

WCAT

Workers' Compensation Appeal Tribunal



Annual Report

For the year January 1 to December 31, 2014

2014

March 5, 2015

The Honourable Shirley Bond
Minister of Jobs, Tourism and Skills Training and
Minister Responsible for Labour
Room 138 - Parliament Buildings
PO Box 9071 Stn Prov Govt
Victoria, BC V8W 9E9

Dear Minister Bond:

Re: 2014 Annual Report of the Workers' Compensation Appeal Tribunal (WCAT)

I am pleased to provide you with the 2014 WCAT Annual Report for the year ended December 31, 2014. This report has been prepared for your review pursuant to section 234(8) of the *Workers Compensation Act*.

Yours truly,

Caroline Berkey
Chair

CB/lc

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GLOSSARY

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

1. CHAIR'S MESSAGE

I am pleased to present the 2014 Annual Report for the Workers' Compensation Appeal Tribunal (WCAT). This report provides an overview of WCAT's operations, statutory mandate and costs, as well as summaries of some of our noteworthy decisions and judicial review decisions.

WCAT is an independent appellate tribunal and the final level of appeal for many issues in British Columbia's workers' compensation system. WCAT has jurisdiction over workers' compensation matters including compensation claims, employer assessments, some occupational health and safety matters¹ and certificates for the courts regarding the status under the *Workers Compensation Act* (Act) of parties to litigation. The majority of the appeals and applications we received in 2014 were appeals regarding benefits under compensation claims.

WCAT is a high volume appellate tribunal. In 2014, workers and employers filed 4,818 appeals and applications. Our vice chairs decided 4,105 appeals and applications on the merits, and we addressed 1,110 through various summary decisions for a total output of 5,215 decisions. Our intake of appeals and applications in 2014 was slightly lower than last year but still higher than the average intake since 2007. Our decision output was higher this year than last year. WCAT is committed to providing quality decision making consistent with the Act, policy and WCAT precedent decisions in a timely manner.

I have the great pleasure of working with very dedicated and capable vice chairs and staff. The success of the tribunal is a result of their collective professionalism, expertise and hard work. I want to express my sincere appreciation for their work and their commitment to our mandate.

Caroline Berkey
Chair

¹ This Report also uses the term "prevention" when referring to occupational health and safety matters.

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 occupational health and safety 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 for court actions.

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 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 (Bill 56 - 2004)*. 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 2014

There were two amendments to the Act in 2014, both made by the *Miscellaneous Statutes Amendment Act, 2014* (Bill 17). The first added "nurse practitioner" to the definition of "qualified practitioner" under section 1 of the Act. This amendment came into effect on January 1, 2015. The second amendment created a presumption for firefighters in section 6.1 of the Act in relation to heart disease and heart injury. The amended section provides that if a firefighter is disabled as a result of heart disease or a heart injury, and was employed as a firefighter at or immediately before the date of disablement, the disease or injury must be presumed to have arisen out of and in the course of the firefighter's employment. This amendment came into force on May 29, 2014.

There were no changes in 2014 to the *Administrative Tribunals Act* or to the federal *Government Employees Compensation 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 or the chair's delegate to a maximum of 90 days if the appellant requests and receives additional time to make submissions or submit new evidence and WCAT grants to the other parties a similar opportunity. The chair or the chair's delegate 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 it is found 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 error and provide a new decision. (See definition of jurisdictional error in place as of December 2014 under section 13 “Judicial Review of WCAT Decisions / *Fraser Health Authority v. Workers’ Compensation Appeal Tribunal*”).

(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 several minor changes to the MRPP in 2014. Item 16.1.1 (Expenses) was amended to refer to a new Board policy on the reimbursement of expenses and to remove references to former policy items. Appendix 5 (Chair’s Delegation Decision) was changed to permit the vice chair/quality assurance, or a legal counsel to perform the duties of the chair under section 66 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) even if tribunal counsel is not absent or exposed to a possible or actual conflict of interest or appearance of bias with respect to the given case. It was also changed to permit scheduling employees to establish WCAT panels. Appendix 11 (Current Fee Schedules) was updated to reflect the latest information regarding fee schedules for physicians and psychologists.

4. COSTS OF OPERATION FOR THE 2014 CALENDAR YEAR

| Category | Cost |
|---|----------------------|
| Salaries | \$ 9,166,558 |
| Employee Benefits and Supplementary Salary Costs | \$ 2,393,509 |
| Per Diem – Boards and Commissions | \$ 601,382 |
| Travel | \$ 73,274 |
| Centralized Management Support Services* | \$ 1,354,431 |
| Professional Services | \$ 537,500 |
| Information Technology, Operations and Amortization | \$ 997,299 |
| Office and Business Expenses | \$ 414,377 |
| Building Service Requests and Amortization | \$ 841 |
| TOTAL EXPENDITURES | \$ 15,539,171 |

* 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, 2014 | | |
|---|--|-----------------------------|
| Name | Position | End of Term |
| Caroline Berkey | Chair | June 30, 2018 (OIC# 741) |
| Jane MacFadgen | Senior Vice Chair & Registrar | February 29, 2020 |
| Teresa White | Senior Vice Chair & Tribunal Counsel | December 31, 2019 |
| James Sheppard | Vice Chair, Quality Assurance & Training | February 28, 2019 |
| Kevin Johnson | Vice Chair & Deputy Registrar | February 28, 2017 |
| Randy Lane | Vice Chair & Team Leader | February 29, 2020 |
| Susan Marten | Vice Chair & Team Leader | February 28, 2018 |
| David Newell | Vice Chair & Team Leader | January 31, 2020 |
| Debbie Sigurdson | Vice Chair & Team Leader | February 28, 2019 |

| Vice Chairs as of December 31, 2014 | |
|-------------------------------------|--------------------|
| 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, 2018 |
| Hélène Beauchesne* | March 31, 2019 |
| Sarwan Boal | February 28, 2017 |
| Dana G. Brinley | February 28, 2018 |
| Kate Campbell | September 5, 2017 |
| Lesley Christensen | February 28, 2018 |
| Melissa Clarke | September 30, 2015 |
| Daphne A. Dukelow | February 28, 2017 |
| William J. Duncan | February 29, 2016 |

| Vice Chairs as of December 31, 2014 | |
|-------------------------------------|--------------------|
| Name | End of Term |
| Andrew J. M. Elliot | August 31, 2015 |
| Lisa Hirose-Cameron | September 30, 2018 |
| Warren Hoole | September 30, 2019 |
| Nora Jackson | February 29, 2016 |
| Cynthia J. Katramadakis | March 31, 2018 |
| Joanne Kembel | February 28, 2018 |
| Brian King | August 31, 2015 |
| Robert Kyle | February 28, 2017 |
| Darrell LeHouillier | October 31, 2017 |
| Janice A. Leroy | February 28, 2017 |
| Shelley Lopez | September 5, 2017 |
| Julie C. Mantini* | February 28, 2019 |
| Renee Miller | April 30, 2016 |
| Herb Morton | February 29, 2020 |
| Elaine Murray | August 31, 2019 |
| Diep Nguyen | September 5, 2017 |
| Andrew Pendray | January 3, 2017 |
| Carla Qualtrough | September 5, 2017 |
| Dale Reid | February 29, 2016 |
| Deirdre Rice | February 28, 2019 |
| Guy Riecken | February 28, 2019 |
| Simi Saini | September 5, 2017 |
| Shelina Shivji | March 31, 2017 |
| Timothy B. Skagen | March 31, 2017 |
| Anthony F. Stevens | February 28, 2017 |

| Vice Chairs as of December 31, 2014 | |
|-------------------------------------|-------------------|
| Name | End of Term |
| Andrew J. Waldichuk | February 28, 2017 |
| Lois J. Williams | February 29, 2016 |
| Sherryl Yeager | February 28, 2018 |

* Part-time Deputy Registrar

| Vice Chairs Appointed in 2014 | | |
|-------------------------------|------------------|-----------------|
| Name | Appointment Date | End of Term |
| David Bird | January 6, 2014 | January 5, 2017 |
| Grace Chen | January 6, 2014 | January 5, 2017 |
| Sherelle Goodwin | January 6, 2014 | January 5, 2017 |
| Janice Hight | January 6, 2014 | January 5, 2017 |
| Ellen Riley | January 6, 2014 | January 5, 2017 |
| Debe Simpson | January 6, 2014 | January 5, 2017 |
| Kim Workun | January 6, 2014 | January 5, 2017 |
| Terry Yue | January 6, 2014 | January 5, 2017 |
| Lyall Zucko | January 6, 2014 | January 5, 2017 |

| Vice Chair Departures in 2014 | | |
|-------------------------------|---------------------------|-------------------------------|
| Name | Original Appointment Date | Departure Date or End of Term |
| Patricia Broad | May 3, 2010 | July 5, 2014 |
| Michael Redmond | March 1, 2004 | May 31, 2014 |
| Marguerite Mousseau | March 3, 2003 | June 12, 2014 |
| Shannon Salter | September 6, 2011 | July 14, 2014 |

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 2014, 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 2014:

-
- | | | |
|----|------------|--|
| 1. | February 6 | <ul style="list-style-type: none">▪ Weighing Evidence▪ Weighing Medical Evidence▪ Group discussion of scenarios relating to medical evidence |
| 2. | March 6 | <ul style="list-style-type: none">▪ Clinical Significance of Ergonomic Risk Factors▪ Ergonomic Risk Assessment for activity related soft tissue disorders |
| 3. | April 3 | <ul style="list-style-type: none">▪ Assessment of Malingering▪ <i>Martin v. Alberta</i> (WCB) |
| 4. | April 16 | <ul style="list-style-type: none">▪ CMS Refresher |
-

-
- | | | |
|-------|-------------|---|
| 5. | June 5 | <ul style="list-style-type: none">▪ Security Issues – Diffusing Hostile Behaviour▪ Permanent Disability Awards / Policy Item #41.00 – Age 65 Policy Changes▪ Permanent Disability Awards / Loss of Earnings▪ Assessment / Awards |
| <hr/> | | |
| 6. | June 18 | <ul style="list-style-type: none">▪ Medication & Addiction |
| <hr/> | | |
| 7. | September 4 | <ul style="list-style-type: none">▪ Mental Disorder Appeals – A Panel Discussion▪ Mental Disorder Appeals – Decision Writing▪ Mental Disorder Appeals – Practical Considerations▪ Mental Disorder Appeals – Ethics and Practice Points |
| <hr/> | | |
| 8. | October 2 | <ul style="list-style-type: none">▪ Disability Management – A View from the Frontline▪ Restrictions and Limitations – An Open Discussion▪ Security Issues – Oral Hearing Safety and Security |
| <hr/> | | |
| 9. | November 6 | <ul style="list-style-type: none">▪ Overview and Open Discussion of Chapter 10 RSCM II (Medical Assistance) Policy Changes (in effect January 1, 2015) |
| <hr/> | | |
| 10. | December 4 | <ul style="list-style-type: none">▪ Overview and Open Discussion of the Policy Changes to the Permanent Disability Evaluation Schedule (in effect January 1, 2015) |
-

In addition, many WCAT vice chairs attended the Administrative Law Conference (CLE) in October 2014. Some vice chairs also attended the October 2014 BC Council of Administrative Tribunals (BCCAT) Conference.

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 go through the performance evaluation process. The performance of vice chairs will continue to be regularly evaluated on an ongoing basis.

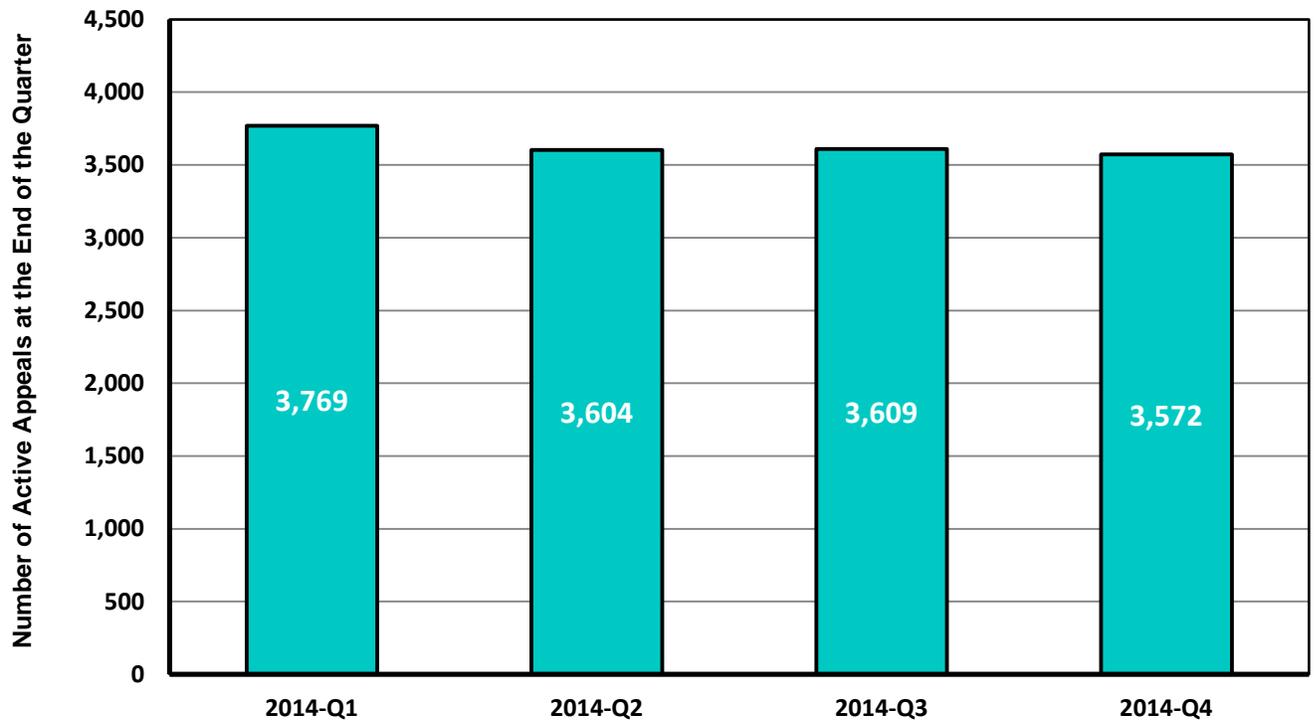
8. STATISTICS

8.1 Overview of Appeals Inventory

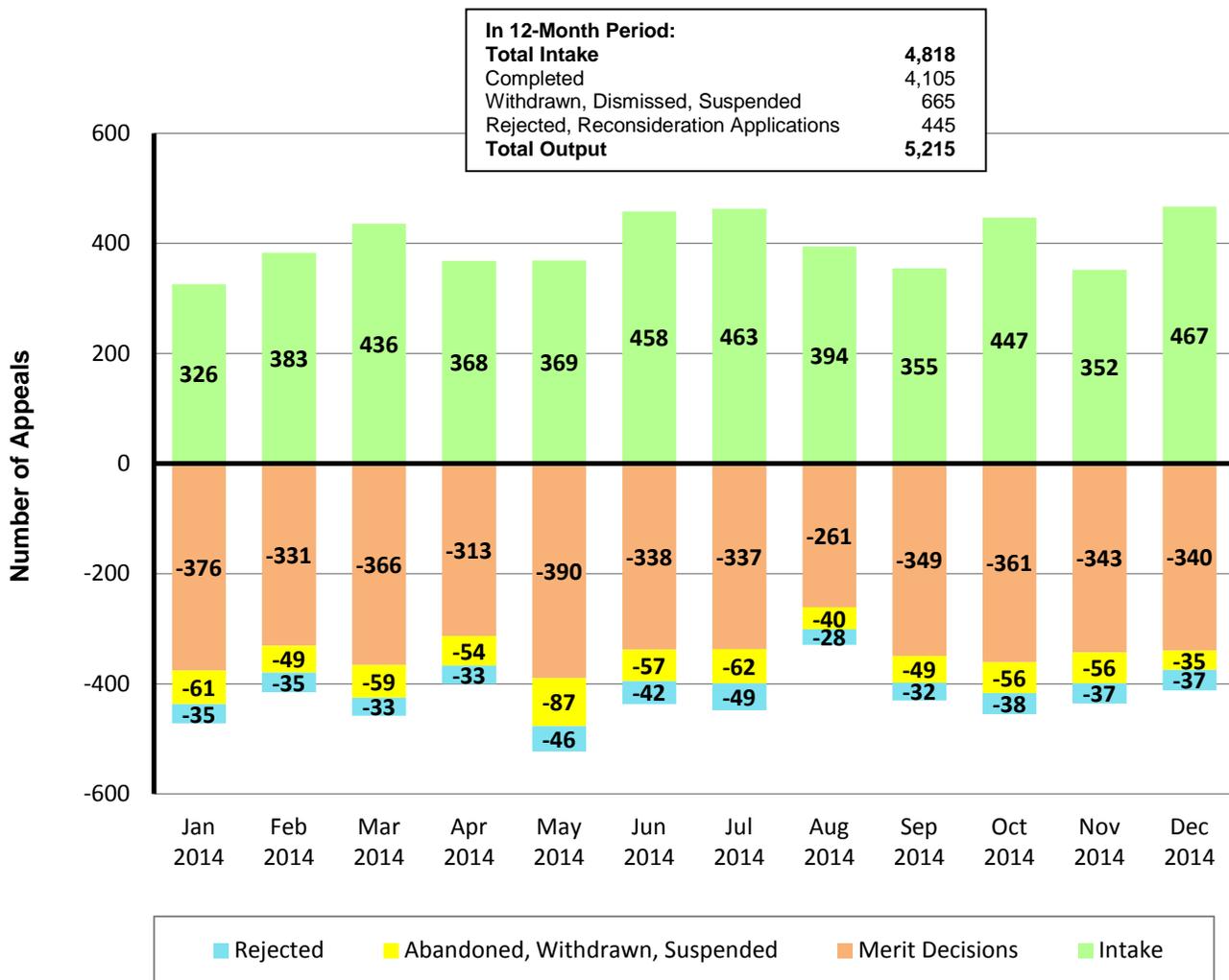
This section contains two charts providing a high level overview of the status of our appeals inventory for 2014. WCAT records appeals by their date of initiation.

The first chart (Number of Active Appeals) provides the number of appeals in our inventory at the end of each quarter of 2014. WCAT’s total active inventory at December 31, 2014 was 3,572 appeals compared to 3,963 at the end of 2013. 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 4,818 new appeals in 2014, representing a decrease of 6% from the number of appeals we received in 2013. Our output in 2014 was 5,215 summary and merit decisions and determinations representing an increase of 6% from the 4,927 merit and summary decisions and determinations made in 2013.

**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.

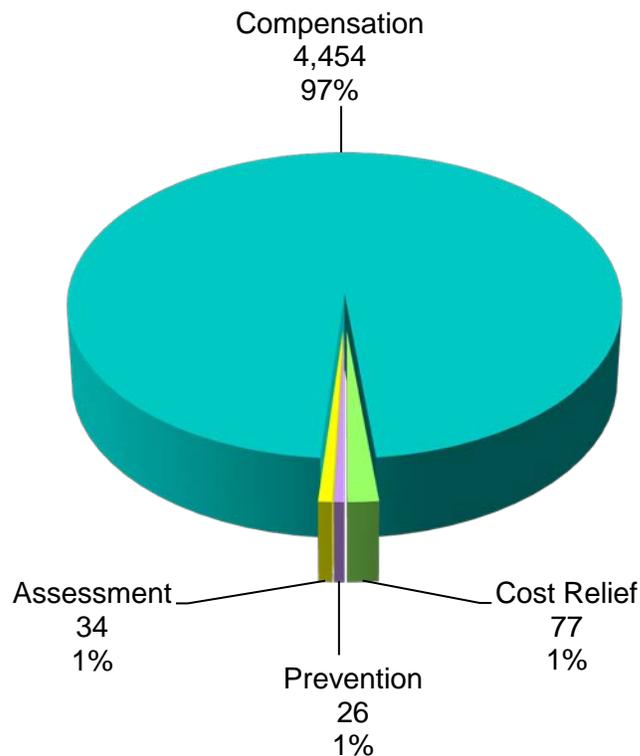
(a) Intake

WCAT received 4,818 appeals and applications in 2014. Of these, 4,591 appeals (95%) arose from decisions of Board review officers and 227 were direct.

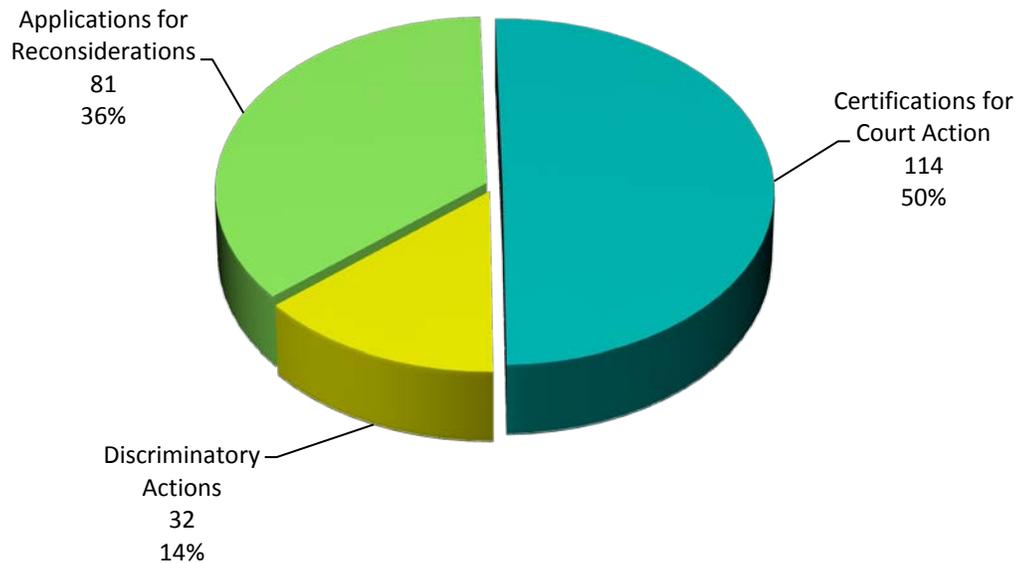
| Source | Intake |
|-----------------|--------------|
| Review Division | 4,591 |
| Direct | 227 |
| Total | 4,818 |

The following two charts show the breakdown of the types of appeals and applications we received in 2014.

APPEALS FROM REVIEW DIVISION BY TYPE



DIRECT APPEALS AND APPLICATIONS BY TYPE



(b) Merit Decisions

WCAT made 4,105 merit decisions on appeals and applications in 2014, 52 of which concerned applications for certificates for court actions. The remaining 4,053 merit decisions concerned appeals from decisions of the Review Division or Board officers, which may be varied, confirmed or cancelled by WCAT.

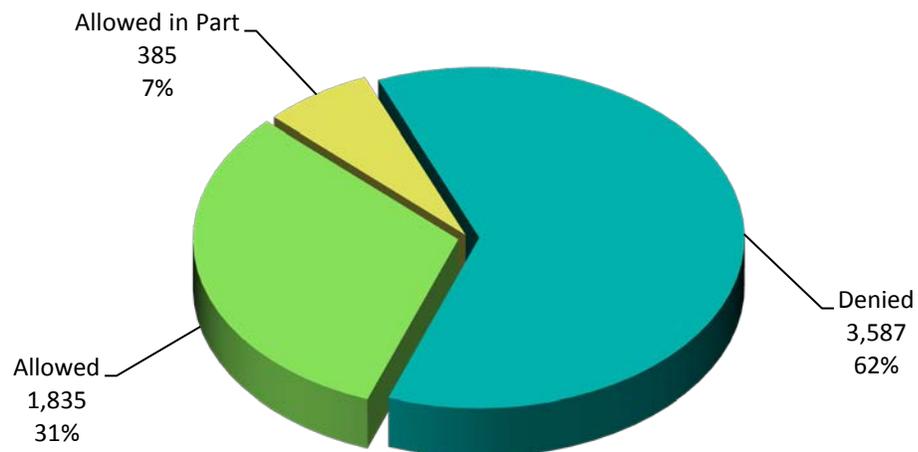
“Vary” means that WCAT varied the previous decision in whole or in part. Accordingly, whether WCAT has fully granted the remedies requested by the appellant on all issues arising under the appeal or merely changed a minor aspect of the previous decision, the decision is considered to have been “varied.” “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. The number of merit decisions cancelling the decision under appeal is too low to be reflected in the table below. Appeals from Review Division decisions regarding reopenings are included as compensation appeals.

| Appeals | | Outcome | |
|------------------------|---------------------|---------|-----------|
| Appeal Type | Number of Decisions | Varied | Confirmed |
| Compensation | 3,940 | 45% | 55% |
| Relief of Costs | 48 | 33% | 67% |
| Prevention | 26 | 15% | 85% |
| Assessments | 26 | 42% | 58% |
| Discriminatory Actions | 13 | 23% | 77% |

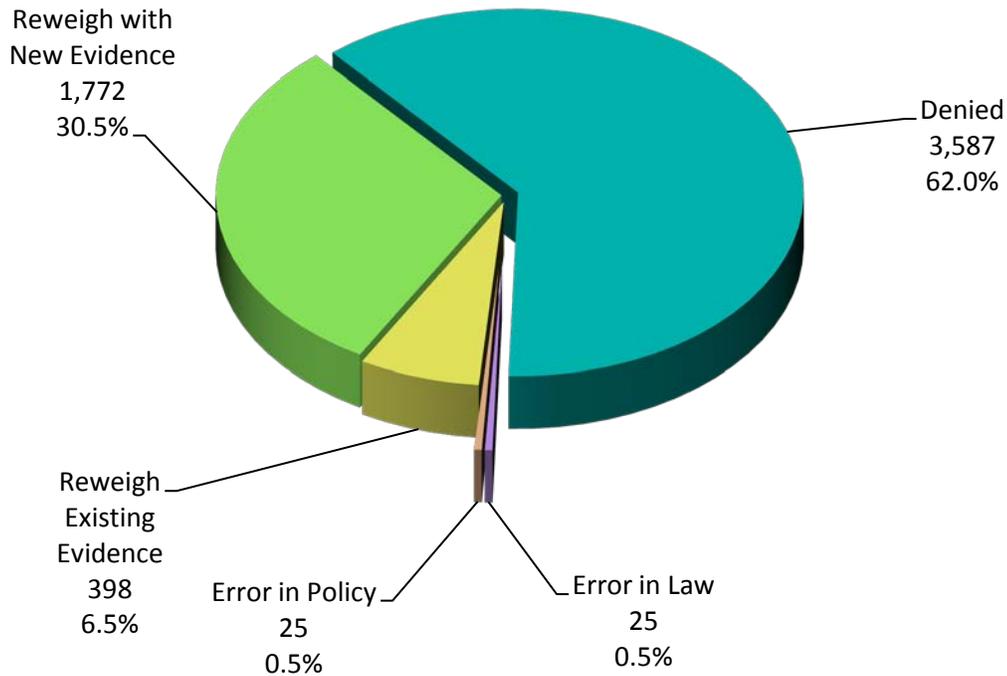
An appeal may raise numerous issues and WCAT may allow or deny the appeal on each issue. In 2014, WCAT decided 5,807 issues that arose out of the 4,105 appeals that led to merit decisions. The following chart shows the percentage of issues for which the appeals were allowed, allowed in part, or denied.

ISSUE OUTCOMES



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 1,110 summary decisions on appeals and applications. In 648 of these decisions, WCAT dismissed the appeal or confirmed that the appellant had withdrawn it. WCAT rejected 344 appeals and applications because there was no appealable issue or the decision under appeal was not appealable to WCAT. Seventeen summary decisions suspended appeals. Of the remaining summary decisions, 57 decided applications for reconsideration, 2 were reconsideration applications that were withdrawn and/or dismissed and 42 denied requests for extension of time to appeal.

(d) Requests for Extensions of Time

WCAT decided 105 requests for extensions of time to appeal, allowing 63 and denying 42.

(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 | 1651 | 29% | 36% | 64% |
| Section 23 – Permanent Partial Disability | 1450 | 26% | 48% | 52% |
| Section 30 – Temporary Partial Disability | 438 | 8% | 39% | 61% |
| Section 6 – Occupational Disease | 359 | 6% | 40% | 60% |
| Section 29 – Temporary Total Disability | 302 | 5% | 35% | 65% |

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 2014, WCAT decided a total of 4,105 merit decisions appeals and applications. WCAT decided 1,806 (44% of the total) after convening an oral hearing and decided 2,299 appeals and applications (56% of the total) by written submission.

(b) Locations of Oral Hearings

In 2014, WCAT held oral hearings in 12 locations around the province. The following table shows the number of oral hearings held in each location.

| Location | Number of Hearings |
|-------------------------------|--------------------|
| Castlegar | 17 |
| Courtenay | 61 |
| Cranbrook | 31 |
| Fort St. John | 8 |
| Kamloops | 67 |
| Kelowna | 85 |
| Nanaimo | 95 |
| Prince George | 44 |
| Terrace | 19 |
| Victoria | 122 |
| Williams Lake | 14 |
| Total outside Richmond | 563 |
| Richmond | 1045 |
| Grand Total | 1608 |

Note: Since 2013 we made changes to the chart above to show the number of hearings held in each location rather than the number of hearing weeks in each location. The number of hearings per week can vary so the actual number of hearings provides more precise information.

(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 2014. The table does not include assessment or relief of costs appeals as the appellant is always the employer.

| Type of Appeal or Application | Appellant / Applicant | | |
|-------------------------------|-----------------------|----------|-----------|
| | Worker | Employer | Dependant |
| Compensation | 92.9% | 6.9% | 0.2% |
| Direct Reopening | 77% | 23% | 0% |
| Discriminatory Action | 71% | 29% | 0% |
| Prevention | 10% | 90% | 0% |
| Reconsideration | 92% | 8% | 0% |

(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 2014.

| Type of Appeal | Percent Represented where Appellant / Applicant is: | | |
|------------------------|---|----------|-----------|
| | Worker | Employer | Dependant |
| Assessment | NA | 62% | NA |
| Compensation | 75% | 75% | 69% |
| Direct Reopening | 33% | 100% | NA |
| Discriminatory Actions | 19% | 85% | NA |
| Prevention | NA | 79% | 100% |
| Reconsiderations | 64% | 77% | NA |
| Relief of Costs | NA | 84% | 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 2014. No precedent panel decisions were pending at the end of 2014.

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 *WCAT-2013-00551*, a WCAT panel referred the issue of the lawfulness of policy item #40.13 of the *Rehabilitation Services and Claims Manual, Volume II (RSCM II)* to the chair under section 251(2) of the Act in 2013. Policy item #40.13 addresses the calculation of permanent disability awards that are based on a loss of earnings. In *WCAT-2014-02307*, dated July 31, 2014, the panel withdrew the referral. The panel determined that the impugned portion of the policy was not applicable to the circumstances of the appeal.

In 2014, no policies were referred to the chair.

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.

WCAT decisions from 2014, 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 2014. This section provides summaries of some of those decisions.

- (a) WCAT Decision No.: WCAT-2014-00203**
Decision Date: January 23, 2014
Panel: H. Morton

In changing an employer's classification unit (CU) the Board cannot rely on an amendment to policy, in this case the creation of a new CU, if the amendment is not yet in place at the date of the Board's decision, even if the Board's decision makes the change prospectively. The Board's decision to change the employer's CU to the new CU was made on October 23, 2012 but made effective January 1, 2013. The amended version of policy item #AP1-37-2 of the *Assessment Manual* was effective on January 1, 2013. The Board could only apply policy from the 2012 *Assessment Manual*, and should not have taken into account amendments to policy item #AP1-37-2 that became effective after the date of the Board's decision.

- (b) WCAT Decision No.: WCAT-2014-00467**
Decision Date: February 14, 2014
Panel: D. Newell, C.J. Katramadakis, G. Riecken

Policy item #41.00 of the RSCM II should be read broadly so as not to limit the evidence an adjudicator can consider to independently verifiable evidence confirming a worker's subjective statement regarding an intent to work beyond age 65. However, independently verifiable evidence must be relied upon if it is available. A broad interpretation of the policy is the only interpretation which gives meaning to both of two otherwise incompatible statements in the policy: 1) the categorical statement that independently verifiable evidence is required; and 2) the exception that "if the worker's statement is not independently verifiable, the Board officer will make a determination based on the evidence available, including information provided by the worker". WCAT noted its interpretation was consistent with the legislative scheme and, unlike the strict approach, avoided possible conflict with sections 99(3) and 250(4) of the Act requiring the Board and WCAT to determine compensation decisions in favour of the worker when the evidence is evenly weighted.

- (c) WCAT Decision No.: WCAT-2014-00679**
Decision Date: March 3, 2014
Panel: C. Agnew

Policy item #31.00 of the RSCM II (Hearing Loss) does not limit the acceptance of tinnitus so that it is only compensable where it arises as a compensable consequence of an accepted claim for noise-induced hearing loss. Policy item #C3-22.00 (Compensable Consequences) may still apply if a prior compensable injury or its treatment is of causative significance to the development of tinnitus. The worker claimed tinnitus developed as a result of previously accepted psychological conditions or from their treatment. WCAT denied the worker's appeal.

- (d) WCAT Decision No. 2014-01272**
Decision Date: April 29, 2014
Panel: S. Yeager

This decision refers to the *Occupational Health and Safety (OHS) Guidelines G-D3-115(1) – 3 Bullying and Harassment* in assessing the meaning of “bullying and harassment” in the workplace, and how the guidelines interact with section 5.1 of the Act and policy item #C3-13.00 of the RSCM II. Specifically, the objective and subjective standards as described in the guidelines are used to assess impugned conduct to decide if certain behaviours in the workplace constitute bullying and harassment.

- (e) WCAT Decision No.: WCAT-2014-01468**
Decision Date: May 15, 2014
Panel: L. Alcuity-Imperial

An “employer” for the purposes of section 5.1(1)(c) of the Act is an individual with direct supervision and control over a worker's working conditions, work performance, and scheduling. In this case, WCAT allowed the worker's appeal on the basis that the worker's claim for a work-caused mental disorder was not excluded by section 5.1(1)(c) because the co-worker who had the interactions with the worker was not the worker's employer.

- (f) WCAT Decision No.: WCAT-2014-01756**
Decision Date: June 10, 2014
Panel: W. Hoole

A review officer does not have the authority to issue new contravention orders. A review officer had failed to resolve the validity of a contravention order issued by the Board, even though the employer had requested a review of the order, and instead concluded that the employer had breached their regulatory obligations on other regulatory grounds. WCAT found that the Act does not grant review officers explicit jurisdiction to substitute one contravention order for another. WCAT allowed the employer's appeal with respect to the review officer's decision to issue a new contravention order, but upheld the original contravention order.

(g) WCAT Decision No.: WCAT-2014-01931
Decision Date: June 25, 2014
Panel: G. Riecken

If a worker claims compensation in relation to a condition that is an occupational disease but the worker has not yet taken time off work, the one-year time limit for making a claim as set out in section 55 of the Act does not begin to run. By statute, the one year period runs from the date of injury, death, or disablement. Disablement is defined as disabled from earning full wages. Here, the Board determined that the worker's claim was for an injury and found that it was brought out of time. WCAT determined that the diffuse nature and gradual onset of the worker's symptoms, as well as the absence of a specific trauma or incident meant her claim was appropriately adjudicated as an occupational disease and not an injury. As the worker was not disabled at the time of the application, it was not out of time. Had the worker's claim been for an injury, the worker's belief that provincial workers' compensation law did not apply to employees of federally regulated banks was an unreasonably held mistaken belief that would not have constituted "special circumstances" as described by section 55.

(h) WCAT Decision No.: WCAT-2014-02222
Decision Date: July 23, 2014
Panel: H. Beauchesne

The cost of living adjustment (COLA) provisions in policy item #40.13 of the RSCM II are only applicable if the Board does not have the occupational class average earnings for the worker's post injury occupation as at the date of injury. On the facts of this case, the Board's application of the COLA provisions in policy item #40.13 was inconsistent with policy because the occupational class average earnings for the worker's post-injury occupation were available for the year of the worker's injury.

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.

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 2014, WCAT received 81 applications for reconsideration and issued 57 stage one decisions. Of the stage one decisions issued, 10 determined that reconsideration grounds existed. The outcomes of the stage one reconsideration decisions were as follows:

| Type of Reconsideration | Number of Reconsideration Decisions | Allowed | Denied |
|-------------------------|-------------------------------------|-----------|-----------|
| Jurisdictional Error | 40 | 9 | 31 |
| New Evidence | 9 | 1 | 8 |
| Both Grounds Alleged | 8 | 0 | 8 |
| TOTAL | 57 | 10 | 47 |

12.1 Reconsideration on the Basis of Jurisdictional Error

In deciding whether WCAT has made a jurisdictional error by breaching the rules of procedural fairness, WCAT considers whether, in all of the circumstances, WCAT acted fairly. WCAT applies the same test for unfairness as the courts do on judicial review (*Administrative Tribunals Act*, section 58(2)(b)).

In deciding whether WCAT has made an error in respect of its narrow jurisdiction, WCAT considers whether it decided a matter that it had no power to decide or failed to decide a matter that it was required to decide.

In deciding whether WCAT had made a patently unreasonable error, WCAT would determine whether a finding of fact or law was capable of being rationally supported. 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 would be considered patently unreasonable if the discretion had

been exercised arbitrarily or in bad faith, for an improper purpose, based entirely or predominantly on irrelevant factors, or failed to take statutory requirements into account (*Administrative Tribunals Act*, section 58(3)).

On December 18, 2014, the B.C. Court of Appeal issued its decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499. The majority of the Court determined that WCAT's jurisdiction to reconsider a decision to cure a jurisdictional error is limited to review for procedural unfairness and for errors in respect of true (narrow) questions of jurisdiction. The majority determined that WCAT does not have the jurisdiction to determine whether a decision contains a patently unreasonable error of fact, law, or exercise of discretion.

Prior to the Court's decision, WCAT considered applications for reconsideration based on alleged patently unreasonable errors, in addition to those based on procedural unfairness and errors of narrow jurisdiction. All of WCAT's reconsideration decisions in 2014 were made before the *Fraser Health* decision was issued.

In 2014, WCAT allowed 9 applications for reconsideration on the ground of jurisdictional error. Of those 9 allowed applications, 1 was 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, and 2 were allowed on the basis of an error in respect of a narrow question of jurisdiction.

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. The remedy requested 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

In 2014, WCAT was served with 18 applications for judicial review of WCAT decisions and 2 appeals of B.C. Supreme Court judicial review decisions.

13.2 Judicial Review Decisions

The following court decisions were issued in relation to judicial review applications in respect of WCAT decisions and related appeals².

(a) *Cole v. British Columbia Nurse's Union*, 2014 BCCA 2 (January 7, 2014)

Decision under review: *WCAT-2008-03834*

The British Columbia Nurses' Union had applied to the B.C. Supreme Court to dismiss the worker's petition for judicial review on the basis of a want of prosecution. The chambers judge had dismissed the union's application because the petitioner was self-represented. The B.C. Court of Appeal allowed the union's appeal, finding that although the courts should accommodate self-represented litigants in procedural matters, a litigant's lack of sophistication is no defence to an application to dismiss for want of prosecution where the delay is not attributable to his or her self-representation. The chambers judge had found that the petitioner's delay had been inordinate, deliberate, and prejudicial. The petitioner had not wanted to proceed with the judicial review until he received disclosure of various documents that WCAT had denied him during the appeal.

(b) *Johnson v. Cassiar Packing Company Ltd.*, 2014 BCSC 152 (January 30, 2014)

Decision under review: *WCAT-2013-02179*

WCAT denied the petitioner's appeal from a Review Division decision that had upheld the Board's refusal to reimburse the petitioner for the cost of un-prescribed non-pharmaceutical grade marihuana purchases. The Court found that WCAT's decision was not patently unreasonable and dismissed the petition for judicial review.

The Court found that WCAT properly decided the appeal on the basis of the only medical evidence that was before it, namely a report by a Board medical advisor that relied on the recommendations of the Board's Evidence Based Practice Group that there was insufficient evidence to support the use of marihuana for the treatment of chronic non-malignant pain. The Court rejected the argument that the medical advisor's opinion could not be relied upon because the doctor had never treated the petitioner as the medical advisor's opinion was based solely on the research available to the Board regarding the use of marihuana in pain reduction, and in no way depended on the nature of the petitioner's injuries or the severity of the pain he suffered from.

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

(c) *Erskine v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2014 BCCA 96 (March 5, 2014)

Decision under review: *WCAT-2012-02032*

WCAT concluded that the petitioner had a forklift accident while he was at work, but his subsequent injuries did not arise out of and in the course of his employment. The B.C. Supreme Court found that WCAT's decision was not patently unreasonable and dismissed the application for judicial review.

The B.C. Court of Appeal denied the petitioner's appeal, finding that the decision was neither patently unreasonable nor procedurally unfair. It determined that it was not unfair for WCAT to prefer evidence in clinical notes to the testimony of the petitioner where the petitioner failed to obtain written clarifying evidence from the doctor or to request cross examination of the doctor in circumstances where the petitioner was aware that the clinical notes had been interpreted unfavourably in the decisions appealed. Here, the clinical note in question was from the day of the work accident and only referred to an earlier non-work related incident reported by the petitioner. WCAT did not refuse to afford to the petitioner an opportunity to test and challenge any evidence. Secondly, the Court found that the obligation to seek out further evidence does not require the Board to obtain further evidence in every situation where there is conflicting evidence. Thirdly, WCAT may reject the conclusions of an expert report by finding the factual underpinnings of an expert report are incorrect. Lastly, WCAT's reasoning in relation to the medical opinions on causation was clear, and therefore its failure to mention a Board medical advisor opinion did not constitute a failure to deal with a critical issue or a substantive error.

(d) *Chinook Scaffolding Systems Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2014 BCSC 997 (March 28, 2014)

Decision under review: *WCAT-2012-03082*

Chinook Scaffolding Systems Ltd. petitioned the Court for judicial review of a WCAT decision which had found that an injured worker was entitled to wage loss benefits even after Chinook offered the worker temporary light duties. WCAT had determined that Chinook's offer was not suitable for the worker. Chinook argued that WCAT was patently unreasonable because it relied on medical evidence that did not evaluate the safety of the light duties or the worker's medical limitations, contrary to policy item #34.11 of the RSCM (the policy on selective/light employment). The Court disagreed, noting that the evidence relied on reveals a rational basis on which WCAT could conclude that the worker could not safely perform the work. The Court dismissed the petition.

(e) **Combs v. Teck Cominco Metals Ltd.**, 2014 BCSC 572 (April 3, 2014)

Decision under review: *WCAT-2012-02569*

The Court determined that the Act was constitutionally applicable to the petitioner, a United States citizen and a resident of Washington State, as there was a sufficient connection between British Columbia and his sporadic work in the province as a truck driver.

In a determination made pursuant to section 257 of the Act, WCAT determined that the petitioner was a “worker” under the Act. It applied policy AP1-2-1 of the *Assessment Manual* which provides, in part, rules for determining whether certain employers in the trucking industry only temporarily carrying on business in the province are exempt from coverage under Part 1 of the Act. The policy sets out thresholds for the number of visits and working days in the province such an employer can have in order to remain exempt. WCAT determined that the petitioner’s employer exceeded those thresholds.

On judicial review, the court determined that WCAT’s decision was not patently unreasonable. The primary issue however was whether the Act was constitutionally applicable to the petitioner. The constitutional question turned on whether the application of the Act to the petitioner (by finding him to be a “worker” under the Act) gave the Act impermissible extra-jurisdictional effect. Constitutionally, the Act cannot apply to a person who lacks a “sufficient connection” to the province. The court determined that WCAT had not determined the constitutional question as it did not have jurisdiction to consider constitutional questions.

Applying the sufficient connection test, the court found that the Act was constitutionally applicable to the petitioner. He was working in the province at the time of the accident, the injury clearly arose at the employer’s plant, the purpose of his trip was work, and he took frequent work trips into the province. His presence in the province was not simply transitory as the province was not merely a corridor for the work performed, it was his loading site. The Court found that the requirements of “order and fairness” did not otherwise prevent the application of the Act as it would not create a multiplicity of competing exercises of state power given that a finding that he was a worker in the province would not affect his rights outside of the province.

The court also determined that the exemption portion of policy AP1-2-1 cannot be constitutionally invalid as it does not purport to govern the application of the Act for constitutional purposes. The exemption portion of the policy applies only to workers and employers who are not otherwise constitutionally excluded from application of the Act. The exclusion portion of policy AP1-2-1 leaves open the possibility that there may be other types of workers and employers to whom the Act will not apply for constitutional law reasons.

(f) *Preast v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2014 BCSC 864 (May 16, 2014)

Decision under review: *WCAT-2012-03342*

The B.C. Supreme Court found that WCAT was not patently unreasonable when it found that the petitioner was not entitled to a loss of earnings award under the current section 23(3) of the Act because the petitioner's post injury earnings, calculated either on the basis of what he was actually earning post injury (including corporate dividends), or on the basis of what he could earn in a suitable alternate occupation, exceeded the statutory maximum established by the Board.

The Court determined that WCAT was not bound by findings in earlier, unappealed, Review Division decisions made on the claim. WCAT was not bound by a finding made by the Review Division at the loss of earning award assessment decision stage that the petitioner was unable to work in his own occupation or adapt to another suitable occupation without a significant loss of earnings. The finding was not binding because it was made at the assessment stage and not the entitlement stage. The petitioner's argument ignored the discretionary aspect of the loss of earnings award provision and the requirement that a worker's position be "so exceptional". Further, the Court found that it is for WCAT to decide whether it is bound by facts found by lower decision makers. The petitioner has appealed this decision to the B.C. Court of Appeal.

(g) *Corcoran v. Workers' Compensation Appeal Tribunal*, 2014 BCSC 1087 (June 17, 2014)

Decisions under review: *WCAT-2013-01869*, *WCAT-2014-00647*

The B.C. Supreme Court determined that employers and workers have independent obligations under the Act to report accidents to the Board. A worker who reports an accident only to his employer will not have established special circumstances for filing his application for compensation out of time where the worker knows he was injured at the time of the accident.

(h) *Marchant v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2014 BCSC 1194 (June 30, 2014)

Decisions under review: *WCAT-2011-01272*; *WCAT-2013-00400*; *WCAT-2013-02754*

The B.C. Supreme Court found that WCAT was procedurally unfair by changing the focus of the decision from that relied on by the Board and the Review Division without notice to the appellant. The earlier decisions denied the worker compensation for his patellofemoral osteoarthritis because his job did not involve sufficient kneeling. WCAT decided the appeal on the basis that no amount of kneeling, absent trauma, could cause the condition.

(i) ***Alamolhoda v. British Columbia (Workers' Compensation Appeal Tribunal)***, 2014 BCSC 1643 (August 28, 2014)

Decision under review: *WCAT-2014-00883*

The B.C. Supreme Court dismissed the petitioner's request for judicial review on the basis that he had failed to demonstrate that the WCAT decision was patently unreasonable. WCAT had confirmed a reconsideration decision of the Board that terminated the worker's temporary total wage loss benefits because it determined that his carpal tunnel syndrome was not caused by the accident and because the worker had misrepresented his post injury abilities by failing to disclose part-time employment.

In dismissing the petition, the Court noted that WCAT had reviewed the evidence and given valid reasons for preferring the medical evidence that supported the Board's conclusions. On the question of whether the petitioner had misrepresented his ability to earn post-injury income, the Court noted that although the petitioner disputed the amount of other work he was found to have done, the material question was whether he worked at all during the period he was receiving benefits. The fact that he did work was not in dispute.

(j) ***Goghari v. Saarela***, 2014 BCSC 1667 (September 2, 2014)

Decision under review: *WCAT-2012-02679*

WCAT determined that the petitioner's employer had not engaged in discriminatory action contrary to section 151 of the Act when it terminated the petitioner's employment. The reason for the termination was due to a slowdown in work and not because of any workplace safety complaints raised by the petitioner. The B.C. Supreme Court dismissed the petitioner's request for judicial review on the basis that the WCAT decision was neither patently unreasonable nor procedurally unfair. The Court found that there was at least some evidence to support WCAT's conclusion that there was a slowdown in business and that WCAT was not unfair when it denied the petitioner an opportunity to cross examine a witness as the petitioner did not provide information to WCAT as to why the evidence could not be obtained from a witness that was in attendance at the hearing. WCAT was also not unfair in refusing to order disclosure of certain documents from the employer given that the petitioner had not demonstrated the relevance or necessity of the documents. Lastly, WCAT was not unfair in asking extensive questions of the petitioner at the hearing.

(k) ***Funk v. British Columbia (Workers' Compensation Appeal Tribunal)***, 2014 BCSC 1737 (September 16, 2014)

Decision under review: *WCAT-2011-01232*

The petitioner challenged a decision of WCAT confirming that his compensable condition had resolved. The petitioner argued that WCAT failed to apply policy items #26.30 and #97.32 of the RSCM II. The WCAT panel found that policy item #26.30 is concerned with a worker's initial entitlement to compensation for an

occupational disease and does not apply to the question of the duration of a worker's benefits. The Court concluded that WCAT's interpretation of the policy was a matter within its exclusive jurisdiction and, in this case, could not be said to be patently unreasonable. With respect to the application of policy item #97.32, which says a worker's statement about his or her own condition is evidence, the Court said the petitioner's complaint was really about the weight WCAT gave to his evidence and it is not for the Court on judicial review to reweigh the evidence.

**(l) *Bandic v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 490
(December 12, 2014)**

Decision under review: *WCAT-2012-01074*

WCAT determined that the petitioner was not entitled to a loss of earnings award under the provisions of the Act as it read before June 30, 2002. The entitlement issue arose following the acceptance of a new permanent condition on his claim more than three years after the original injury. Based primarily on the findings of earlier appellate decisions regarding his physical condition and employability prior to the reopening, WCAT determined that at the time of the reopening the worker was not a viable entity in the workforce for reasons unrelated to his injuries, that his reopening wage rate should therefore be zero, and that he would therefore would not suffer a loss of earnings as a result of his new condition.

The B.C. Supreme Court found that WCAT was patently unreasonable. The B.C. Court of Appeal allowed WCAT's appeal on the basis that the B.C. Supreme Court had misapplied the standard of patent unreasonableness when it determined that WCAT had failed to "properly consider other evidence going to the reason of unemployment". The Court of Appeal determined that the correct question to ask was whether there was "some evidence" to support WCAT's decision. It determined that there was. The Court found that WCAT is entitled to deference in its interpretation of prior decisions on a claim file.

**(m) *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*,
2014 BCCA 499 (December 18, 2014)**

Decisions under review: *WCAT-2010-03503, WCAT-2011-03079, WCAT-2010-03507, WCAT-2011-03080, WCAT-2010-03502, WCAT-2011-03081*

The majority of a five justice division of the B.C. Court of Appeal determined that WCAT's reconsideration decision was a nullity as only the panel that made the original decision is authorized to reopen the appeal to cure a jurisdictional defect. The Act does not authorize the WCAT chair to appoint a different panel to address that question. In the absence of new evidence, finality rests with the original decision maker.

The majority also found that it was patently unreasonable for WCAT to conclude that it had the power, at common law or pursuant to section 253.1(5) of the Act, to consider whether a WCAT decision should be set aside on the basis that it is patently

unreasonable. WCAT's power to reopen an appeal to cure a jurisdiction defect is limited to curing errors of true jurisdiction and breaches of procedural fairness. It is only in those circumstances that the tribunal has failed to fulfill its statutory task.

Section 253.1(5) preserves only the existing limited common law exceptions to the operation of the principle of *functus officio*. The exceptions do not extend to curing errors made within jurisdiction. Review for reasonableness is a review for errors made within jurisdiction. The Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick* did not change the basic dichotomy between lack of jurisdiction and excess or loss of jurisdiction. While mindful of the adage that a tribunal does not have the jurisdiction to make patently unreasonable decisions, the majority determined that the decisions regarding *functus officio* refer only to failures by tribunals to complete their mandatory tasks. To find that a tribunal has the power to cure errors that result in a loss of jurisdiction would undermine finality and the general application of the principle of *functus officio*.

Lastly, the majority agreed with the B.C. Supreme Court that WCAT's majority decision was patently unreasonable for finding the workers' breast cancer was due to the nature of their employment. Two of the three justices of the majority found that the existence of a statistical anomaly (namely a cancer cluster) constitutes some supporting evidence for the decision but is not a sustainable basis for the decision. They agreed with a third justice who found that "even if it could be said that there was some evidence before [WCAT] to support its finding, its decision is, on the basis of the evidence before it, openly, clearly, evidently unreasonable". The third justice found the decision to be patently unreasonable given the absence of any evidence and the expert opinion to the contrary - none of which found the cancer was due to the nature of the employment. The suggestion that the cancer was due to the employment did not rise above speculation.

WCAT and the individual workers have separately sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

14. OTHER COURT DECISIONS

The following court decisions are of significance to WCAT or the workers' compensation system generally.

**(a) *Lockyer-Kash v. Workers' Compensation Board*, 2014 BCSC 1443
(December 18, 2104)**

The worker filed a petition in the B.C. Supreme Court challenging a former policy of the board of directors of the Board respecting the payment of interest on retroactive benefits. The policy in question, item #50.00 of the RSCM, provided that interest may be paid only if there is a "blatant Board error" in the original decision denying the benefit.

The B.C. Supreme Court certified the petition as a class action pursuant to the *Class Proceedings Act*, R.S.B.C., c. 50. The Court identified the class as all workers whose claim for interest was decided on or after November 1, 2001 and before January 1, 2014. The common issues were determined to be: (a) whether the applicant and the members of the class are entitled to interest on their retroactive pension and wage loss awards as part of compensation entitlement under ss. 5 to 8 of the Act; and (b) whether the “blatant Board error” aspect of the interest policy, and a subsequent decision of the board of directors maintaining the policy, is patently unreasonable and a nullity at law.

In February of 2015, the B.C. Court of Appeal allowed the Board’s appeal of the B.C. Supreme Court decision (*Lockyer-Kash v. Workers’ Compensation Board of British Columbia*, 2015 BCCA 70). The Court of Appeal found that a class proceeding is not the preferable procedure for the fair and efficient resolution of the appropriate common issue of whether the policy is patently unreasonable. The Court noted that a class proceeding cannot create substantive rights nor set aside the decisions issued on individual claims. For this reason, a class proceeding could provide no benefit to those workers who have not exhausted their internal remedies within the workers’ compensation system. The Court found that the class members would be in the same position had Ms. Lockyer-Kash pursued her judicial review proceeding without it being certified as a class proceeding. The class members would have the benefit in a class proceeding of the ruling that policy #50.00 was patently unreasonable, but would be entitled to no other remedy. They would gain the same benefit if it were not a class proceeding, on the basis of *stare decisis*. Lastly, the Court determined that the petitioner’s access to justice would not be denied as the petitioner had not deposed that her judicial review proceeding could not be pursued unless it was certified as a class proceeding.

**(b) *Martin v. Alberta (Workers’ Compensation Board)*, 2014 SCC 25
(March 28, 2014)**

The Alberta Workers’ Compensation Board, its internal Review Body, and the Alberta Appeals Commission, denied a claim by a federal employee (a park warden) for compensation arising from chronic onset stress. It did so on the basis that the claim did not meet the criteria set out in the Alberta Board’s binding policy related to chronic onset stress. Specifically, the work-related events were not “excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation” and there was no “objective confirmation of the events”. On judicial review the Commission’s decision was set aside on the basis that the policy did not apply to federal employees, but the decision was restored on appeal.

The Supreme Court of Canada (SCC) determined that the federal statute that governs workers’ compensation for federal employees (the *Government Employees Compensation Act* (GECA)) incorporates provincial workers’ compensation regimes, including eligibility criteria set out in policy, except where they directly conflict with the GECA (i.e. are specifically included or excluded by GECA). The SCC found that the particular policy in this case did not conflict with the definition of “accident” in GECA – which is broad and open-ended – and the Commission’s decision finding the appellant was ineligible for compensation was reasonable.