC 1145) dismissing her judicial review. In the underlying WCAT decision, relating to an application under section 257 of the Act, WCAT had found that the petitioner was a worker at the time of the motor vehicle accident. The B.C. Court of Appeal found that none of the petitioner's proposed grounds of appeal had sufficient merit to warrant an extension of time.

(c) *Goulding v. British Columbia (Workers' Compensation Board)*, 2012 BCSC 280 (February 24, 2012)

Decisions under review: *WCAT-2010-00007* and *WCAT-2011-00351*

The B.C. Supreme Court dismissed the petition for judicial review. WCAT had found that the petitioner, who injured his lower back while working as a stage rigger, was entitled to a permanent partial disability award based on 7.86% of total disability. The

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

Board determined that the petitioner would not suffer a loss of earnings if he accepted the Board's offer of vocational rehabilitation training and, therefore, was not entitled to a pension calculated using the loss of earnings method. The Court concluded that WCAT's original decision was neither patently unreasonable nor the result of a process that was unfair.

The petitioner's objections to the decision in respect of the extent of his disability and the refusal to refer him for a loss of earnings assessment were both based on his treating physicians' opinions that he was much more disabled than the Board recognized. The Court held that it was not patently unreasonable for WCAT to prefer the evidence from the functional capacity evaluation and the Board medical advisor's PFI evaluation, both of which employ objective criteria, over the petitioner's doctors' opinions, which were based largely on the petitioner's own subjective reports of his limitations.

WCAT concluded (as had the Board) that the petitioner would not suffer a significant loss of earnings in another suitable occupation. WCAT determined that the petitioner was capable of both retraining as a computer support specialist and working as one. The Court found that there was evidence in the record on which WCAT could come to this conclusion and, therefore, it could not be said that WCAT's decision was patently unreasonable.

(d) *Fincaryk v. Workers' Compensation Appeal Tribunal*, 2012 BCSC 341 (March 8, 2012)

Decisions under review: *WCAT-2010-02176* and *WCAT-2011-00588*

The B.C. Supreme Court allowed this judicial review on the basis that WCAT's decision was patently unreasonable for finding that a Board decision constituted a final determination regarding the petitioner's entitlement to a loss of earnings pension.

The Board decision had reduced the amount of the petitioner's PFI pension on the basis that his shoulder impairment had improved. The "Form 22" document attached to the decision contained a paragraph that addressed the petitioner's employment status, indicating that the petitioner's current employment status was not known. Also attached to the decision was a document entitled "Administrative Data" which contained a list which included the item "Loss of earnings: Not applicable." Well after the appeal period for this decision had expired, the petitioner requested a decision from the Board regarding his loss of earnings award entitlement. Relying on the statement in the attachment, WCAT determined that the Board had already made a binding decision and, as the petitioner had not requested a review of it, that it was not open to WCAT to consider its merits. A second WCAT panel denied the petitioner's application for reconsideration on the basis that there was some evidence to support its conclusion.

The Court found the WCAT decision did not contain any analysis as to why the words "Loss of earnings: Not applicable" had the meaning attributed to them by the panel. In

this case, there was no evidence in the Board documents, or from the history of the Board's dealings with the petitioner, from which to draw an inference that a decision had been made regarding the petitioner's loss of earnings pension. Thus, WCAT's decision was based on speculation and such a decision is patently unreasonable.

(e) *Pistell v. Workers' Compensation Appeal Tribunal*, 2012 BCSC 463 (March 29, 2012)

Decisions under review: *WCAT-2007-03078* and *WCAT-2011-00348*

The B.C. Supreme Court dismissed this judicial review. The petitioner was employed as an apprentice plumber for a 13-week period. His job included installing pipe hangers in a ceiling. His work required him to use a heavy drill over his head. After his employment ended, he was diagnosed with a torn tendon in the rotator cuff of his left shoulder. WCAT determined that the petitioner's tendon tear did not arise out of and in the course of his employment, and was therefore not compensable pursuant to section 5 of the Act. A second WCAT panel subsequently dismissed the petitioner's reconsideration application.

The Court found that there was clearly some evidence to support the conclusion reached by the original panel on the question of causation. In part, that conclusion was based on the medical evidence before the panel, and the evidence of the employer's foreman, who testified that he did not see any sign of pain or injury throughout the time of the petitioner's employment. The original panel canvassed all the facts at an oral hearing and concluded that the petitioner had exaggerated the amount of overhead work that he had done, and that his evidence with respect to the development of his injury and the work he performed was simply not credible. The original panel concluded that the petitioner had responsibilities that would not have strained his left shoulder, that he had placed fewer hangers or inserts overhead than he had indicated, and that even when working overhead, he had the opportunity to work at other tasks that would have rested his shoulder. The original panel rejected the medical evidence as largely reliant on information that the petitioner provided to the doctors and which the panel rejected as not credible.

The Court also found that the reconsideration panel was not patently unreasonable in concluding that there was at least some evidence to support the original panel's conclusion, and that the original panel had not made a jurisdictional error. The standard of review of the reconsideration panel's consideration of the new evidence application was also patent unreasonableness. The new evidence the petitioner had sought to adduce was a medical report from a physician who had provided two earlier reports that had been considered by the original panel. The reconsideration panel held that the new report did not set out a significantly different basis for supporting the petitioner's claim. It was similar in substance to earlier medical opinions that had been considered by the panel at the original hearing. Thus, although the report was prepared subsequent to the original decision, it concerned evidence which existed at the time of the original decision

and which could have been discovered through the exercise of reasonable diligence. The Court found that this conclusion was not patently unreasonable.

(f) *Demings v. British Columbia (Workers' Compensation Board)*, 2012 BCSC 475 (March 30, 2012)

Decisions under review: *WCAT-2010-01872* and *WCAT-2010-01872a*

The B.C. Supreme Court dismissed this judicial review. The primary issue was whether the petitioners (the mother of a deceased worker and the estate of the father) had exhausted their internal administrative remedies within the workers' compensation system so as to permit them to pursue a judicial review remedy in the courts over 30 years after their original claim for compensation was denied by both the Board and the former boards of review, and over 20 years after the elimination of the statutory appeal body to which the petitioners had a right of appeal (the Commissioners of the Board). A related issue was whether subsequent statutory appeal bodies within the workers' compensation system, now also eliminated, namely the Workers' Compensation Review Board and the Appeal Division of the Board, had the jurisdiction to take any steps or to provide any remedy in relation to the boards of review decision.

The Court dismissed the judicial review of the 1980 Boards of Review decision on three grounds: (1) failure of the petitioners to exhaust their adequate internal administrative remedies (an appeal to the Commissioners of the Board within 60 days, a request to the Commissioners for an extension of time before that body was abolished, or a request for reconsideration by the Boards of Review); (2) undue delay in seeking judicial review, such delay causing potential prejudice to the Board in assessing the merits of the petitioners' claim; and (3) failure to provide notice of the judicial review proceeding to the Boards of Review, which is a mandatory requirement set out in section 15 of the *Judicial Review Procedure Act*. The Court noted that while it was not possible to serve the Boards of Review when the petition was filed in 2008, the petitioner had six years to serve a petition before the Boards of Review was abolished.

The Court dismissed the application for judicial review of the former Review Board and Appeal Division decisions on the basis that they had no statutory or equitable jurisdiction to, respectively, review the Boards of Review decision for unfairness, or extend the time to appeal the Boards of Review decision, and therefore erred when they purported to do so. A tribunal's equitable jurisdiction to reopen or reconsider one of its decisions does not extend to the decisions of previous appellate bodies that were no longer in existence.

Two of the three WCAT decisions being challenged depended upon the existence of a valid Appeal Division decision. As the Appeal Division decision was void, the Court found that the petitioners' challenges to them were moot. The third WCAT decision had determined, in an unrelated appeal to WCAT, that WCAT lacked jurisdiction to reopen a decision of the Appeal Division on jurisdictional grounds. The Court found that the petitioners lacked standing to challenge the earlier decision. Lastly, the petitioners

sought review of two letters they had received and that they claimed were decisions (one from the Board and one from WCAT). The Court found that both letters were informational letters and as such were purely administrative in nature. They were not decisions and therefore could not be reviewed.

(g) *Jozipovic v. British Columbia (Workers' Compensation Board*), 2012 BCCA 174 (April 26, 2012)

Decisions under review: *WCAT-2006-02312* and *WCAT-2009-02631*

The B.C. Court of Appeal issued a declaration that item #40.00 of the RSCM II is of no force and effect to the extent that it precludes the Board and WCAT from considering the appropriateness of the amount of compensation that is awarded under section 23(1) of the Act when determining whether a worker's circumstances are "so exceptional" under section 23(3.1) and therefore whether the worker may be entitled to a loss of earnings award. The policy precludes considering the appropriateness of the amount of compensation in all cases where the worker is able to return to his previous occupation with a diminished capacity or is able to seek employment in an "occupation of a similar type or nature." The Court concluded that it was not reasonable to ignore the financial detriment that a worker will suffer as a result of such an adaptation. The Court found that, to this extent, the policy is inconsistent with section 23 of the Act.

The Court of Appeal also determined that the power of a superior court to intervene to prevent a tribunal from unreasonable exercises of its statutory powers is part of the irreducible core of its jurisdiction, and cannot be ousted by provincial statute. Therefore, a court on judicial review has the power to review a policy of the board of directors of the Board directly on an unreasonableness standard. It found that while it is not unconstitutional for the Legislature to allow WCAT to consider the reasonableness of a policy, it would be unconstitutional for it to create a statutory scheme that gives WCAT exclusive or final authority to determine that question. Given the power of the Court to review policy directly, it was an error for the chambers judge not to issue a declaration respecting the invalid aspects of the policy once they were determined to be invalid.

(h) *Brown v. Moss,* BCSC (May 9, 2012)

Decisions under review: *WCAT-2010-02714* through *WCAT-2010-02721* and *WCAT-2010-02723* through *WCAT-2010-02733*

The B.C. Supreme Court dismissed the judicial review of a WCAT decision made under section 257 of the Act. The Court found that the WCAT decision was not patently unreasonable. WCAT had concluded that the petitioner, who drove a truck carrying 14 passengers that had been working at a farm, was not in the course of her employment when a motor vehicle accident occurred. WCAT determined that each of the passengers was a worker injured in the course of her or his employment but the petitioner was doing a favour for her grandfather by driving the other workers back to town.

The petitioners had argued that the finding was based on an irrational, and therefore patently unreasonable, interpretation of policy item #21.00 of the RSCM II (Personal Acts, now policy item #C3-18.00). Specifically, the petitioners argued that the policy is meant to focus on the observable nature of a worker's actions and not the subjective motivation behind the actions (such as doing a favour for one's grandfather).

The Court was satisfied that there was a basis in the record for WCAT's conclusion and, therefore, the decisions could not be said to be patently unreasonable. The judge noted that the decisions were made by an expert tribunal deciding matters within its exclusive jurisdiction and he refused to reweigh the evidence.

(i) *Alton v. Workers' Compensation Appeal Tribunal*, BCSC (May 28, 2012)

Decision under review: *WCAT-2010-02204*

The B.C. Supreme Court allowed the petition for judicial review, finding that WCAT's decision was patently unreasonable because there was no evidence to support the tribunal's conclusion that the petitioner, who had a fracture in his left foot, had no disability before 1989.

The petitioner injured his left foot in 1977. He was diagnosed with a soft tissue injury and doctors said that he was able to return to work. The petitioner continued to suffer some pain and had a limp after he returned to work. In 1989, the petitioner experienced increasing pain in his foot and his claim was reopened. Evidence from the time indicate that his foot was deforming, had developed osteoarthritis, and was tender to palpation. The petitioner was off work for a brief time and received benefits for a few weeks in 1989. Throughout the 1990s, his foot became progressively worse, to the point, in 2001, where he felt he could no longer work. He applied for a reopening and, in the course of medical investigations, it was determined for the first time that the worker had an old ununited Lisfranc fracture in his left foot.

Ultimately, his 1977 claim was reopened and temporary wage loss benefits were paid as well as a permanent disability award starting in 2002. The issue before WCAT was whether the petitioner was entitled to benefits from 1977 to 2001. WCAT determined that his permanent disability award should commence in 1989. Although WCAT found that the petitioner broke his foot in the 1977 workplace accident, WCAT concluded there was insufficient evidence that the fracture was disabling between 1977 and 1989. The Court determined that there was no evidence for this finding as the uncontroverted evidence was that the petitioner was suffering minor pain, discomfort, and an altered gait ever since the 1977 injury.

(j) *Vandale v. Workers' Compensation Appeal Tribunal*, 2012 BCSC 831 (June 5, 2012)

Decisions under review: *WCAT-2004-04388* and *WCAT-2010-02774*

The B.C. Supreme Court allowed the judicial review application on the basis that the WCAT decision was inconsistent with an earlier decision of the former Appeal Division of the Board. The petitioner had appealed to WCAT on the basis that his PFI pension should be increased. Instead, WCAT revoked the petitioner's pension. It found that the compensable component of the petitioner's chronic obstructive pulmonary disease (COPD) (the asthmatic component) was not permanent but reversible with the use of a bronchodilator. Therefore, pursuant to policy item #29.20 of the RSCM I, a pension was not payable. The Court held that the Appeal Division had already found that the petitioner's asthma was not completely reversible, and was an indivisible component of his COPD. It found that the Appeal Division decision could not be rationally interpreted as finding otherwise. Given that WCAT's findings of fact were contrary to the Appeal Division's binding findings of fact, and given that WCAT did not have the jurisdiction to vary the findings of fact of the Appeal Division, WCAT's decision was patently unreasonable.

The Court rejected the petitioner's argument that WCAT exceeded its jurisdiction when it revoked the petitioner's pension. WCAT's inquiry authority permits it to engage all issues that are part of a decision chain in an appeal, whether or not they are expressly raised by an appellant or respondent on appeal. In this case, WCAT's jurisdiction to consider all issues of fact and law arising on appeal included the basis and size of the petitioner's pension. WCAT was not limited to the way that the petitioner had framed the issues before it. The Court noted that WCAT had given the petitioner notice that it would consider his entitlement to a pension, and allowed for further submissions on this point.

(k) *Othen v. Workers' Compensation Appeal Tribunal*, 2012 BCSC 818 (June 6, 2012)

Decision under review: *WCAT-2008-00657*

The B.C. Supreme Court dismissed the petition for judicial review, finding that WCAT was not patently unreasonable as there was evidence in the record of proceedings to support the conclusions made. The Court also found that in all of the circumstances the petitioner was treated fairly by WCAT. WCAT had determined that the Board had properly implemented an earlier 2005 WCAT decision, that the worker was not entitled to a loss of earnings permanent disability award (as he could restore his pre-injury earnings in another occupation), and that the legal costs and the expenses of attending the WCAT oral hearing were not reimbursable.

The Court found that there was a rational basis for WCAT's findings and held that the petitioner was not denied a fair hearing as a result of the vocational rehabilitation

consultant not being produced at WCAT for cross-examination, given that the vocational plan that the petitioner pursued was one he had designed, and the Board agreed to.

(l) *Mitchell v. Workers' Compensation Appeal Tribunal*, 2012 BCSC 986 (June 15, 2012)

Decision under review: *WCAT-2009-00128* and *WCAT-2011-01189*

The B.C. Supreme Court dismissed the petition for judicial review. WCAT found that the petitioner's fall at work, which was not reported to the Board for three months, was unlikely to have caused the petitioner's low back pains. The petitioner claimed that she did not report the injury right away for fear of reprisals from her employer. WCAT dismissed the petitioner's application for reconsideration, which was brought on both the ground of patent unreasonableness and the ground of new evidence. The Court held that WCAT's original decision was not patently unreasonable because there was evidence to support the tribunal's conclusion. The Court also upheld the reconsideration decision.

The jurisdictional error alleged to have been committed by the WCAT original panel was not applying policy item #97.32 of the RSCM which requires the Board to consider a worker's own statements about her medical condition when it relates to matters that would be within her knowledge. The evidence the petitioner said was new was (a) a note from the first doctor she saw purporting to clarify his diagnosis; and (b) a lengthy report from a rheumatologist which confirmed that the petitioner has a compression fracture to a lumbar disc and that the fracture and low back pain were attributable to the fall.

The Court found there was evidence to support the original WCAT decision and concluded that WCAT's decision to refuse to accept the petitioner's purportedly new evidence was not irrational. WCAT had determined that the evidence provided on reconsideration was not new and could have been obtained before the WCAT hearing through the exercise of reasonable diligence. Accordingly, the Court found that neither WCAT panel made a patently unreasonable error. The judge said that on judicial review, she could not reweigh the evidence.

Lastly, in respect of the petitioner's claim that WCAT was biased, the Court said that the petitioner had failed to offer any substantive sworn evidence to prove the allegations. Noting that the onus to prove bias is on the party making the allegation, the judge also said the allegations of bias should have first been raised with WCAT.

(m) *Phillips v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2012 BCCA 304 (July 17, 2012)

Decision under review: *WCAT-2009-02116*

The B.C. Court of Appeal dismissed this appeal from an unsuccessful petition for judicial review. The appellant argued that the WCAT decision to use her earnings as a part-time employee over the year before her injury as a basis for her long-term wage rate was patently unreasonable. She claimed that her wage rate should be calculated based on full-time earnings of a care aide as she would have eventually been working full time had she not been injured. The appellant also argued WCAT's interpretation of policy item #67.21 of the RSCM I (Class Averages/New Entrants to Labour Force) amounted to an improper fettering of the tribunal's discretion and that WCAT had failed to give adequate reasons for its decision.

The Court of Appeal applied recent jurisprudence from the Supreme Court of Canada to the effect that the failure to give adequate reasons does not provide an independent or free-standing ground for judicial review. Rather, the reasons must be read together with the result for the purpose of showing whether the result is or is not patently unreasonable. The Court also rejected the appellant's argument that WCAT's interpretation of Board policy amounted to an improper fettering of WCAT's discretion. WCAT is bound by the Act to apply Board policy and therefore cannot fetter its discretion by doing so. The question is whether WCAT's interpretation of policy is or is not patently unreasonable.

A unanimous Court found that WCAT had not actually interpreted the policy too restrictively, as the appellant had suggested. Even if it had, the Court noted that interpreting Board policy lies at the heart of WCAT's exclusive jurisdiction and the courts may only interfere with WCAT's interpretation if it is patently unreasonable. The Court found that WCAT's interpretation of policy item #67.21 recognized the purpose of the policy was to protect against inequitable use of actual earnings where those earnings are not sufficient to determine what best represents the worker's long-term loss of earnings. As such, the interpretation could not be said to be patently unreasonable.

The Court agreed with the chambers judge's reasons for dismissing the appellant's arguments that WCAT had also made several patently unreasonable findings of fact. In each case, the Court was satisfied that there was some evidence in the record capable of supporting WCAT's findings.

(n) *Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal*, 2012 BCCA 392 (October 4, 2012)

Decision under Review: *WCAT-2010-02812*

The B.C. Court of Appeal held that notwithstanding that the worker's mental stress injury in this case was not of the kind compensated under the Act, WCAT was patently

unreasonable in determining that the worker's mental stress injury did not arise out of or in the course of employment.

The worker had been subjected to periodic verbal abuse by a co-worker throughout the time she worked for the employer. After what would prove to be the final instance of abuse, the worker stopped working altogether and was diagnosed with post-traumatic stress disorder resulting from the abuse. She sued her co-worker and her employer for damages. The defendants pleaded that the worker's action should be barred because the injury arose out of her employment and applied to WCAT under section 257 of the Act to certify that fact. WCAT determined that the injury did not arise out of and in the course of her employment because section 5.1 of the Act (as that section read at the time) required that the event leading to the mental stress injury be sudden and unexpected and WCAT found that it was not. WCAT reasoned that the threshold for compensation under section 5.1 was also a causative threshold and, therefore, an injury that did not meet the criteria in section 5.1 could not be said to have arisen out of and in the course of the worker's employment. WCAT found that this conclusion was consistent with the legislative intent expressed in the so-called "historic trade-off" whereby workers gave up their right to sue their employers for workplace injuries in exchange for receipt of no-fault compensation benefits.

In reversing the B.C. Supreme Court's order, the Court of Appeal agreed with the co-worker and employer that WCAT misunderstood the historic trade-off. The Court of Appeal said WCAT's analysis ignored the trade-off made by employers who are forced to contribute to the no-fault insurance scheme in exchange for complete immunization from workplace injury claims. The Court said that the determination WCAT was asked to make under section 257 was a finding of fact and not one of mixed fact and law and concluded that, based on the record, WCAT's determination that the worker's post-traumatic stress disorder did not arise out of or in the course of her employment was patently unreasonable. The Court of Appeal set aside the affected paragraph of the certificate and substituted one that stated that the worker's injury arose of and in the course of her employment but that she is not entitled to compensation.

(o) *McKnight v. Workers*' Compensation Appeal Tribunal, 2012 BCSC 1820 (December 4, 2012)

Decision under review: *WCAT-2010-02229*

This judicial review challenged a WCAT decision that had determined that six teachers did not have mercury poisoning as a result of spills of elemental mercury at a school. The B.C. Supreme Court allowed the judicial review, finding WCAT's decision to be patently unreasonable for two reasons: (1) WCAT failed to weigh all of the relevant evidence in reaching its conclusion that the teachers did not have mercury poisoning; and (2) WCAT imposed a requirement that there be proof of mercury poisoning as that diagnosis is made by physicians.

In respect of the first issue, the Court found that WCAT had impermissibly considered whether the evidence in favour of the teachers' claims was sufficient to support a finding of mercury poisoning without weighing that evidence against the evidence supporting the opposite conclusion. The Court found that the panel's decision was largely abstract and inconclusive as it made few specific findings as to which body of evidence on any particular issue was to be preferred. WCAT appeared to have decided that the positive evidence, considered alone, was insufficient to support the claim and therefore appears to have concluded that the weight of evidence to the contrary did not have to be considered. As WCAT did not state what criterion it was using to determine that the evidence was insufficient, one could infer either that WCAT thought the evidence required proof beyond a balance of probabilities or that WCAT considered the claimants as being under an onus to prove their case. The Court found that both positions were patently unreasonable.

In respect of the second issue, the Court found that WCAT must be free to make findings of fact on a balance of probabilities (with an evenly balanced case to be decided in the claimant's favour), regardless of whether the higher degree of certainty some physicians might insist upon in arriving at a diagnosis can be satisfied. The Court found that WCAT's approach of applying a diagnostic criterion higher than the balance of probabilities standard to the evaluation of the evidence, could effectively deny compensation at least to some deserving workers who, on a balance of probabilities, have suffered or contracted an occupational disease. The Court found that no such result is contemplated by the Act and is patently unreasonable.

(p) *Whetung v. Workers' Compensation Appeal Tribunal*, 2012 BCSC 1850 (December 7, 2012)

Decision under review: *WCAT-2010-02795*

The B.C. Supreme Court found the decision of WCAT to be patently unreasonable insofar as it confirmed the ability of the Board to stop paying benefits for a worker's disability where that worker had also been awarded damages in a civil suit for the same disability and where the judge in the civil action had found that the disability was entirely caused by the non-work-related event. The Court held that because the Board was not a party to the civil proceeding and because tort law and workers' compensation law were different in important respects (including in respect of causation), the Board had no right to rely as it did on the comments made in the trial judgment. Although the Court recognized that the Board may have some basis upon which to seek recovery from the petitioner, the Court found no rational basis for the Board taking action based solely on the trial judge's comment that the Board was subrogated.

The Board was a party to the judicial review (see the judgment of the B.C. Court of Appeal at 2012 BCCA 119) and argued that WCAT lacked the jurisdiction to hear an appeal from the Board's decision to stop the petitioner's benefits. When the matter was before the Review Division, the review officer found that the Board's decision was not one respecting compensation and, therefore, was not reviewable by the Review Division

under section 96.2 of the Act. On judicial review, the Board argued that if the matter was not reviewable by the Review Division, it could not be appealed to WCAT under section 239. The chambers judge found that the question of whether the matter was one respecting compensation was within WCAT's exclusive jurisdiction to determine, as was a refusal by the Review Division to conduct a review. Therefore, notwithstanding that by answering the question WCAT was effectively determining its own jurisdiction to hear the appeal, WCAT's determination was entitled to deference. The judge found that WCAT's determination that the matter was reviewable was not patently unreasonable.

14. OTHER COURT DECISIONS

The following court decision is of significance to WCAT or the workers' compensation system generally.

(a) *Lysohirka v. British Columbia (Workers' Compensation Board),* 2012 BCCA 457

The B.C. Court of Appeal dismissed the petitioner's appeal from a B.C. Supreme Court decision dismissing his judicial review. The petitioner sought judicial review of three decisions of the Review Division considering his entitlement to retroactive vocational rehabilitation benefits. The Review Division determined that the petitioner was entitled to retroactive benefits, but only insofar as he could provide evidence confirming his participation in vocational rehabilitation activity (such as a job retraining program). The petitioner had argued that particularly for the period during which his claim was wrongly denied, he was entitled to full retroactive vocational rehabilitation benefits from the date of his disablement, without having to give evidence of his involvement in vocational rehabilitation activities.

The Court of Appeal upheld the two Review Division decisions denying the worker vocational rehabilitation benefits on a retroactive basis. It also found that a third Review Division decision dismissing the petitioner's reconsideration application was made without jurisdiction.

The B.C. Supreme Court had applied a standard of reasonableness to the two original Review Division decisions and a standard of correctness to the Review Division reconsideration decision. The chambers judge found that no deference was owed with respect to the reconsideration decision because the reconsideration panel applied the same standard as the Court was to apply to the original decisions on judicial review. Since the two original decisions were reasonable, it followed that the reconsideration decision was correct.

The Court of Appeal agreed that the standard of reasonableness applied to the first two Review Division decisions but found that the Review Division did not have the power to reconsider one of its own decisions on the basis that the decision is unreasonable. It found that the Review Division's common law authority to reconsider is limited to jurisdictional errors. The Court determined that the grounds raised by the petitioner

before the Review Division on reconsideration were not “jurisdictional,” but went to the reasonableness of the decisions. Therefore, the Review Division had no jurisdiction to reconsider the decisions on the grounds raised by the petitioner.