



tribunal

Annual Report
appellant

employer

WCAT 2019
Annual Report

tribunal
worker

Annual Report

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CHAIR'S MESSAGE

I am pleased to present the 2019 Annual Report for the Workers' Compensation Appeal Tribunal (WCAT). This report is an overview of WCAT's operations in 2019.

WCAT continued, as it has throughout its history, to be a high volume appeal tribunal, with workers and employers filing more than 3,000 appeals and applications in 2019. The vast majority of those appeals and applications continue to be appeals regarding entitlement to benefits under compensation claims.

In 2019, WCAT continued to make positive strides in its goal of ensuring that parties to an appeal receive decisions in a timely manner. For the third consecutive year WCAT was able to reduce the time from receiving a notice of appeal to issuing a final decision, with a reduction of nearly 10% compared to 2018. 2019 saw WCAT issue decisions, on average, in the least amount of time in its 16-year history, while continuing to provide quality decision making consistent with the *Workers' Compensation Act*, policy, and WCAT precedent decisions.

As noted in previous reports, WCAT is striving to improve accessibility to the tribunal. In 2019, the tribunal began to take steps in this regard with a particular focus on improving accessibility for parties who are Indigenous. Specifically, WCAT began to offer parties the opportunity to self-identify as Indigenous on our Notice of Appeal and Notice of Participation forms. WCAT also created a navigator position to assist Indigenous appeal participants throughout the appeal process, re-designed one of the WCAT hearing rooms in order to lessen the adversarial feel of the appeal process, and arranged to hold hearings in new locations closer to individuals' home communities.

While the above steps were taken as part of WCAT's response to the Calls to Action of the Truth and Reconciliation Commission, the tribunal's hope is that those efforts will provide insight into general steps that can be taken to improve access to all appellants and respondents in the province. To that end, WCAT also took steps to optimize all of its forms for use on smartphones and tablets in 2019, as part of an ongoing website redesign process.

As always, I would like to take this opportunity to thank all of my colleagues for their efforts in ensuring another successful year. It is the dedication and hard work of WCAT's employees and appointees which enables the tribunal to fulfill its mandate to deliver predictable, consistent, and efficient decision-making to the public. I look forward to continuing our efforts to improve WCAT's service to British Columbians in 2020.

Andrew Pendray
Chair

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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 such as decisions respecting vocational rehabilitation.

STATUTORY FRAMEWORK

a) Changes in 2019

Section 1 and section 5.1(4) of the *Workers' Compensation Act* were amended in 2019 by the *Workers Compensation Amendment Act, 2019* (Bill 18). The change came into force on May 16, 2019 and applied to all section 5.1 claims made but not finally adjudicated before May 16, 2019. The amendment replaced the definition of "firefighter". Among other changes, it was changed to read that it means a member of a fire brigade "working with or without remuneration" and to include a member of a fire brigade who is assigned primarily to "investigation duties respecting the cause, origin or circumstances of a fire". Section 6.1 was also amended to repeal section 6.1(1), which had defined "firefighter".

The *Workers Compensation Act* was also revised under the *Statute Revision Act* in 2019. The *Statute Revision Act* establishes a mandate for the Chief Legislative Counsel of BC to consolidate, renumber, and reorganize British Columbia's acts into more coherent and readable "revised" acts. The revision of the *Workers Compensation Act* (Act) makes no changes to the law regarding workers' compensation, occupational health and safety, and employers' assessment premiums. The Act has been reorganized so specific laws are easier to find and the language has been modernized so the Act is easier to read and understand. The proposed revision of the Act was reviewed and approved by the B.C. Legislative Assembly's Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills. By order in council No. 512, the revised Act comes into force on April 6, 2020.

The *Mental Disorder Presumption Regulation*, B.C. Reg. 136/2018 was amended, for purposes of the presumption set out in section 5.1(1) of the Act, to include in the eligible occupations described in section 5.1(4) of the Act the occupations of "emergency response dispatcher", "health care assistant", and "nurse". The Regulation defines these terms. The amending regulation, B.C. Reg. 92/2019, was deposited April 16, 2019.

The Workers' Compensation Board amended several other Regulations in 2019, effective April 6, 2020: the *Fishing Industry Regulations*, the *Lower Maximum Administrative Penalties Regulation*, the *Occupational Disease Recognition Regulation*, the *Occupational Health and Safety Regulation*, the *Reports of Injuries Regulations*, and the *Review of Old Permanent Disability Awards Regulation* (now

entitled the *Reconsideration of Prescribed Compensation Claims Regulation*). The Board amended these regulations by an order deposited December 17, 2019 (B.C. Reg. 279/2019). Some of the changes in these regulations are consequential upon the Act statute revision that will be in force on the same date.

There were no amendments to the *Administrative Tribunals Act* or to the federal *Government Employees Compensation Act* in 2019.

b) Practice and Procedure

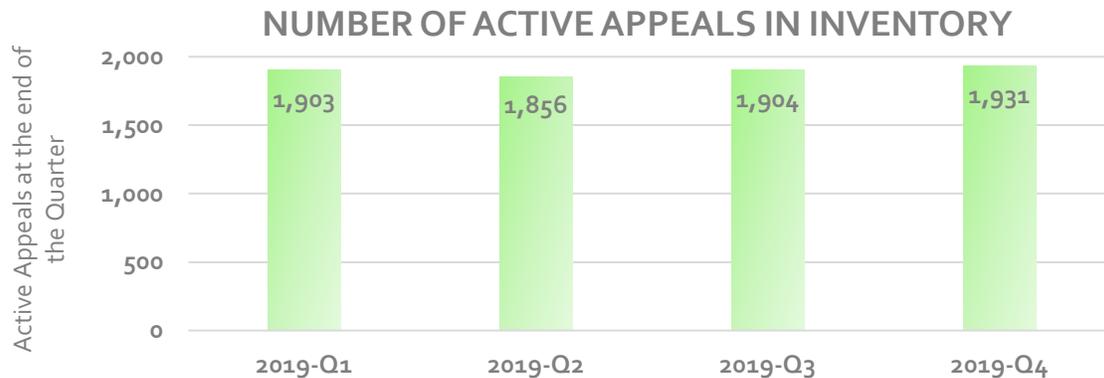
There were no changes to the *WCAT Manual of Rules of Practice and Procedure* (MRPP) in 2019.

STATISTICS

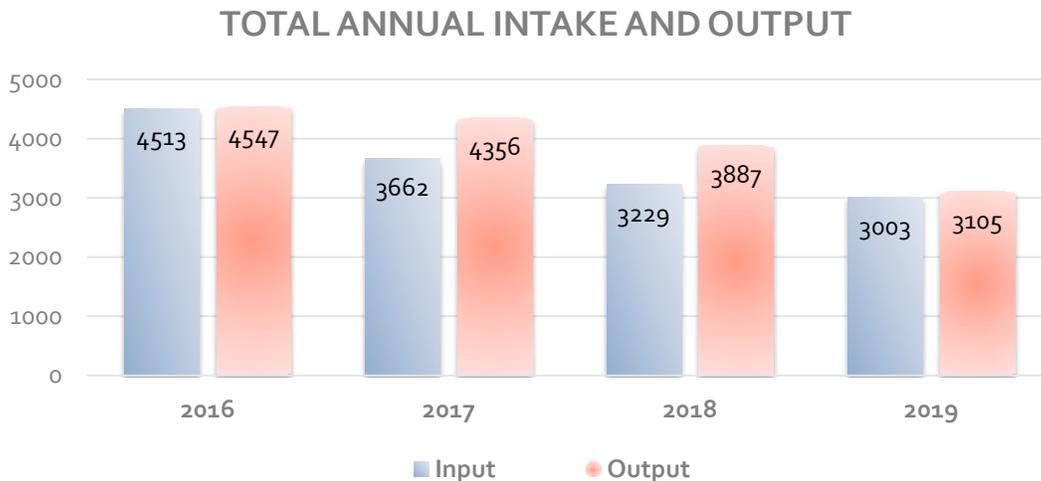
Overview of Appeals Inventory

This section contains three charts providing a high-level overview of the status of our appeals inventory for 2019. WCAT records appeals by their date of initiation.

WCAT's total active inventory at December 31, 2019 was 1,931 appeals compared to 2,034 at the end of 2018.



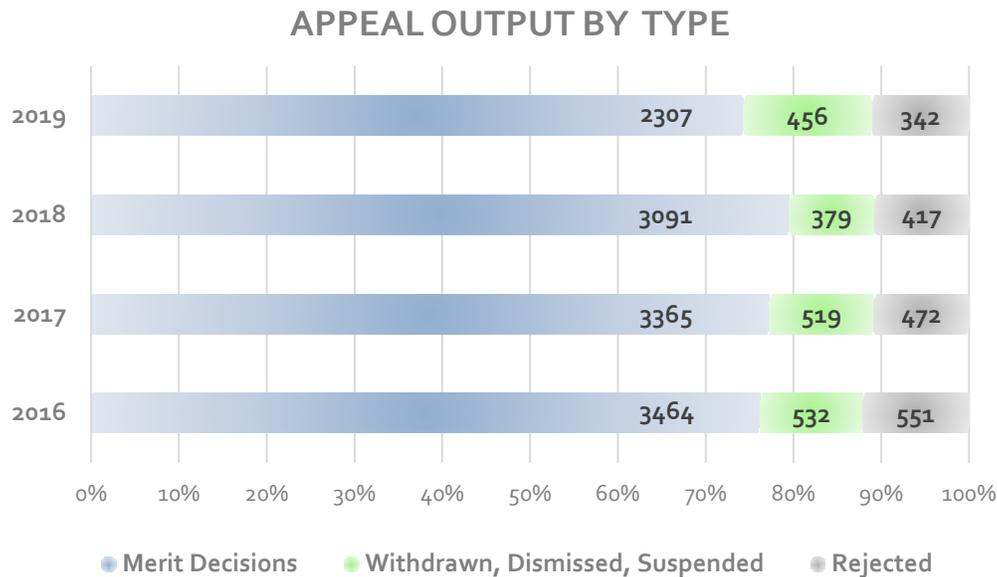
WCAT received 3,003 new appeals in 2019. Intake of new appeals for 2019 was consistent with the volume forecasted, based on an analysis of historical intake and appeal rates.



With the vast majority of WCAT appeals coming from the Review Division, WCAT's reduced intake of new appeals over the past four years has corresponded with a decrease in the number of reviews at the Review Division (from 15,523 to 14,101), and the significant decrease in the number of Board decisions confirmed by the Review Division (from 7,223 in 2016 to 5,171 in 2019).

WCAT's forecast for 2020, based on analysis of historical intake and appeal rates, called for similar intake as 2019, with between 2,900 and 3,100 new appeals and applications expected. The effect of the ongoing COVID-19 pandemic on that forecast is not yet known.

Our output of summary and merit decisions and determinations in 2019 was 3,105.



Time to Decision

Section 253 of the Act requires WCAT to decide new appeals within 180 days from the date that WCAT receives from the Board the records (disclosure) relating to the decision under appeal. The appeal submission process does not begin until WCAT receives that disclosure from the Board.

The chair or the chair's delegate may extend the 180 day statutory timeframe up to a maximum of 90 days if the appellant requests and receives additional time to make submissions or submits new evidence and WCAT grants to the other parties a similar opportunity (additional time for submissions).

The chair or the chair's delegate may also extend the statutory timeframe on the basis of complexity (additional time for decision). For example, additional time may be required where a WCAT panel finds it necessary to pursue further investigations.

Lastly, an appeal may be suspended in situations where WCAT is waiting for any of the following:

- 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 Board decision respecting a matter that is related to an appeal; or,
- a pending report from an independent health professional.

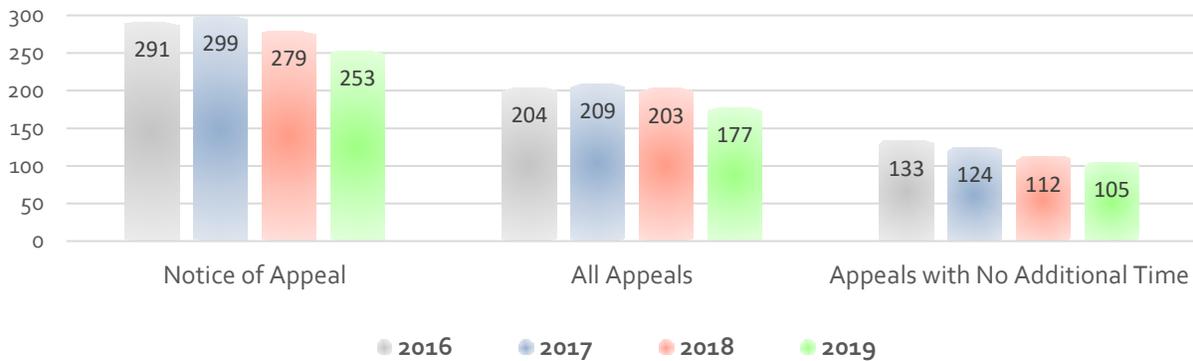
The 180-day statutory timeframe clock is stopped in such situations.

The table below illustrates the average number of days for completing appeals in 2019, taking into account the various situations described above.

<u>Notice of Appeal</u>	<u>All Appeals</u>	<u>Appeals With No Additional Time</u>
Time from the date of receipt of the notice of appeal to the date the final decision is issued.	Time from the date of receipt of disclosure from the Board to the date the final decision is issued for all appeals (including those where additional time for submissions and additional time for decision was granted).	Time from the date of receipt of disclosure from the Board to the date the final decision is issued (excluding appeals where there was either additional time for submissions or additional time for decision).
253	177	105

As part of its strategic plan, one of WCAT’s goals is to provide timely decision-making. In 2019, WCAT took steps to reduce the time from the date the notice of appeal is received to the date that disclosure is received by increasing the number of resources assigned to the assessment phase of an appeal. As can be seen from the table below, the time to final decision has improved across all categories in 2019.

TIMELINESS - Number of Days to Decision



Appeals and Applications

Appeals and applications comprise:

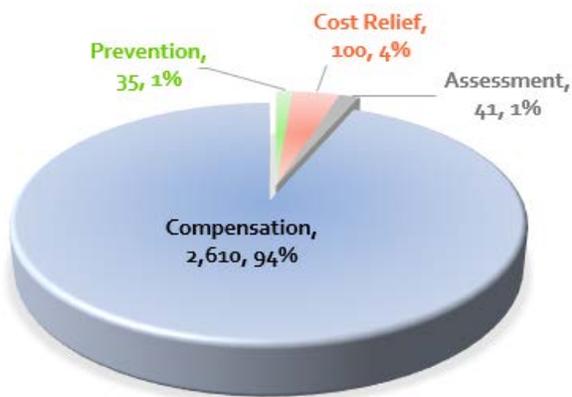
- appeals to WCAT from decisions made by review officers in the Review Division and direct appeals from decisions of other Board officers;
- applications for certificates for court actions; and,
- applications for reconsideration of WCAT decisions.

The Act provides that parties may appeal to WCAT from compensation, assessment, and occupational health and safety 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.

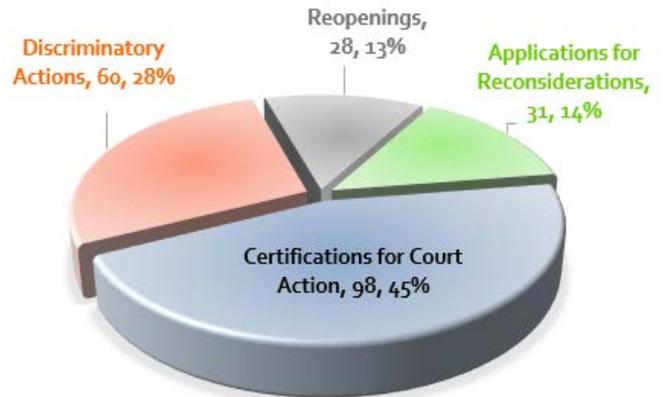
a) Type of Appeal

Of the 3,003 appeals received by WCAT in 2019, 93% arose from decisions of Board review officers and 7% were direct. The following two charts show the breakdown of the types of appeals and applications we received in 2019:

APPEALS FROM REVIEW DIVISION BY TYPE



DIRECT APPEALS AND APPLICATIONS BY TYPE



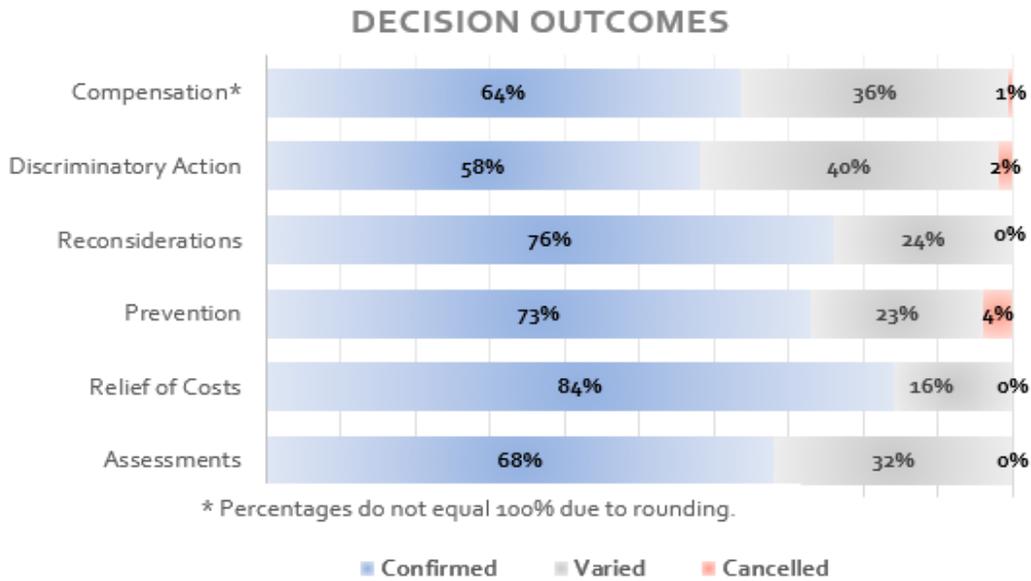
b) Merit Decisions

WCAT made 2,307 merit decisions on appeals and applications in 2019, 36 of which concerned applications for certificates for court actions. The remaining 2,271 merit decisions concerned appeals from decisions of the Review Division or Board officers, which may be varied, confirmed, or cancelled by WCAT.

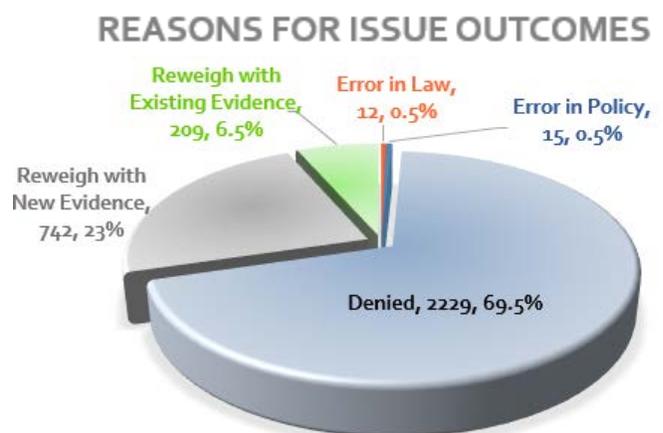
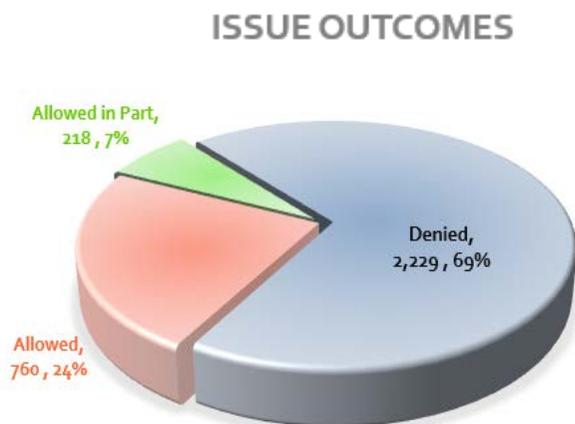
“Vary” means that WCAT varied the previous decision in whole or in part. Accordingly, whether WCAT has fully granted the remedies requested by the appellant on all issues arising under the appeal or merely changed a minor aspect of the previous decision, the decision is considered as “varied.”

“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.

Overall, in 2019, 35% of WCAT appeals were varied, 63% were confirmed, 1% were cancelled and 1.5% were certifications to court*. The graphics below demonstrate the decision outcomes in the different types of appeal in 2019:



An appeal may raise numerous issues and WCAT may allow or deny the appeal on each issue. In 2019, WCAT decided 3,207 issues that arose out of the 2,307 appeals that led to merit decisions.



c) 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	995	31%	29%	71%
Section 23 – Permanent Partial Disability	527	16%	39%	61%
Section 30 – Temporary Partial Disability	271	8%	31%	69%
Section 6 – Occupational Disease	261	8%	33%	67%
Section 29– Temporary Total Disability	168	5%	27%	73%

d) Requests for Extensions of Time

WCAT decided 144 requests for extensions of time to appeal; allowing 80 and denying 64.

General

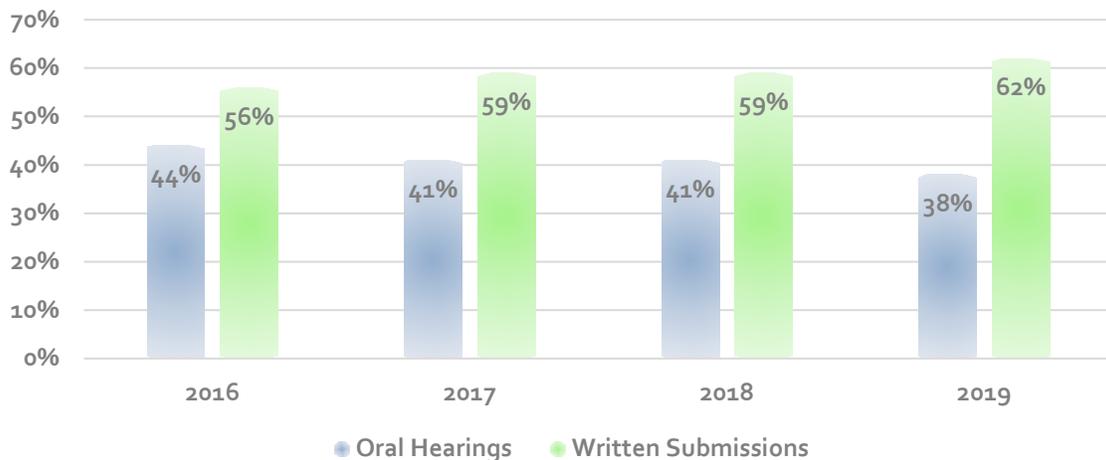
Appeal Paths

WCAT decides appeals and applications in one of two ways:

- 1) after an oral hearing; or,
- 2) after reading and reviewing the Board’s records, any new evidence, and the submissions of the parties.

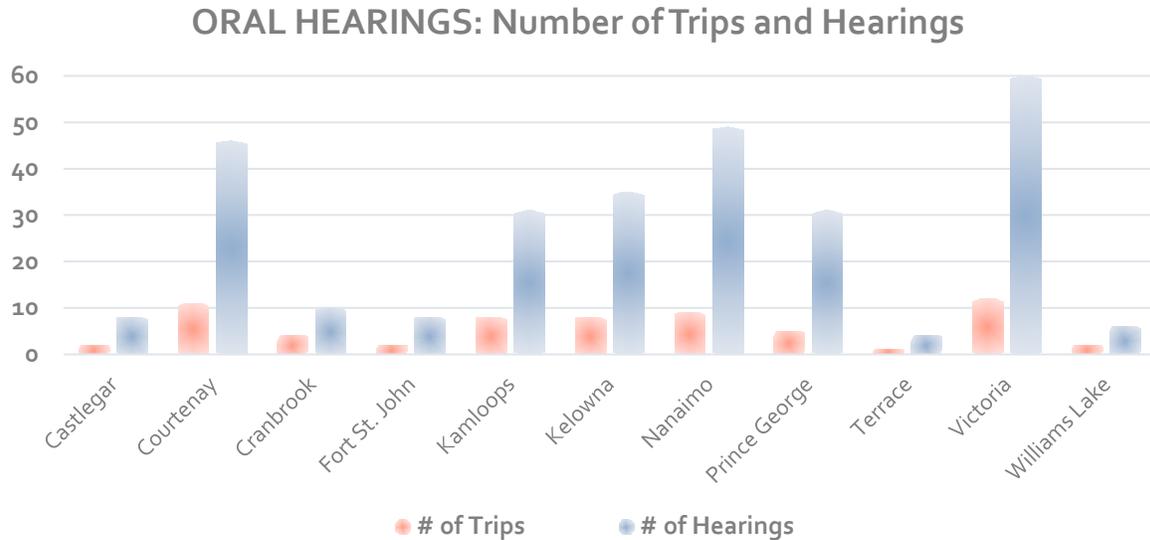
In 2019, WCAT decided 886 appeals and applications (38%) after convening an oral hearing and 1,421 (62%) after consideration of written submissions.

ORAL HEARINGS vs. WRITTEN SUBMISSIONS



Location of Oral Hearings

WCAT held 288 oral hearings in 11 locations around the province in addition to the 488 held in Richmond. The following table shows the number of oral hearings held in each location:



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 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	84%	15.7%	0.3%
Direct Reopening	94.2%	5.8%	0%
Discriminatory Action	58.3%	41.7%	0%
Prevention	11.4%	88.6%	0%
Reconsideration	93.5%	3.3%	3.2%

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.

Type of Appeal	PERCENT REPRESENTED WHERE APPELLANT / APPLICANT IS:		
	Worker	Employer	Dependant
Assessment	0%	47.2%	0%
Compensation	60.3%	81.9%	80%
Direct Reopening	5.6%	42.9%	0%
Discriminatory Actions	32.5%	83.9%	0%
Prevention	0%	66.7%	0%
Reconsiderations	51.6%	100%	0%
Relief of Costs	0%	92.6%	0%

While the number of employers who have representation in compensation appeals has remained relatively consistent over the past five years, we have seen a decrease in the number of appellant workers with a representative. The increase in self-represented workers underscores the need for WCAT to continue to work to ensure that the tribunal's processes are accessible to all.

PERCENTAGE OF WORKERS/EMPLOYERS WITH A REPRESENTATIVE - Compensation Appeals



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, 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 contains documents listing all noteworthy WCAT decisions organized by subject and date.

Summaries of New Noteworthy WCAT Decisions in 2019

(a) A1601702 - Decision Date: January 12, 2017 Panel: G. Riecken

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

(b) A1604527 - Decision Date: May 25, 2017 Panel: M. Clarke

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

(c) A1605218 - Decision Date: January 13, 2017 Panel: H. Morton

A written request for reconsideration of a Review Division decision is not a notice of appeal for the purpose of Rule 5.1.1 of the MRPP but represents a written expression of disagreement with the Review Division decision that, if received by the Review Division within the time limit for an appeal may be considered special circumstances that precluded the timely filing of an appeal.

(d) A1606018 - Decision Date: September 19, 2017 Panel: W. Hoole

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

(e) A1700498 - Decision Date: August 30, 2018 Panel: R. Kyle

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

(f) A1701547 - Decision Date: October 19, 201

Panel: H. Morton

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

(g) A1900037 - Decision Date: September 27, 2019

Panel: E. Murray

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

(h) A1900153 - Decision Date: February 28, 2019

Panel: W. Hoole

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

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 have been discovered through the exercise of reasonable diligence. 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 2019, WCAT issued 33 stage one decisions. Of the stage one decisions issued, eight determined that reconsideration grounds existed. The outcomes of the stage one reconsideration decisions were as follows:

Type of Reconsideration	Number of Reconsideration Decisions	Allowed/Allowed in part	Denied
Jurisdictional Error	11	4	7
New Evidence	14	4	10
Both Grounds Alleged	8	0	8
TOTAL	33	8	25

JUDICIAL REVIEW OF WCAT DECISIONS

WCAT decisions are final and conclusive. There is no further avenue of appeal.

A party may apply to the Supreme Court of British Columbia 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 requested remedy will, therefore, be granted only in limited circumstances. A judicial review is not an appeal and does not involve an investigation into the merits of the decision. Under section 57(1) of the *Administrative Tribunals Act* (ATA), an application for judicial review of a final decision of WCAT must be commenced within 60 days of the date the decision is issued. The court may extend the time for applying for judicial review under certain circumstances.

Judicial Review Applications

In 2019, WCAT was served with 27 applications for judicial review of WCAT decisions and nine appeals of a Supreme Court of British Columbia judicial review decision.

Judicial Review Decisions

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

a) *Simpson v. Workers' Compensation Appeal Tribunal*, B.C.S.C. Victoria Registry, No.14-4206 (March 5, 2019)

Decision Under Review: WCAT-2014-03091

Pursuant to section 23.1 of the Act, WCAT determined that the petitioner would have retired once she reached the age of 65 had the work injury not occurred and therefore confirmed that date as the date her 100% loss of earnings permanent disability award would terminate. The petitioner was 46 years old at the time of the accident. The petitioner had argued that she would have worked to the age of 80 as a labour relations specialist, a position that she had obtained just prior to the accident. WCAT concluded that the petitioner's evidence regarding her intentions was more in the nature

of expressing her hopes and aspirations and that independently verifiable evidence was lacking. The Court denied the petitioner's judicial review, finding that WCAT's decision was not patently unreasonable. There was some evidence to support WCAT's finding, and WCAT did not ignore the fact that she had in fact obtained employment in the field that she said she would continue to work in beyond the age of 65.

b) *Kostiuk v. Workers' Compensation Appeal Tribunal*, 2019 BCSC 363 (March 15, 2019)

Decision Under Review: A1603245

The petitioner, who had a significant pre-existing low back condition, injured his back at work. The Board found that he had temporarily strained his low back and that ongoing problems beyond a certain date were not compensable. Responding to further requests from the petitioner, the Board determined that the incident did not aggravate his pre-existing condition (confirmed by WCAT in a 2013 decision) nor was it a new back injury (confirmed by WCAT in a 2014 decision). In the course of the 2014 appeal WCAT obtained a new medical opinion, which stated that the petitioner did not sustain a new back injury but that the accident likely aggravated his pre-existing condition. Relying on the new opinion, the petitioner then applied for reconsideration of the 2013 WCAT decision on the basis of new evidence. WCAT determined that the new opinion met the threshold for new evidence in section 256 of the Act but that it did not change the result of the 2013 decision. On judicial review, the Court set aside WCAT's reconsideration decision on the basis that the WCAT panel misapprehended the medical opinion in two different ways. First, that the opinion did in fact support a conclusion opposite the one reached by the original panel; and second, that there was no medical opinion suggesting that the "pre-existing changes" within the petitioner's lumbar spine and his L5/S1 disc condition were distinct diagnoses. The Court also found that WCAT failed to address an important matter in policy item C3-16.00 of the RSCM II, which required a determination of whether the petitioner's pre-existing condition was at a critical point at the time of the accident. Finally, the Court found that WCAT failed to determine whether the petitioner's condition was aggravated, activated, or advanced more quickly by the workplace accident.

c) *Lissimore v. Workers' Compensation Appeal Tribunal*, 2019 BCSC 444 (March 27, 2019)

Decision Under Review: WCAT-2016-00128

Pursuant to section 251 of the Act, WCAT concluded that item (B) #6 in the *Permanent Disability Evaluation Schedule* (PDES) is not so patently unreasonable it could not be supported by the Act or the Regulations. That item sets out the percentage of impairment for certain losses of range of motion to a worker's shoulder. The petitioner sought judicial review of WCAT's decision and the petition was dismissed. The Court found that the principles of statutory interpretation required the Board to consider whether the average worker with the petitioner's shoulder injury would be expected to have reduced earning capacity, with reference to the PDES. The Board was empowered to take this approach by section 23(2) of the Act. The Court found it was not patently unreasonable for WCAT to determine that the use of the PDES to measure loss of earning capacity was not unlawful. It was also not patently unreasonable for WCAT to not consider the petitioner's actual loss of earnings as a relevant factor in determining her award under section 23(1) of the Act because section 23(1) awards do not consider actual loss of earnings.

d) *Morris v. British Columbia (Workers' Compensation Board)*, 2019 BCSC 706 (May 7, 2019)

Decisions Under Review: WCAT-2013-00635, WCAT-2013-0635a, WCAT letter dated February 7, 2018, and a summary decision dated June 20, 2018

The Court dismissed the petition, finding that the petitioner could not rely on evidence about his condition that post-dated the 2013 WCAT decision to establish that a factual finding in that decision was patently unreasonable. Such evidence was not before WCAT and is inadmissible on judicial review. WCAT had determined that the petitioner's condition had plateaued. The new evidence purported to show that his condition had in fact subsided (and then

later worsened). The Court also found that WCAT's 2018 decision, in which WCAT found that it could not decide whether to reopen the worker's claim or not in the absence of a Board decision on reopening, was not a patently unreasonable interpretation of section 240(2) of the Act. The Court also rejected the petitioner's request for an order that benefits be payable by WCAT.

e) *Webb v. Canada (Attorney General)*, 2019 BCSC 760 (May 14, 2019); 2019 BCCA 288 (July 30, 2019)

Decision Under Review: A1600564

The B.C. Supreme Court denied the petitioner's request under section 57(2) of the ATA to extend the time to file a judicial review of his WCAT decision, finding that there was no reasonable likelihood that the petition would succeed. WCAT had found that his work activities (vibrations and shocks arising from the operation of rigid-hulled inflatable boats while working as a fisheries officer) did not cause his knee osteoarthritis. WCAT preferred the medical evidence provided by Board medical advisers to the medical opinions the worker did provide. WCAT found that references to studies the petitioner provided showing a correlation between the operation of rigid-hulled inflatable boats and various types of injuries was not helpful because it did not provide evidence to establish that the petitioner's own employment activities likely caused his osteoarthritis. The petitioner argued that WCAT had been unfair by restricting the time available to him at the hearing of the appeal and that the decision was patently unreasonable. The judge disagreed, finding that the petitioner had a fair opportunity to present his case and that WCAT's analysis of the evidence and submissions was comprehensive. The Court of Appeal agreed, finding that there was nothing in the record to support the inference that WCAT's evidentiary findings were arbitrary or made in bad faith. The Court also found that there was no evidence that the WCAT panel was biased.

f) *Colwill v. Workers' Compensation Board*, 2019 BCSC 826 (May 27, 2019); 2019 BCCA 453 (December 11, 2019)

Decision Under Review: A1607114

WCAT determined that policy item #37.21 of the RSCM II was not so patently unreasonable that it could not be supported by the Act and the Regulations and therefore declined to refer the policy to the chair of WCAT under section 251 of the Act. The policy said that the minimum amount of compensation set out in section 22 of the Act only applies in cases where a worker is found to be 100% disabled under the section 23(1) method of permanent disability assessment (i.e., the functional impairment method), as opposed to where a worker is entitled to a 100% award under the section 23(3) method of assessment (i.e. unemployable under the loss of earnings method). The petitioner had been determined to be 73% disabled under the functional impairment method but was also found by the Board to be unemployable under the section 23(3) method of assessment. On judicial review, the Court held that the policy is inconsistent with any reasonable interpretation of the Act and declared the policy (and a corresponding part of policy #39.30) to be of no force and effect. In the course of reaching its decision, the Court confirmed that a policy of the Board can be directly reviewed by the court after WCAT has made a decision under section 251 of the Act that policy is lawful. The Court of Appeal allowed the Board's appeal, finding that the policy constitutes a reasonable way to distinguish between a total disability and a partial disability. The Court of Appeal also confirmed that a policy of the Board can be directly reviewed after WCAT has made a decision under section 251 of the Act that the policy is lawful.

g) *Paleos v. Workers' Compensation Appeal Tribunal*, 2019 BCSC 1113 (July 10, 2019)

Decisions Under Review: A1700441

The petitioner's counsel withdrew an appeal filed with WCAT, saying that subsequent events had made the appeal moot. In accordance with its regular practice, WCAT allowed the request and

summarily dismissed the appeal. Later, counsel became aware that the appeal was not in fact moot, as the decision from the Board determined that the petitioner would retire at age 65. The petitioner requested reconsideration, arguing that WCAT was procedurally unfair when it allowed his withdrawal request, as it had a duty to inform him that not all issues in the appeal were moot. WCAT denied the reconsideration request, finding that the duty of fairness did not require it to determine whether or not all issues in the appeal were moot before allowing the withdrawal request. The petitioner brought a judicial review, and argued that WCAT was unfair for allowing the withdrawal request. The Court dismissed the petition for judicial review, finding that the duty of procedural fairness did not require WCAT to inquire as to whether all issues in the appeal were moot. WCAT is not required to provide legal advice to the petitioner or any other worker. Further, WCAT is not required to backstop any advice that a worker may receive from his or her representative.

h) *Brkich v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2019 BCSC 1557 (September 17, 2019)

Decision Under Review: A1802368

The petitioner claimed that her work as a dental hygienist caused degenerative disc disease and osteoarthritis in her neck. In support of her appeal to the WCAT she provided an opinion from her attending physician and many abstracts from journal articles, which she said established a causal connection between work as a dental hygienist and the development of degenerative disc disease. WCAT considered this evidence against the opinions of two other doctors who observed that there was nothing in the medical literature that demonstrated such a causal connection and, based on observations of the petitioner's work activities, it was unlikely that those activities caused or aggravated her condition. The court found that WCAT's preference for the other doctors' opinions was not patently unreasonable and therefore dismissed the petition.

i) *Bhullar v. Workers' Compensation Appeal Tribunal*, 2019 BCSC 1973 (September 20, 2019)

Decision Under Review: A1601400

The Court held that WCAT's decision was neither patently unreasonable nor procedurally unfair for not holding an oral hearing. There was ample evidence to support WCAT's conclusion that the petitioner's low back was symptomatic prior to the work incident. It was not unfair to proceed by way of written submissions in the circumstances of this case as the petitioner requested to proceed in that way, WCAT did not denigrate the petitioner's honesty in its decision, the petitioner was not taken by surprise by WCAT's reliance on contested evidence, and it is unclear how oral testimony would have assisted WCAT.

j) *McGowan v. Forster*, 2019 BCSC 1647 (September 27, 2019)

Decision Under Review: A1603218

The Court found a determination made by WCAT pursuant to section 257 of the Act patently unreasonable and returned the matter to WCAT for reconsideration. WCAT had decided that Ms. McGowan was a worker in the course of her employment when she was injured in a motor vehicle accident a day before she was formally to begin a job as a care worker for a disabled child. On that day Ms. McGowan offered to take the child to get ice cream and the accident occurred on the way to the store. In its decision WCAT relied on a factor that is not enumerated in policy item C3-14.00 of the RSCM II, namely whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production. The Court accepted that WCAT could consider non-enumerated factors, but noted that WCAT relied almost exclusively on that factor. The Court found that WCAT ignored other evidence as well as findings it had already made regarding Ms. McGowan's motivations, namely that at the time of the trip she had no expectation of compensation or personal benefit. Further, WCAT did not relate this non-enumerated factor to the meaning of "in the course of employment"

as defined by binding policy. Lastly, WCAT relied solely on the rebuttable presumption in section 5(4) of the Act to determine that Ms. McGowan's injuries "arose out of her employment" despite considerable evidence that the fact that Ms. McGowan's pending employment at the time of the accident had no causative significance at all on her injuries.

k) *Sherstobitoff v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2019 BCSC 1659 (September 30, 2019)

Decision Under Review: A1606325

The petitioner was injured on her first day at a new job as a heavy equipment operator. She had argued that her employment was permanent and that pursuant to section 33.3 of the Act her long term wage rate should therefore be calculated using the 12-month earnings of a person doing the same work for the employer rather than her own earnings over the previous 12 months. WCAT determined that the petitioner's employment was temporary. The Court allowed the petition on the basis that WCAT's decision was patently unreasonable for not reviewing the available evidence pertaining to the terms of the employment contract. The Court said that it could not think of any way to determine the nature of the petitioner's employment except by considering the general principles of contractual interpretation, where the goal is always to determine objectively the parties' intention at the time the contract was formed. The Court found that while there was some evidence on the record before WCAT pertaining to the terms of the agreement, WCAT did not attempt to ascertain the words exchanged by the contracting parties and instead based its decision on surrounding circumstances such as the petitioner's employment history and the limited scope of the employer's work at the worksite. The Court observed that evidence of these circumstances, to the extent that it was known to the parties at the time the employment contract was made, could only be relevant to clarify the parties' express agreement or their objective intention.

l) *C.S. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2019 BCCA 406 (November 19, 2019)

Decision Under Review: WCAT-2014-02791

WCAT found that the worker's pre-existing mental disorder was not aggravated by her conflict with the employer and a co-worker, and was not aggravated by the employer's alleged failure to accommodate her, as there was no accommodation agreement on the point alleged by the worker. WCAT also found that the co-worker's conduct did not rise to the level of bullying and harassment and that the employer's conduct fell within the employment decision exclusion in section 5.1.1(c) of the Act. The worker brought a judicial review, and argued for the first time on judicial review that the mental disorder provisions in the Act and the associated policy in the RSCM II were contrary to section 15 of the *Canadian Charter of Human Rights and Freedoms*, and also argued that WCAT's decision was patently unreasonable. The chambers judge found that the Charter issue ought to have been, but was not, raised before the Review Division of the Board in the first instance, and declined to hear the issue for the first time on judicial review (2018 BCSC 778). The chambers judge also found that WCAT's decision was not patently unreasonable, and dismissed the petition. The worker brought an appeal of the Supreme Court decision. On appeal, she argued that the chambers judge ought to have addressed her new arguments, and argued that the employer's conduct constituted targeted harassment. The Court of Appeal dismissed her appeal. It found that the chambers judge did not err when he declined to address the new issues, especially given that the worker had not explicitly raised the *Charter* before the Review Division and had only referred to "discriminatory treatment". The Court of Appeal also found that WCAT was not patently unreasonable in its findings in relation to the nature of the alleged harassing conduct and was not procedurally unfair as the worker had been given an opportunity to testify before WCAT.

OUTREACH

As the final level of appeal in the British Columbia workers' compensation system, WCAT plays a role in ensuring that stakeholders and those appearing before it are well informed regarding its operations and practices. In addition to publishing detailed quarterly reports regarding our operations, WCAT provides presentations to external stakeholder groups throughout the year, including the following:

January 22	• Canadian Labour Congress Winter School presentation
February 13	• WCAT Presentation for New Hires of the Employers' Advisor's Office
April 10	• WCAT Presentation for New Hires of the Workers' Advisor's Office
November 1	• WCAT held an educational session for representatives of workers and employers.

Response to the Truth and Reconciliation Commission's Calls to Action

In 2018 WCAT invited members of the legal community who, through personal and professional experience, are knowledgeable about the circumstances and needs of Indigenous communities, to form a Community Advisory Council to assist WCAT in responding to the Calls to Action of the Truth and Reconciliation Commission. The Community Advisory Council made a number of recommendations regarding WCAT's practices and procedures and, in 2019, WCAT began acting on a number of those recommendations, with a view to addressing potential institutional impediments which may affect Indigenous parties to an appeal.

- In April 2019, in order to clarify WCAT's understanding about the background of the peoples appearing before it, the tribunal began providing parties to an appeal with the opportunity to self-identify as Indigenous.
- WCAT created a "navigator" position. The navigator is responsible for coordinating the overall processing of appeals involving parties who have self-identified as Indigenous in order to ensure that those parties are treated in a welcoming and culturally safe manner.
- One of the hearing rooms at WCAT's Richmond headquarters was redesigned, with a view to ensuring that the hearing rooms facilitated the "listening" aspect of the oral hearing process while reducing the image of an adversarial process.
- WCAT has made arrangements to hold hearings in new locations in the province, closer to the home communities of Indigenous parties.

In 2020 WCAT will be soliciting feedback from those who have had the opportunity to work with a navigator and to make use of the new hearing room. In doing so, the tribunal is hopeful that there may be aspects of these efforts to improve accessibility for Indigenous parties that could also be used to improve accessibility in appeals involving parties who are subject to any of the various barriers that inhibit individuals from participating fully in the justice system.

In addition to the above noted efforts focused on ensuring that WCAT is responsive to the needs of Indigenous parties appearing before it, WCAT recognizes that, as participants of the justice system and public servants, it is incumbent upon the tribunal to engage in cultural competency and intercultural skills-based training, including an education on the history of Indigenous peoples, the history and legacy of the residential schools, and Indigenous law. That process commenced in 2019. All WCAT members and staff will have undertaken training in these areas by early 2020, and further training sessions on these topics will form part of our internal learning on an ongoing basis.

EDUCATION

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

As part of its commitment to excellence in decision-making, WCAT has continued to provide an extensive program of education, training, and development.

Internal Education

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 2019, the WCAT education group, led by the vice chair quality assurance, 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. As part of WCAT's ongoing commitment to implement the Truth and Reconciliation Commission's Calls to Action, several sessions focused on cultural competency and engagement with Indigenous participants in WCAT appeals.

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 2019:

February 7	<ul style="list-style-type: none"> • Statutory Interpretation
March 7	<ul style="list-style-type: none"> • Indigenous Cultural Competency Training – A Beginning
April 4	<ul style="list-style-type: none"> • Tools, Tips and Trends in Loss of Earnings Assessments
April 9	<ul style="list-style-type: none"> • Average Earnings Decisions
April 11	<ul style="list-style-type: none"> • Occupational Noise-Induced Hearing Loss
May 9	<ul style="list-style-type: none"> • WCAT's Steps Towards Implementation of the Truth and Reconciliation Commission's Calls to Action
May 16	<ul style="list-style-type: none"> • Indigenous Engagement: Deepening Knowledge, Building Competencies
June 6	<ul style="list-style-type: none"> • Section 23(1) Awards: Policy Changes and Other Developments
June 20	<ul style="list-style-type: none"> • Mental Disorder Decisions • Procedural Challenges in Mental Disorder Appeals
October 3	<ul style="list-style-type: none"> • Associated and Related Claims • Recent Judicial Review Decisions
November 7	<ul style="list-style-type: none"> • Reconsideration of WCAT Decisions • Marijuana in the Workplace

In addition, many WCAT vice chairs attended the BC Council of Administrative Tribunals (BCCAT) Annual Education Conference on October 21, 2019, or the Continuing Legal Education (CLE) Society Administrative Law Conference on November 28, 2019.

COSTS OF OPERATION FOR THE 2019 CALENDAR YEAR

Category	Cost
Salaries	8,956,413.30
Employee Benefits and Supplementary Salary Costs	2,285,405.27
Per Diem – Boards and Commissions	284,050.02
Travel	62,759.19
Centralized Management Support Services*	1,288,185.92
Professional Services	381,072.97
Information Technology, Operations and Amortization	1,155,412.60
Office and Business Expenses	395,364.80
Building Service Requests and Amortization	5,312.46
TOTAL EXPENDITURES	14,813,976.53

* These charges represent Building Occupancy and Workplace Technology Service charges.

WCAT MEMBERS

Section 234(2)(b) of the Act provides that 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.

EXECUTIVE AND VICE CHAIRS WITH SPECIAL DUTIES AS OF DECEMBER 31, 2019		
Name	Position	End of Term
Andrew Pendray	Chair (OIC #780)	November 7, 2022
Luningning Alcuítas-Imperial	Senior Vice Chair and Registrar	February 28, 2021
David Newell	Senior Vice Chair and Tribunal Counsel	January 31, 2020
James Sheppard	Vice Chair, Quality Assurance and Training	February 29, 2024
David Bird	Vice Chair and Deputy Registrar	January 5, 2020
Sherelle Goodwin	Vice Chair and Deputy Registrar	January 5, 2020
Randy Lane	Vice Chair and Team Leader	February 29, 2020
Julie Mantini	Vice Chair and Team Leader	February 28, 2022
Susan Marten	Vice Chair and Team Leader	February 28, 2023
Debbie Sigurdson	Vice Chair and Team Leader	February 28, 2024

VICE CHAIRS AS AT DECEMBER 31, 2019			
Name	End of Term	Name	End of Term
Cathy Agnew	August 31, 2021	Darrell LeHouillier	October 31, 2020
Beatrice K. Anderson	February 28, 2021	Lori Leung	December 21, 2022
W. J. (Bill) Baker	February 28, 2021	Deborah Ling	June 21, 2023
Anand Banerjee	October 15, 2020	Chad McRae	October 15, 2020
Hélène Beauchesne	March 31, 2022	Renee Miller	April 30, 2022
Sarwan Boal	February 28, 2020	Herb Morton	February 29, 2020
Dana G. Brinley	February 28, 2021	Barbara Murray	October 15, 2020
Larry Campbell	October 15, 2020	Elaine Murray	August 31, 2024
Grace Chen	January 5, 2020	Paul Pierzchalski	December 21, 2022
Lesley Christensen	February 28, 2021	Dale Reid	February 28, 2022
Melissa Clarke	September 30, 2020	Deirdre Rice	February 28, 2022
Adam Doherty	October 15, 2020	Guy Riecken	February 28, 2024
William J. Duncan	February 28, 2022	Ellen Riley	January 5, 2020
Andrew J. M. Elliot	August 31, 2021	Simi Saini	September 5, 2020
Scott Ferguson	June 21, 2021	Shelina Shivji	March 31, 2022
Tamara Henderson	October 15, 2020	Debe Simpson	January 5, 2020
Janice Hight	January 5, 2020	Tim Skagen	March 31, 2020
Warren Hoole	September 30, 2024	Tony Stevens	February 29, 2020
Nora Jackson	February 28, 2022	Hilary Thomson	October 15, 2020
Kevin Johnson	February 28, 2022	Andrew Waldichuk	February 29, 2020
Cynthia J. Katramadakis	March 31, 2021	Teresa (Terri) White	December 31, 2019
Joanne Kembel	February 28, 2023	Sherryl Yeager	February 28, 2021
Brian King	August 31, 2021	Terry Yue	January 5, 2020
Rob Kyle	February 29, 2020	Lyall Zucko	January 5, 2020

VICE CHAIR DEPARTURES IN 2019		
Name	Original Appointment Date	Departure Date or End of Term
Kate Campbell	September 6, 2011	June 4, 2019
Kim Workun	January 6, 2014	February 28, 2019