

The background of the cover features a photograph of a lighthouse situated on a small island in the middle of the ocean. The lighthouse is a dark, cylindrical structure with a white lantern room and a green top section. The water is a calm, light blue-grey color, and the sky is a pale, hazy blue. The overall mood is serene and professional.

W/CAT

Workers' Compensation
Appeal Tribunal

ANNUAL
2023
REPORT

CHAIR'S MESSAGE

On behalf of the Workers' Compensation Appeal Tribunal (WCAT), I am pleased to present our 2023 Annual Report.

2023 was a special year for WCAT, as we marked our 20th anniversary. On March 3, 2003, WCAT commenced operations as an independent appeal tribunal in the workers' compensation system.

I am privileged to have been a part of WCAT's history since that time. Reflecting on 20 years of work, I recall the intense demands placed on WCAT's leadership to build a new administrative tribunal. As well, any account of WCAT's history must mention the foremost challenge facing the tribunal at startup – namely, adjudicating the 22,400 appeals that were transferred to WCAT from the former review and appeal bodies.

Despite the daunting size of the backlog, WCAT successfully eliminated it in the spring of 2006.

This first milestone in WCAT's history laid the groundwork for WCAT's continued success over the past 20 years. The elimination of the backlog required:

- An engaged, knowledgeable, and dedicated complement of vice chairs and staff
- Effective leadership focused on strategic goals and actions
- Solid linkages with stakeholder groups in the workers' and employers' community
- Robust communication lines within the system, including with the Workers' Compensation Board, operating as WorkSafeBC (Board)
- Sufficient people, infrastructure, and monetary resources
- Above all, a commitment to WCAT's independent role and to produce high-quality decisions in a timely manner, rendered after a fair and impartial process

Since 2006, many challenges and opportunities have arisen. WCAT must continually adapt to the changing law and policy landscape, while ensuring predictable, consistent, and efficient decision making. The retention and recruitment of skilled and knowledgeable people was required. WCAT had to respond to the evolving service and access needs of our stakeholders and the public.

In 2023, WCAT faced variations of the same challenges. We continued to operate as a high-volume tribunal, receiving 2,512 appeals and applications from workers and employers and issuing 2,283 summary and merit decisions.

Appeals and applications became progressively more complex, while the volume of intake grew. Like many organizations, WCAT faced challenges in staffing due to demographic and other factors. There was an increase in our inventory. The use of technology continued to be a prominent tool for WCAT vice chairs and staff, as well as our stakeholders and the public. The pace of change remained rapid.

I am proud to say that WCAT's people are meeting these challenges. Through their significant efforts, dedication, and creativity, WCAT continues to maintain its reputation as an independent tribunal providing needed independent and impartial appellate decision making in the workers' compensation system. Outstanding examples of our people-driven efforts in 2023 include the successful launch of WCAT's Online Services for workers, employers, and representatives who have active appeals; the continuing expansion of the Calls to Action (Indigenous reconciliation) program; the implementation of a new appeal officer role in the Registry to improve service to parties; and, after the coming into force of amendments to the *Workers Compensation Act* (Act), the introduction of a simple and accessible process for parties to request WCAT retain an independent health professional (IHP).

I send immense gratitude and appreciation to WCAT's vice chairs, staff, and counsel – not only those who worked at WCAT in 2023, but all who have become part of the WCAT family over its 20 years. Thank you for carrying out WCAT's statutory mandate and ensuring that the workers and employers of British Columbia were served within our guiding principles.

I hope that you find this report a helpful overview of our operations, our plans, and our people.



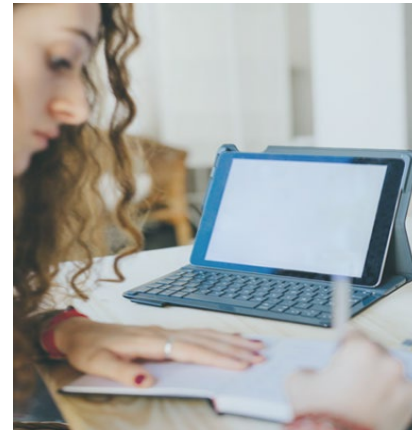
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Chair

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OUR 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 and applications brought by workers, employers, and dependants of deceased workers 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 prohibited 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.

WCAT is an independent appeal tribunal external to WorkSafeBC.

As the external independent appeal body in the worker's compensation system, WCAT strives to provide:

- predictable, consistent, and efficient decision making
- independent and impartial decision making
- succinct, understandable, and high-quality decisions
- consistency with the *Workers Compensation Act (Act)*, policy, and WCAT precedent decisions
- transparent and accountable management
- communication within the workers' compensation system while safeguarding WCAT's independence
- accountability through performance management
- appropriate balance between efficiency (timeliness and stewardship of scarce resources) and effectiveness (quality decision making)
- prompt, knowledgeable and responsive client service and
- interpretative guidance for the workers' compensation system.

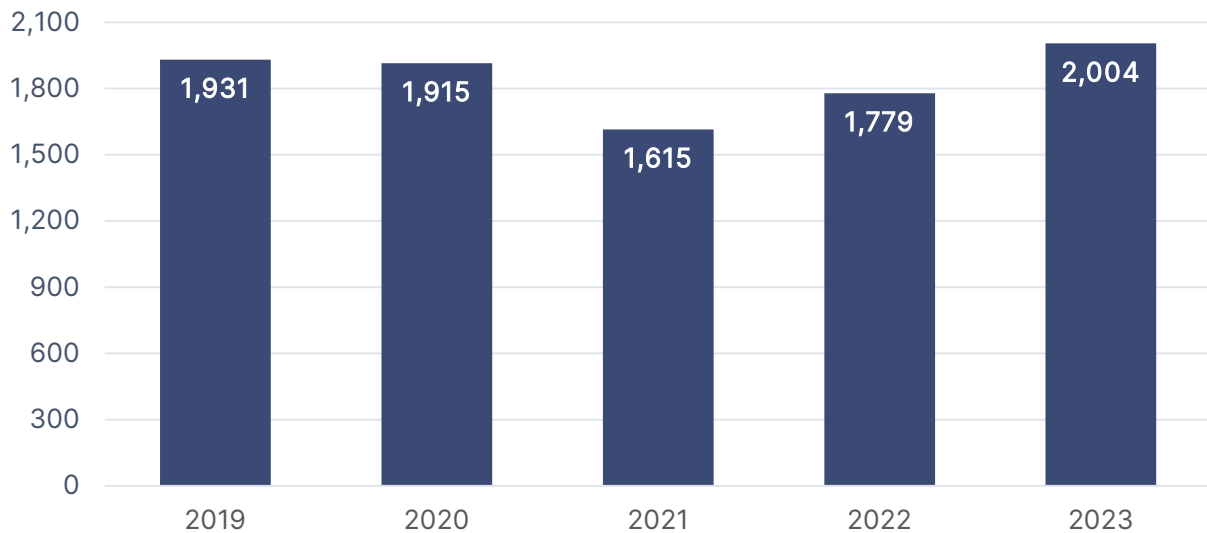
STATISTICS

Overview of Inventory

This section contains three charts providing a high-level overview of the status of our active appeals and applications inventory for 2023. WCAT records appeals and applications in the inventory by their date of initiation.

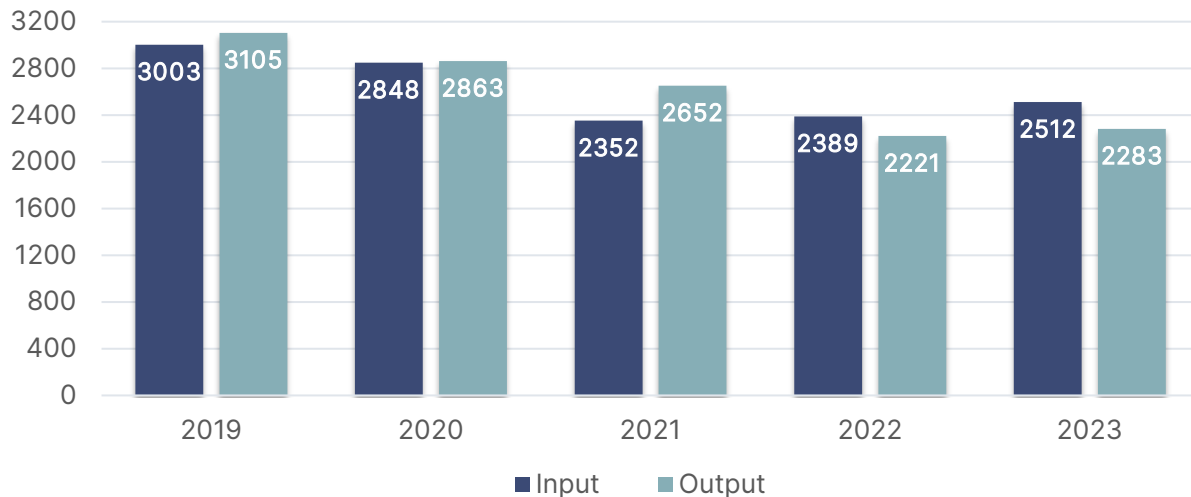
WCAT's total inventory at December 31, 2023 was 2,004 active appeals and applications compared to 1,779 at the end of 2022. This represents a 13% increase.

ACTIVE APPEALS AND APPLICATIONS IN INVENTORY



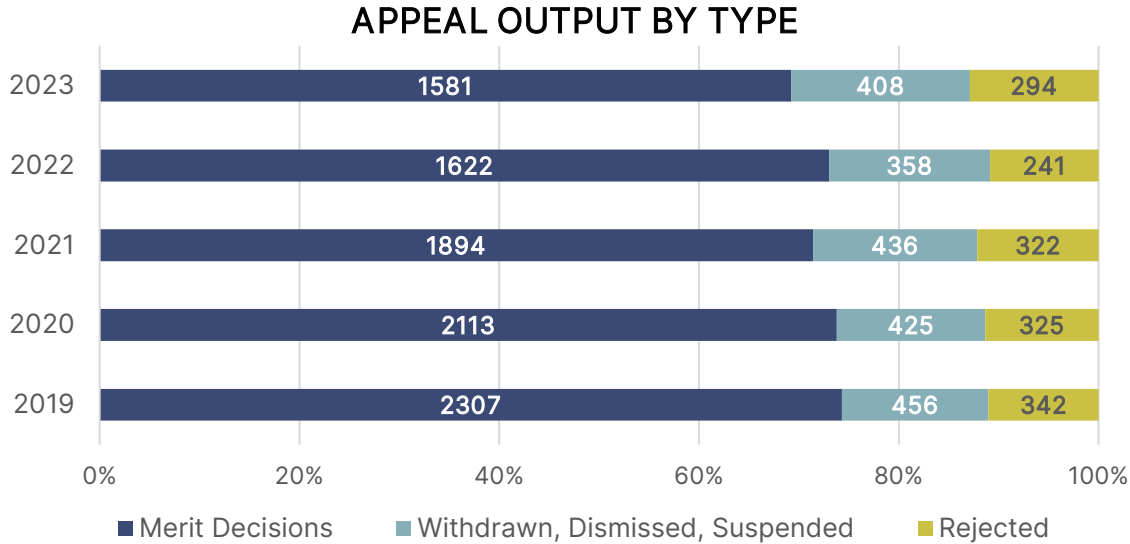
WCAT received 2,512 new appeals and applications in 2023 representing a 5% increase from the 2,389 new appeals and applications received in 2022.

TOTAL ANNUAL INTAKE AND OUTPUT



The output of summary and merit decisions and determinations in 2023 was 2,283, a 3% increase from 2022.

Most of the output, as shown below, consisted of merit decisions.



More analysis of WCAT's intake, inventory, and output is contained in the trends and plans section of this report.

Time to Decision

Section 306 of the Act requires WCAT to decide new appeals within 180 days from the date that WCAT receives from the Board the records (or disclosure) relating to the decision under appeal.

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 submit 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 based on 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
- a pending report from an independent health professional

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

In 2023, there were increases in average days (3 to 15 days) for completing appeals in the various situations described above.

<u>Notice of Appeal</u>	<u>All Appeals</u>	<u>Appeals With No Additional Time</u>
Average days from the date of receipt of the notice of appeal to the date the final decision is issued.	Average days 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).	Average days 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).
305	223	117

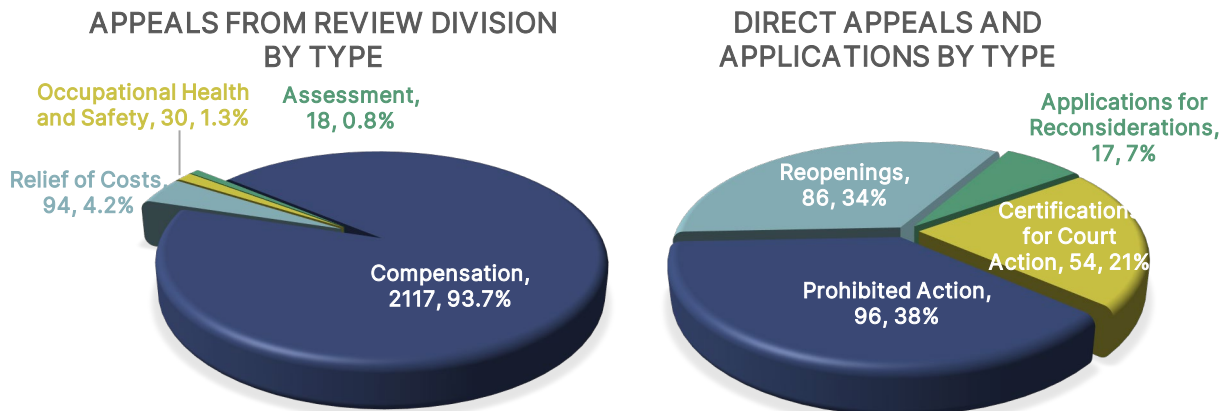
Appeals and Applications

Appeals and applications to WCAT comprise:

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

a) Type of Appeal

Of the 2,512 appeals and applications received by WCAT in 2023, 90% (2,259) arose from decisions of Board review officers and 10% (253) were appeals or applications to WCAT that came directly from decisions of Board officers. Most WCAT appeals relate to compensation matters. The two charts below show the breakdown of the types of appeals and applications received in 2023:



b) Merit Decisions

WCAT made 1,581 merit decisions on appeals and applications in 2023, 38 of which concerned applications for certificates for court actions.

c) Merit Decision Outcomes

WCAT has the statutory authority to vary, confirm, or cancel the appealed decision or order.

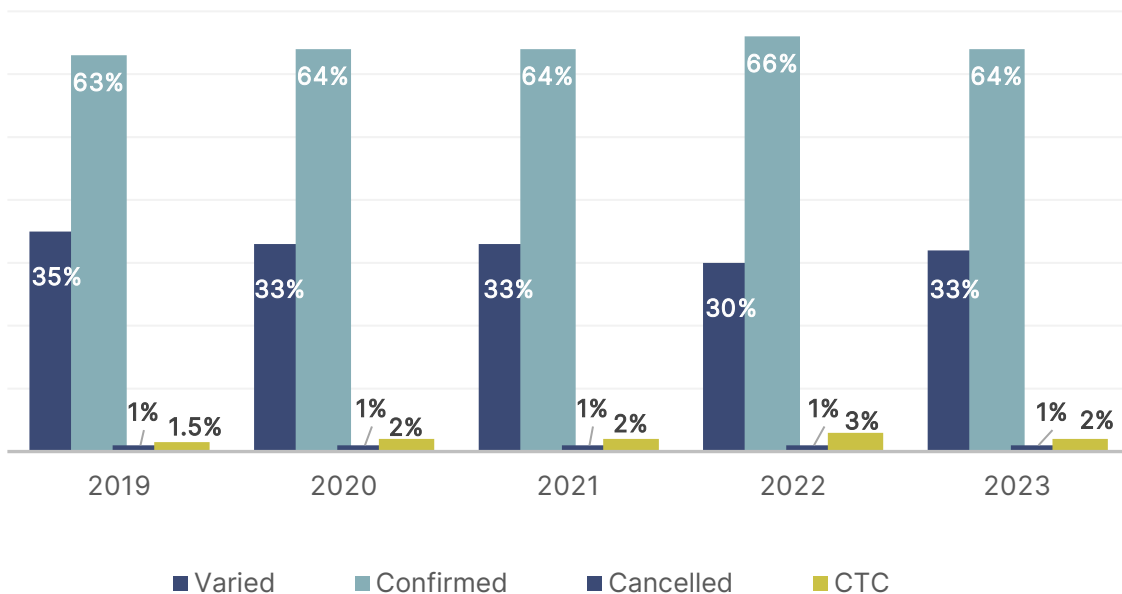
“Vary” means that WCAT changed the previous decision in whole or in part. WCAT has fully granted the remedies requested by the appellant on all issues arising under the appeal or changed a minor aspect of the previous decision.

“Confirm” means that WCAT agreed with all aspects of the previous decision.

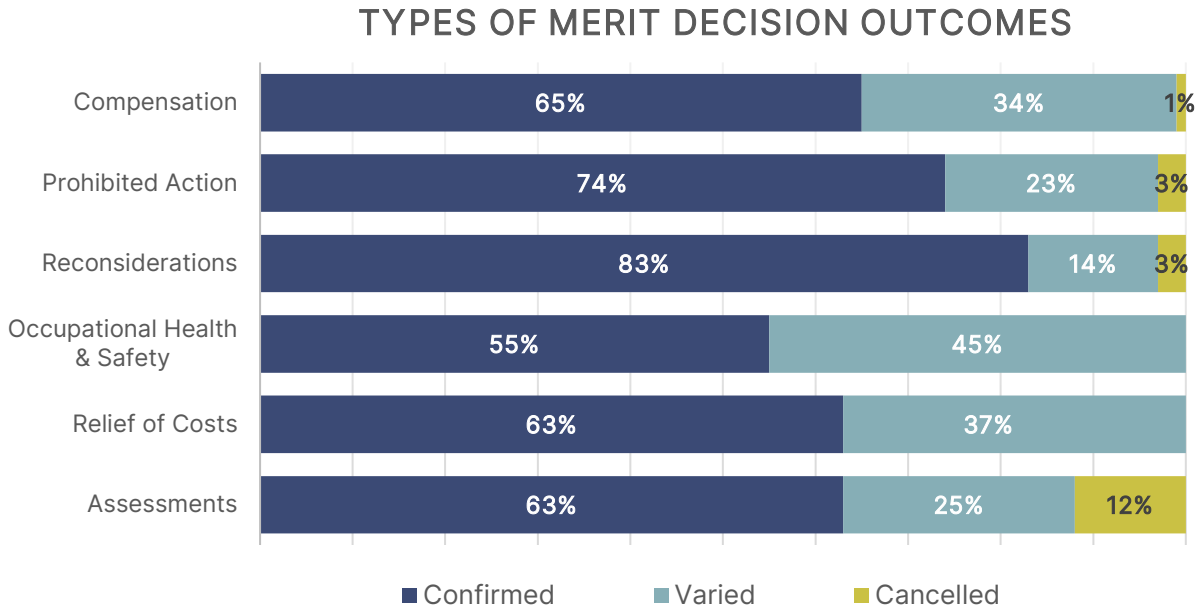
“Cancel” means that WCAT set aside the previous decision without a new or changed decision being provided in its place.

Overall, in 2023, 33% of WCAT appeals were varied, 64% were confirmed, 1% were cancelled, and 2% were certifications to court. The chart below shows WCAT’s merit decision outcomes over a 5-year period. The outcomes remain consistent over this time.

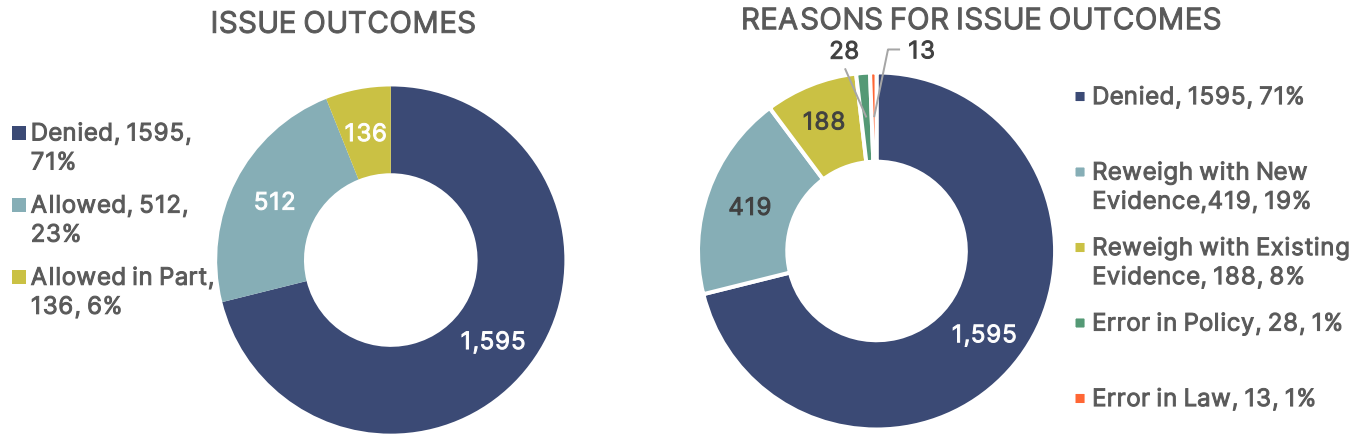
MERIT DECISION OUTCOMES



The graphic below shows the decision outcomes for different types of appeals in 2023:



An appeal may raise numerous issues. WCAT may allow or deny the appeal on each issue. In 2023, WCAT decided 2,243 issues that arose out of the 1,581 appeals that led to merit decisions.

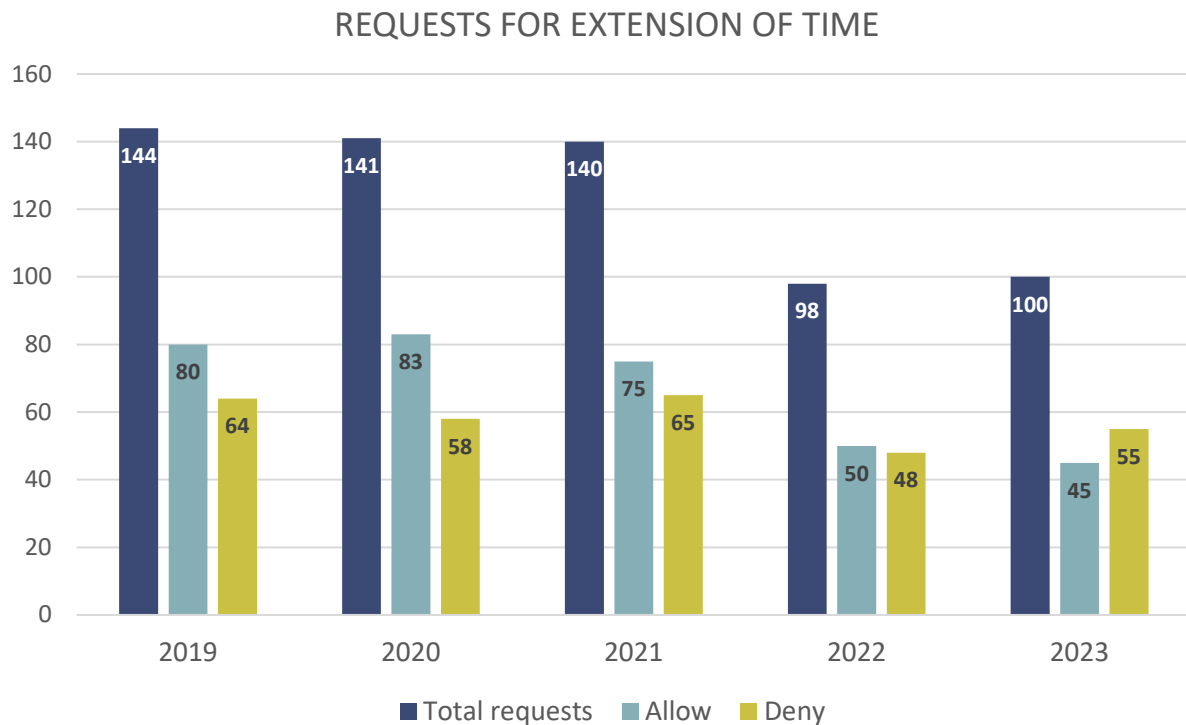


d) Top Five Issue Groups for Appeals

Appeal Issue	Merit Decisions	Percentage of Total Decisions	Allowed / Allowed in Part	Denied
Compensation For Personal Injury	626	27.91%	25.72%	74.28%
Permanent Partial Disability	480	15.74%	43.34%	56.66%
Occupational Disease	205	9.14%	32.20%	67.8%
Temporary Partial Disability	180	8.02%	29.44%	70.56%
Health Care	107	4.77%	23.36%	76.64%

e) Requests for Extensions of Time

WCAT decided 100 requests for extensions of time to appeal; allowing 45 and denying 55.

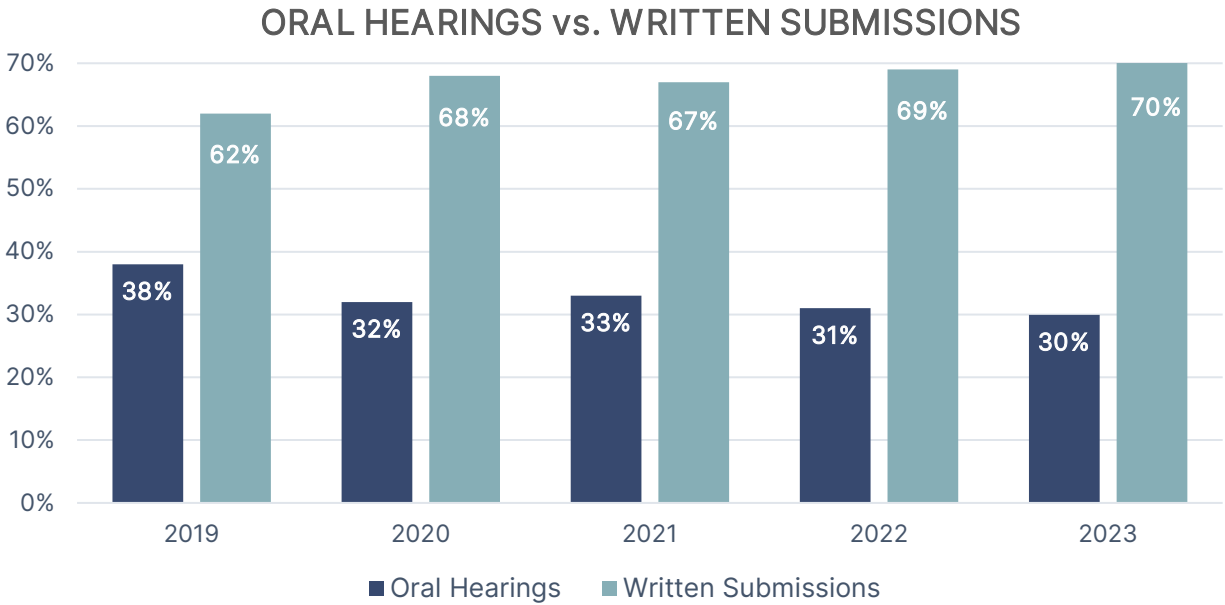


Appeal Paths

WCAT decides appeals and applications in one of two ways:

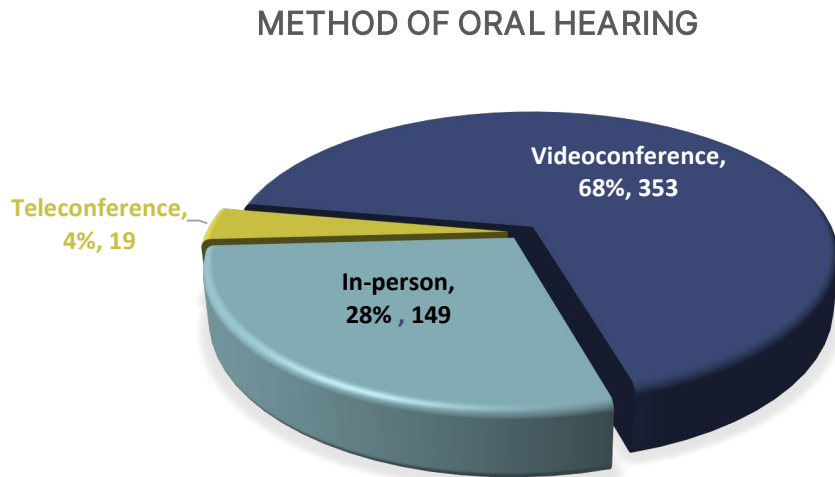
- 1) after an oral hearing
- 2) after reading and reviewing the Board’s records, any new evidence, and the submissions of the parties (written submissions)

Most appeals and applications were decided by way of review of the written submissions in 2023.



Method of Oral Hearing

In 2023, WCAT held 521 oral hearings, an increase of 13% from the 463 oral hearings held in 2022. Most oral hearings were held by videoconference. The number of in-person hearings increased significantly by 366% from 32 in 2022 to 149 in 2023. This increase corresponds with the conclusion of the COVID-19 pandemic.



Appellants and Applicants

A majority (87%) of the appeals and applications received in 2023 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 in those appeals is always the employer.

Type of Appeal or Application	APPELLANT / APPLICANT		
	Worker	Employer	Dependant
Compensation	86.3%	13.3%	0.4%
Direct Reopening	95.3%	4.7%	0%
Prohibited Action	63.5%	36.5%	0%
Occupational Health and Safety	26.7%	73.3%	0%
Reconsideration	82.4%	17.6%	0%

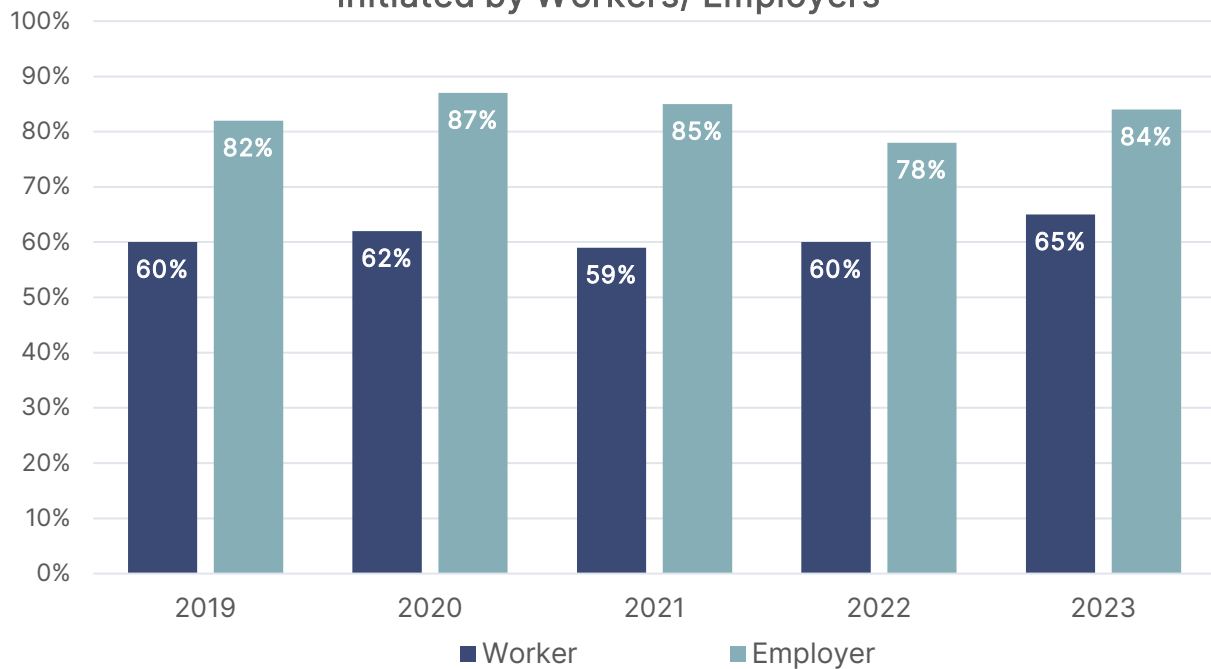
Representation

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. In assessment and relief of costs appeals, the employer is always the appellant/applicant.

Type of Appeal or Application	PERCENT REPRESENTED WHERE APPELLANT / APPLICANT IS:		
	Worker	Employer	Dependant
Assessment	0%	25%	0%
Compensation	64.8%	84.3%	58.3%
Reconsiderations	30.8%	80%	0%
Prohibited Action	38.6%	78.6%	0%
Occupational Health and Safety	25%	72.2%	0%
Relief of Costs	0%	93.8%	0%

As compensation appeals make up the vast majority of WCAT's intake, the chart below looks at representation rates for workers and employers when they initiated compensation appeals.

PERCENTAGE OF WORKERS/EMPLOYERS WITH A REPRESENTATIVE - Compensation Appeals Initiated by Workers/ Employers



INDEPENDENT HEALTH PROFESSIONAL

The *Workers Compensation Act* was amended in 2022 (*Workers Compensation Amendment Act (No. 2), 2022*) to permit an employer, worker, or dependant of a deceased worker to make a written request that a WCAT panel retain a health professional to provide independent assistance or advice in an appeal. This amendment came into force on April 3, 2023.

The WCAT panel receiving a request must retain an independent health professional (IHP) if the medical condition of the worker is at issue in the appeal, and the panel determines that the independent assistance or advice would assist in reaching a decision on the appeal.

In addition to parties requesting independent health professionals (IHP)s, the panel may determine that independent assistance or advice would assist in reaching a decision on the appeal and commence the IHP process on their own initiative.

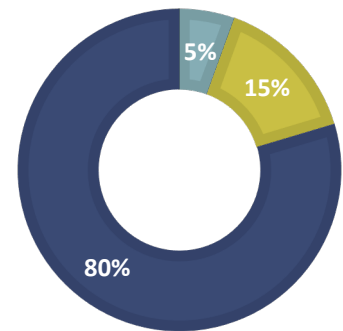
From April 3 to December 31, 2023, WCAT received 54 requests from parties for an IHP. This chart illustrates which party requested an IHP.

In 2023, WCAT decided 13 requests - 7 requests were denied (54%), 5 requests were allowed (38%), and 1 request was withdrawn (8%). Decisions have not yet been made with respect to the remaining requests.

In 2023, the IHP process was commenced in 39 appeals. The majority (34) of those were commenced on the panel's own initiative. The remainder involved a party request for an IHP.

INDEPENDENT HEALTH PROFESSIONAL REQUESTS

- Dependent, 5%
- Employer, 15%
- Worker, 80%



RESPONSE TO THE TRUTH AND RECONCILIATION COMMISSION'S CALLS TO ACTION

In 2019, WCAT initiated its response to the Calls to Action (CTA) contained in the Truth and Reconciliation Commission (TRC) Report. Our response also considers the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

In 2023, WCAT continued to act on its commitment to respond to the CTA. WCAT has a CTA Committee which leads WCAT's reconciliation work. As well, WCAT has vice chairs and navigators assigned to appeals where the appellant and/or respondent have self-identified as Indigenous.

A self-identified Indigenous party is offered the option to work with a WCAT navigator. Since 2019, 87.5% of Indigenous parties opted to work with a WCAT navigator.¹

A WCAT navigator works with the Indigenous party to ensure they are treated in a welcoming and culturally sensitive manner. The WCAT navigator also works to ensure that WCAT's appeal processes are open and responsive. The navigator works to build a relationship of trust that is culturally appropriate. A WCAT navigator helps throughout the entire appeal, including explaining the appeal process, detailing how to get access to file disclosure, and assisting with accessing oral hearings. For example, the navigator may help by finding suitable hearing locations and noting cultural processes a party may wish to have included in the hearing process. In 2023, WCAT increased the number of navigators from three to five. The number of panels assigned to CTA appeals also increased.

In 2023, WCAT's CTA Committee continued to discuss, monitor, and chart the progress of WCAT's work towards reconciliation. The CTA Committee also continued to take specific actions towards improvements such as:

- Recruiting Indigenous doctors and psychologists to work as independent health professionals
- Hiring an Indigenous co-op student from Thompson Rivers Indigenous Law program. This was the second year of WCAT's Indigenous co-op student program. In 2023, the student conducted important research on how to take an Indigenous-informed approach in an administrative law setting. As well, the student explored different adaptative approaches WCAT might take in implementing our CTA response, including the use of alternative affirmations for

¹ Indigenous parties may not opt to work with a navigator as they already have a representative, their application is a certification to court matter that does not generally require a navigator, or they have gained familiarity with WCAT's processes due to work with a navigator on a previous appeal or application.

Indigenous peoples. The student also updated a database of WCAT's CTA decisions for internal reference and data collection.

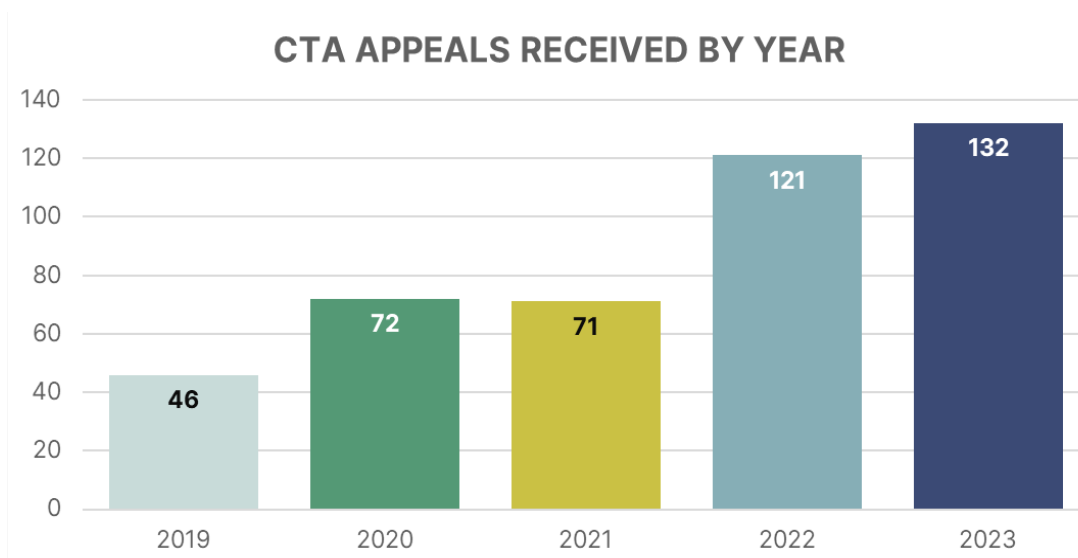
- Liaising with administrative tribunals (provincial and federal levels) to discuss reconciliation initiatives, including sitting on a national TRC committee with the Council of Canadian Administrative Tribunals (CCAT)
- Liaising with WorkSafeBC about WCAT's CTA response and the Board's Indigenous Relations strategy
- Sharing our experience through presentations, such as a CCAT Connects session and the BC Council of Administrative Tribunals (BCCAT) annual conference
- Organizing training sessions for WCAT panels and navigators on Indigenous language, Indigenous trauma-informed practice, Indigenous-informed appeal processes, and Indigenous-informed decision making/writing.

In 2023, WCAT continued to survey Indigenous parties who participate in the navigator program to gain feedback about their experience working with a navigator, as well as their oral hearing experience. The CTA Committee regularly reviews the survey results with a view to continuously improving WCAT's services and eliminating institutional barriers. Highlights of the results are:

- Most participants were satisfied with the assistance of the navigator
- Navigators communicated in a way that was clear and understandable
- More than a majority felt WCAT had respected their Indigenous heritage
- Some participants indicated the need to improve WCAT's written communications and to allow more time to prepare for an appeal

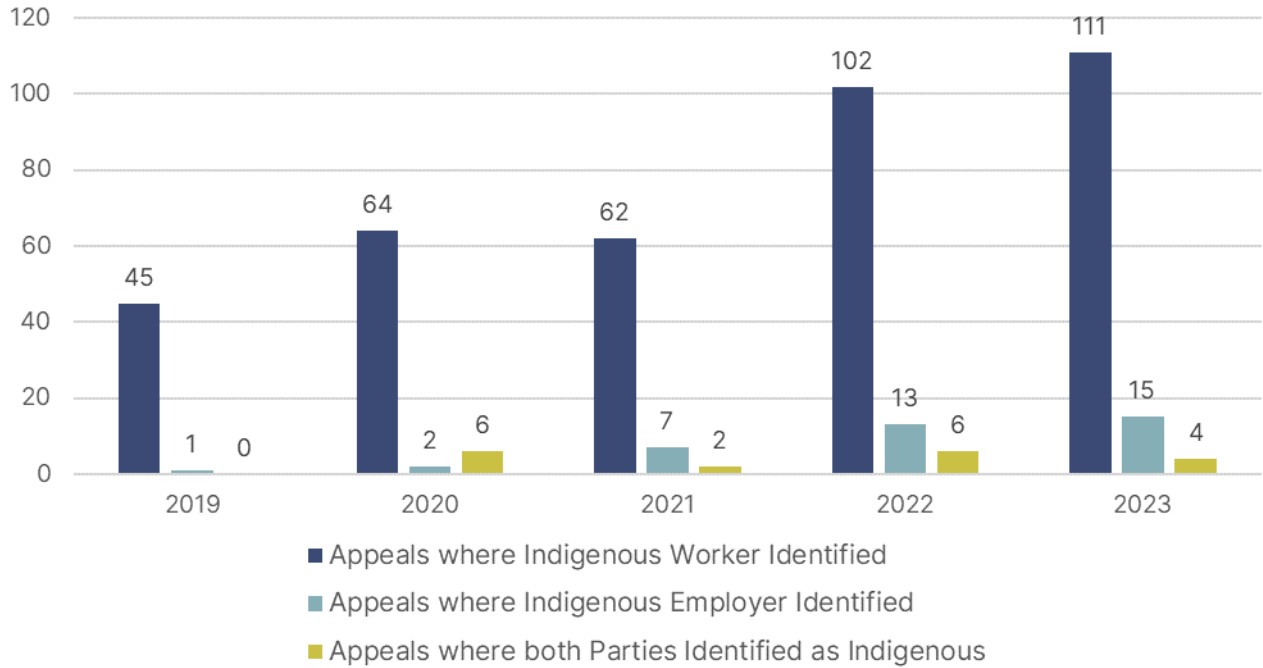
The following are statistical highlights about the appeals involving a self-identified Indigenous party:

- The inventory of appeals at the end of 2023 was 142. This represents a 14.5% increase since year-end 2022
- WCAT received 132 appeals reflecting just over a 9% increase from 2022. WCAT decided 85 appeals



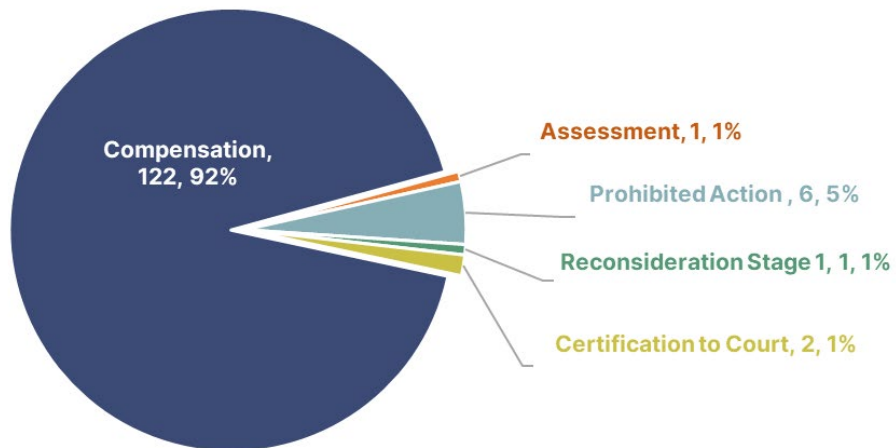
- Most of the Indigenous parties were workers

INDIGENOUS PARTIES APPEALING



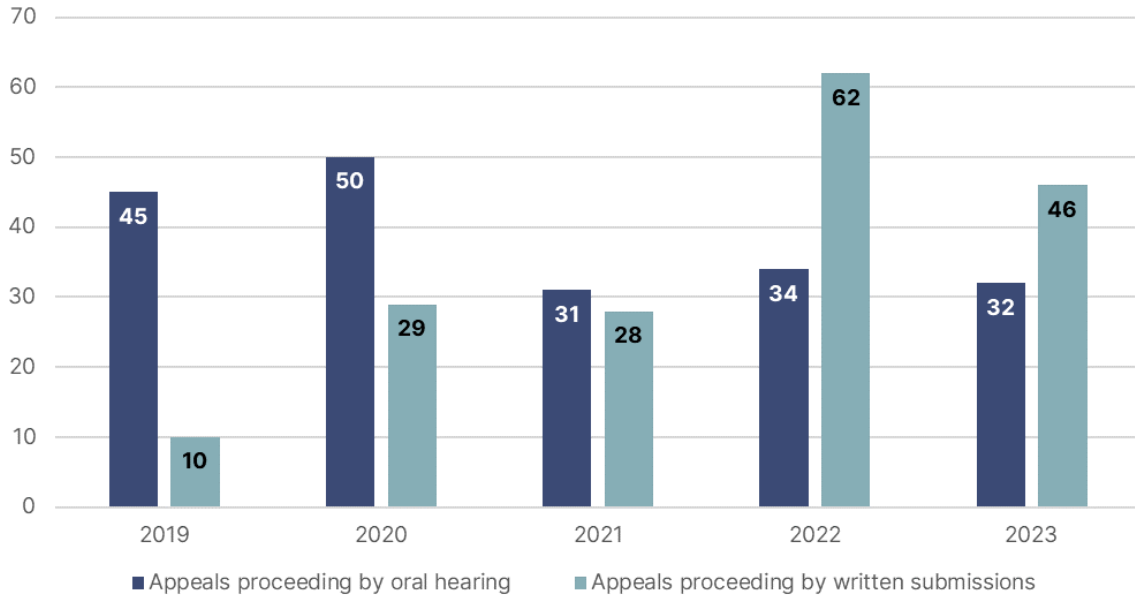
- Most of the matters involving Indigenous parties were compensation appeals

TYPES OF CTA APPEALS



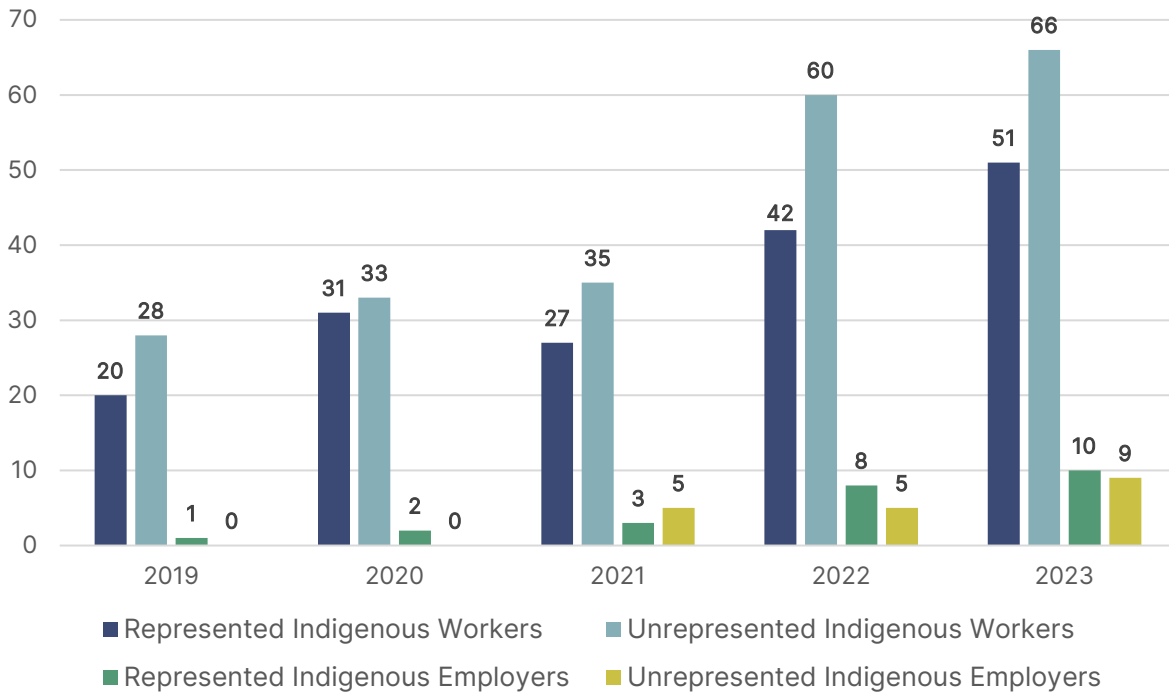
- Most of the matters involving Indigenous parties proceeded by oral hearing

METHOD OF CTA APPEALS



- There were slightly more Indigenous employers with representation, than those with no representation. It was the opposite situation for Indigenous workers.

REPRESENTATION ON CTA APPEALS



NOTEWORTHY DECISIONS

Noteworthy WCAT decisions are those identified 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 while considering an appeal or application.

WCAT decisions, including noteworthy decisions and their summaries, are publicly accessible and searchable on the [WCAT website](#). The website contains an index listing all noteworthy WCAT decisions organized by subject and date.

Summaries of Noteworthy Decisions Identified in 2023

(a) A1603369 - Decision Date: May 30, 2016

Panel: S. Goodwin

Under section 288(2)(d) of the Act, WCAT does not have jurisdiction to hear an appeal concerning a scheduled permanent disability award where the specified range of impairment has no range or has a range that does not exceed 5%. In this case, the worker injured the distal phalanx of his left fifth finger. The range of motion in the worker's distal interphalangeal (DIP) joint was reduced by 5%. The worker also had slightly reduced grip strength in his left hand, and consistently reported cold intolerance in his left fifth finger. The range of impairment specified in the Permanent Disability Evaluation Schedule (PDES) for the DIP joint of the fifth finger is 1% of total disability. The panel noted that WCAT decisions decided prior to the amendment of the PDES in 2015 had determined that a global approach should be taken with respect to scheduled impairments resulting from hand injuries. The panel concluded that the same approach should be taken with respect to the amended PDES. **WCAT has jurisdiction with respect to permanent disability resulting from a hand injury where the impairment resulting from loss of range of motion, loss of strength, loss of sensation, and cold intolerance could exceed 5% when considered together.**

(b) A1801433 - Decision Date: August 29, 2018

Panel: R. Lane

In a previous decision, WCAT denied the employer's appeal of a Review Division decision and confirmed the worker sustained a low back injury arising out of and in the course of employment. WCAT subsequently denied the employer's application for reconsideration on procedural unfairness and new evidence grounds. The employer applied for reconsideration of the reconsideration decision on the grounds of procedural unfairness, saying that medical records placed on the worker's claim file after the first WCAT decision were not disclosed as part of the reconsideration process. **The panel noted that item #20.2.5 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP) which**

states that WCAT will not consider an application for reconsideration of a reconsideration decision, is neither a rule nor a practice directive and concluded that it did not preclude consideration of an application to reopen a reconsideration decision to cure a breach of procedural unfairness. The panel ultimately concluded that WCAT was not procedurally unfair and denied the application for reconsideration.

(c) A2101129 - Decision Date: February 24, 2022

Panel: A. Waldichuk

The worker had permanent pre-existing injuries from a motor vehicle accident in 1995 which resulted in permanent limitations with respect to various movements and activities. The worker had experienced periodic increases in neck and back pain due to her permanent injuries, but these did not disable her from working. The worker's work activities normally fell within her limitations. In January 2020, the worker took on additional work when another employee left. The worker began to experience increased upper back, shoulder, and neck pain, as well as headaches. The worker stopped work in May 2020 on the advice of her doctor, who attributed the increase in the worker's symptoms to the changes in her work conditions.

A Board case manager conducted a worksite visit and prepared an activity--related soft tissue disorder (ASTD) evaluation report. Relying on a Board medical advisor's opinion, the case manager denied the worker's claim, concluding that work activities were not causatively significant with respect to the worker's increased symptoms. On review, a review officer found that the worker's claim should be adjudicated as an ASTD, and that the worker's condition was not compensable as a personal injury under section 134(1) of the Act because it was not attributed to a specific event or trauma. The review officer adjudicated the worker's claim as an occupational disease. The review officer accepted that the worker had a pre-existing condition but found the worker had experienced similar flare-ups of symptoms and concluded that the permanent pre-existing condition had not been aggravated by her work duties.

On appeal to WCAT, the worker provided an opinion from her treating physician that the change in the worker's work activities in January 2020, which exceeded the worker's limitations, resulted in an aggravation of her permanent conditions. The panel found that the worker had a pre-existing condition that was not a disease but concluded that section 134(1) of the Act and policy items C3--12.00 and C3--16.00 of the RSCM II did not preclude adjudicating the worker's claim as a personal injury, specifically as an aggravation of a pre-existing condition, despite the absence of a specific incident or trauma. **Under policy item C3--12.00, an injury may result from a series of incidents happening over a period, even though the incidents are not specifically identified.**

(d) A2101417 - Decision Date: May 20, 2022

Panel: S. Yeager

The issue in the appeal was whether the worker's claim should be reopened based on a significant change in her compensable condition. Although the appeal turned largely on medical evidence, the panel held an oral hearing so the worker could testify about the differences between the symptoms of her compensable injuries and the symptoms of other conditions that were not compensable. The oral hearing was held by videoconference. WCAT sent the worker information regarding the upcoming hearing, advising the worker to contact the WCAT appeal coordinator if she did not have a

computer, smartphone, or tablet with a camera and microphone with the necessary software installed. WCAT sent the worker another invitation to the videoconference which again advised the worker to contact the appeal coordinator if she had any questions about attending the videoconference. The worker did not contact the appeal coordinator and purchased a “webcam” for her desktop computer without making any inquiry about whether WCAT would order reimbursement for that expense.

The panel denied reimbursement of the expense of obtaining the “webcam”. The panel said it was reasonable for a worker to request an oral hearing to explain the evidence, and the worker’s testimony was useful, but it was not necessary for the panel to be able to observe the worker. The worker could have provided her testimony by telephone. **The panel concluded WCAT would reimburse a worker for expenses directly related to producing evidence, travel to attend the oral hearing, or wage loss associated with attending the hearing, but not for the cost of equipment that the worker will own and be able to use for their own benefit after the hearing.**

(e) A2201558 - Decision Date: June 21, 2023

Panel: H. Morton

The worker was returning home on the Coquihalla Highway after a business trip to the Lower Mainland. He stopped his vehicle to help two people whose car had collided with a tractor trailer. The worker was killed when he was struck by two other cars that lost control and struck him while he was assisting the couple involved in the first accident. The worker’s spouse made a claim to the Board for survivor’s benefits. The Board concluded that the worker’s death did not arise out of and in the course of his employment, finding that the worker was travelling on a business trip but his action in pulling over to assist the accident victims was a distinct departure from his employment.

In a court action arising from the accidents, one of the parties requested determinations under section 311 of the Act of the status of several people including the worker. The panel considered whether WCAT was bound by the previous determination made by the Board. The panel concluded that WCAT must weigh all the available evidence and reach its own conclusion on the merits, rather than simply certifying the effect of a prior Board decision. In doing so, WCAT may, in effect, confirm, vary, or cancel the prior Board decision. In the result, **the panel concluded that the worker was on a business trip and was in the course of his employment but that his action in stopping to assist at the accident scene was a distinct departure of a personal nature that took him out of the course of his employment.**

(f) A2202285 - Decision Date: July 12, 2023

Panel: D. Ling

This decision is noteworthy for its application of policy item C10--79.00 (Health Care Supplies and Equipment) of the RSCM II and Practice Directive #C10--5 (Cannabis for Medical Purposes) to payment for cannabis oil as a treatment for acute pain during recovery from injury.

The worker sustained fractures of two thoracic vertebrae and a knee laceration in a fall. The worker was initially prescribed hydromorphone for breakthrough pain, but gradually reduced his use of hydromorphone because of concern over potential tolerance and

dependence. The worker had constant midback pain, which disrupted his sleep, and he was unable to work. He used up to 4000 mg of acetaminophen daily as well as ibuprofen. Dr. S, a family practitioner, discussed pain control alternatives with the worker, including cannabis. Dr. S explained the differences between THC and CBD (the two main active chemicals in cannabis), administration routes, potential side effects, and the limited evidence available with respect to cannabis for pain control. He noted the preference for cannabis oils for ease of use, and predictable response when used in controlled doses. The worker obtained authorization under the *Access to Cannabis for Medical Purposes Regulations* and registered with a licensed producer. Dr. S made specific recommendations for two cannabis oils, containing differing proportions of THC and CBD, for use in specific dosages during the day and at night. The worker used the cannabis oils daily as directed for a period of approximately three months and continued with physiotherapy. During that time the worker made slow gains in mobility and his ability to engage in various activities. His sleep improved. He began to use cannabis oil less frequently.

Dr. F, a Board medical advisor, noted that according to Health Canada clinical studies smoked cannabis, oral THC, cannabis extract, and nabilone produced limited and mixed results. Dr. F further noted that the Canadian Pain Society Guidelines for management of chronic pain listed cannabis as a third line of treatment when there had been either ineffective response or intolerable side effects to standard medications. Dr. F suggested that first line treatments such as serotonin and norepinephrine reuptake inhibitors, tricyclics, and gabapentin should be tried before considering cannabis. Finally, Dr. F noted that the Occupational and Environmental Medical Association of Canada concluded that use of cannabis could lead to impairment which might adversely impact the performance of individuals at work, and it was not advisable to engage in safety-sensitive tasks for 24 hours following cannabis use. Since the worker was employed in a safety-sensitive occupation, the use of cannabis was not medically reasonable.

The panel considered policy item C10-79.00 and Practice Directive #C10-5, which includes a list of considerations when adjudicating a request for cannabis. The panel noted several aspects of the worker's situation as it related to the considerations in the practice directive, including:

- Dr. S authorized the worker to obtain cannabis oil which included a higher proportion of CBD to THC, and the worker provided evidence he had obtained the recommended oils.
 - Dr. S provided reasoning and a rationale to support the worker's use of cannabis oil.
 - The worker had used the cannabis oil daily for approximately 2.5 months under the continued supervision of the nurse practitioner who initially referred the worker to Dr. S.
 - The worker experienced improvements in his condition, which was supported by a homecare services report from a registered nurse that noted the worker had better mobility and pain control using cannabis.
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- None of the worker's treating healthcare practitioners identified any significant risk factors which would weigh against using cannabis, and the worker had not apparently experienced any adverse effects.
 - Although the worker was employed in a safety-sensitive occupation, he used cannabis only for a specific period of time when he was recovering from his injury and not working; thus, the worker's use of cannabis did not impact his safety or the safety of others in his workplace.
 - The dosage directed by Dr. S did not exceed three grams per day and was administered orally.
 - The worker used cannabis for treatment of acute pain rather than chronic pain, and in any event had tried opioid medication, naproxen, acetaminophen, and ibuprofen.

The panel noted that while the Canadian Pain Society Guidelines considered cannabis to be a third-line treatment for chronic pain, Dr. F did not clearly say the guidelines were also applicable to treatment of acute pain. Taking the evidence as a whole, the panel concluded that the benefits to the worker of taking cannabis oil outweighed the risks. Accordingly, the panel concluded the worker should be reimbursed for the cost of the cannabis oil he purchased.



RECONSIDERATIONS

WCAT decisions are “final and conclusive” pursuant to section 309(1) of the Act, but are subject to reconsideration based on two limited grounds:

- new evidence under section 310 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 second stage is engaged and the original decision is reconsidered.

The analysis in the first and second stages of the process differs depending on the grounds argued by the party applying for a reconsideration.

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
- determine 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
- determine that there is new evidence that meets those criteria, and reconsider the original decision based on the new evidence
- on an application to reconsider a WCAT decision based on a jurisdictional error, 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.

WCAT issued 24 stage one reconsideration decisions in 2023. Of the stage one decisions issued, 6 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	3	1	2
New Evidence	7	0	7
Both Grounds Alleged	14	2	12
TOTAL	24	3	21

JUDICIAL REVIEW DECISIONS

Judicial Review Applications

In 2023, WCAT was served with 14 applications for judicial review of WCAT decisions and 4 appeals of decisions of the Supreme Court of British Columbia in judicial reviews.

Judicial Review Decisions

A party may apply to the Supreme Court of British Columbia for judicial review of a WCAT decision.

A judicial review is not an appeal and does not involve an investigation into the merits of the decision.

On judicial review, the court examines the decision to determine whether the decision was patently unreasonable, or the process used in making the decision was unfair. The remedy requested in the underlying WCAT decision will therefore be granted only in limited circumstances. The

usual remedy is for the court to void the WCAT decision in whole, or in part, and refer the matter back to WCAT to be decided afresh.

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 of the decision. Under certain circumstances, the court may extend the time for applying for judicial review.

The following court decisions were made in 2023 and in relation to judicial review proceedings of WCAT decisions and related appeals. A complete list of court decisions involving WCAT are provided on WCAT's website, with summaries, at [Judicial review decisions](#).

Sanders v. Workers Compensation Appeal Tribunal, 2023 BCSC 1

The petitioner suffered a concussion but continued to work for several weeks before going off work. Following an investigation, the Board denied wage loss benefits, and deemed the petitioner's injury to have resolved. The Review Division accepted that the petitioner was temporarily disabled from working until her symptoms resolved about five months after the injury and granted wage loss benefits for that time. Despite her success, the worker appealed to WCAT. On her notice of appeal, the petitioner requested that the appeal proceed by written submissions rather than an oral hearing. At WCAT, the petitioner submitted that her symptoms had improved only slightly and temporarily, and that they were still ongoing and serious. The WCAT panel found that the submissions made on appeal were inconsistent with the submissions made to the Review Division, and that this drew the worker's credibility into question. The panel considered convening an oral hearing, but concluded it was unnecessary. Considering the evidence as a whole, the panel held that the worker's account to the Review Division was more likely to be true than the later version given to WCAT. Accordingly, the appeal was dismissed.

On judicial review, the worker argued that WCAT should not have made adverse findings regarding her credibility without holding an oral hearing. She claimed that she could not have known that her credibility would be in question, and that she did not know that an oral hearing was an option. The court noted that the Notice of Appeal form requires the user to select from two options, written submissions or oral hearing, and the worker selected written submissions. The court did not accept that WCAT was procedurally unfair for using the mode of appeal chosen by the worker herself. Also, given that the worker's submissions to the Review Division were plainly inconsistent with the submissions she gave to WCAT, the court did not accept that the worker had no way of knowing that her credibility would be in issue. The petition was dismissed.

McHugh v. Insurance Corporation of British Columbia, 2023 BCSC 56

The petitioner's work primarily involved keyboarding, which she had been doing for three years. WCAT determined that her bilateral elbow epicondylitis and ulnar neuropathy were not occupational diseases that were due to the nature of her employment, and therefore the petitioner was not entitled to compensation under section 136 of the Act. The WCAT panel gave less weight to an ergonomist's report obtained by the petitioner and preferred a report by a Board Medical Advisor (BMA). The panel concluded that the BMA had a better understanding of the work postures and the ergonomist's report was based on an incorrect assumption. The BMA had relied on evidence from a workplace evaluation by a Board case manager. The ergonomist had done his own workplace evaluation.

The court found WCAT's decision was patently unreasonable for relying on the workplace evaluation (and by extension the BMA's report) as the evaluation did not simulate any actual work activity and could not form a reasonable basis for assessing whether the work activities were of causative significance with respect to the petitioner's condition. The decision was also patently unreasonable because the panel did not consider that the BMA report was based on the same incorrect assumption as the ergonomist's report. The matter was remitted to WCAT to be heard again.

Mardones v. British Columbia (Workers Compensation Appeal Tribunal), 2023 BCSC 385

WCAT determined in an original decision that the petitioner's back injury had resolved. WCAT dismissed the petitioner's application for reconsideration of that decision. The reconsideration panel found that the original decision was not procedurally unfair. The panel also found that a medical report was not new evidence because it predated the WCAT decision and could have been obtained through the exercise of reasonable diligence. On judicial review the only issue was whether the WCAT reconsideration decision was patently unreasonable in finding that the medical report was not new evidence.

The court concluded that the WCAT decision was not patently unreasonable. The court noted that the petitioner had not provided any explanation to WCAT as to why the medical report was not obtained or provided to the reconsideration panel, despite making four sets of submissions. The petition was dismissed.

Chapman v. British Columbia (Workers' Compensation Appeal Tribunal), 2023 BCSC 499

The petitioner was hired less than 12 months before he was injured at work. The Board found the petitioner was a permanent employee and set his long-term wage rate based on class average earnings rather than on the petitioner's earnings in the 12-month period before injury. The Review Division varied the Board decision to set the petitioner's long-term wage rate based on his 12-month earnings, which resulted in a much lower rate. On appeal, WCAT confirmed the Review Division decision. The WCAT decision was partly based on the conclusion that the petitioner had been hired through his union hall rather than directly by the employer.

The petitioner applied for reconsideration of the WCAT decision and presented new evidence showing that he was hired directly by the employer. The panel reconsidered the original decision and found the petitioner was hired directly by the employer, but also found the petitioner was hired only for the duration of a particular project. As a result, the outcome of the appeal did not change.

On judicial review, the petitioner relied on *Sherstobitoff v. WCAT*, 2019 BCSC 1659. In that decision, the court found a WCAT decision was patently unreasonable because it had not considered the specific terms of an oral contract of employment but had instead based its decision on the surrounding circumstances. In the present case, the court found that the panel had considered both the specific words of the employment contract and the surrounding circumstances. The court also noted the statement in *Sherstobitoff* that the common law presumption of permanent employment did not necessarily apply in the workers' compensation context. Consequently, the court found it was not patently unreasonable for the panel to conclude on the available evidence that the petitioner was a temporary rather than permanent employee. The petition was dismissed.

Bird v. British Columbia (Workers' Compensation Appeal Tribunal), 2023 BCSC 543

The petitioner developed bilateral epicondylitis while employed as a stenographer. Her claim was denied by the Board and the Review Division. In her appeal to WCAT, the petitioner provided an ergonomist's report, which was based in part on a technique called surface electromyography (sEMG). The petitioner's employer argued that sEMG was not a reliable technique, citing several WCAT decisions involving different workers but the same ergonomist.

The panel noted that in one of the cited decisions, WCAT obtained an opinion from an independent health professional (IHP) who said sEMG was not a reliable method for measuring stress or load on muscles. The panel acknowledged that the IHP opinion was not evidence in the petitioner's appeal but noted that the ergonomist continued to rely on research that was criticized by the IHP. The panel considered but decided not to obtain an opinion from an IHP or to seek clarification from the ergonomist. The panel also

referred to another WCAT decision in which the panel questioned whether data obtained using sEMG was helpful. The panel denied the petitioner's appeal.

The petition for judicial review was allowed and the matter was remitted to WCAT to be heard again. The court concluded that the panel had relied on the IHP opinion in the earlier WCAT decision, despite the assertion that it had not. The court held that WCAT had breached its duty of procedural fairness in three ways. Firstly, the panel relied on the IHP opinion without giving the petitioner notice of the opinion and an opportunity to respond to it. Secondly, the panel did not clearly identify the research articles it relied on in assessing the reliability of sEMG; consequently, the petitioner did not have an opportunity to respond to them. Thirdly, the second WCAT decision the panel considered was not referred to by the employer and was rendered after the ergonomist made his report; consequently, neither the ergonomist nor the petitioner could be faulted for not addressing the decision.

Borean v. Workers' Compensation Appeal Tribunal, November 14, 2023, unreported, Vancouver Registry No. S231090

The petitioner injured her elbow at work in 2004. The Board accepted the petitioner's claim for medial epicondylitis and chronic pain. The petitioner had previously sustained injuries to the same arm. The petitioner attempted to return to work but was ultimately unable to do so. The Board granted the petitioner a permanent partial disability award based on functional impairment, but denied an award based on loss of earnings because it concluded the petitioner's compensable conditions did not prevent her from returning to work. The Board's decision was confirmed by the Review Division.

In the appeal to WCAT, the panel reviewed extensive medical information, including opinions from Dr. S, Dr. P, Dr. Y, Dr. F, and a three-person medical panel. The panel concluded there was insufficient positive evidence on which to conclude the worker was unable to return to work at her pre-injury occupation because of her compensable injuries. In reaching that conclusion, the panel stated that Dr. S, Dr. P, and the three-person medical panel all concurred the worker would be unable to perform her pre-injury occupation, but not because of her compensable conditions. The panel further stated that only Dr. Y and Dr. F gave opinions that the worker was prevented from returning to work at her pre-injury occupation.

On judicial review, WCAT conceded that the panel had misapprehended the medical evidence insofar as Dr. S had given the opinion that the petitioner's compensable injuries, on top of her previous injuries, contributed to her inability to return to work, and neither Dr. P nor Dr. Y gave opinions on why the petitioner could not return to work. WCAT consented to setting aside the decision on the grounds that it was patently unreasonable to find there was insufficient positive evidence on which to conclude the worker was unable to return to work at her pre-injury occupation because of her compensable injuries, having misapprehended the medical opinions of Drs. S, P, and Y.

Edwards v. British Columbia (Workers' Compensation Appeal Tribunal), 2023 BCSC 1277

The petitioner slipped on ice at work. The Board accepted the petitioner's claim for a back strain but concluded that the accident had not aggravated the petitioner's pre-existing spondylolisthesis and degenerative disc disease. A BMA stated that radiological images of the petitioner's spine following the accident were almost identical to images from 13 years earlier; consequently, there was no evidence that the accident had aggravated the petitioner's pre-existing conditions. A Review Division Medical Advisor's opinion was that the petitioner had suffered "acute on chronic" back pain. The Review Division confirmed the Board's decision.

On appeal to WCAT, the petitioner submitted a medical opinion that he had pre-existing back pain which was aggravated by the workplace incident resulting in significant functional disability. The panel accepted the BMA's opinion that there was no objective evidence of aggravation or acceleration of the petitioner's pre-existing spine conditions. The panel concluded that the work incident had not aggravated those conditions.

The court concluded it was patently unreasonable to treat the lack of objective evidence of change in the petitioner's spine conditions as conclusory. The panel should have considered the petitioner's pre-accident condition, which included chronic back pain, more holistically and should have weighed all medical evidence relevant to the aggravation issue. The matter was remitted to WCAT to be heard again.

De Jesus v. British Columbia (Workers' Compensation Appeal Tribunal), 2023 BCSC 1277

The petitioner, a care aide at a residential care facility, made a claim for compensation for a mental disorder under section 135 of the Act. The petitioner made her claim shortly after being suspended for one day without pay because of what her employer characterized as inappropriately loud and aggressive conduct at a meeting. The meeting was held to investigate a complaint made by a resident that the petitioner had assaulted him. The complaint was later determined to be unfounded. However, at the meeting, the petitioner alleged that the resident, who had dementia, had previously touched her inappropriately on two occasions. The petitioner criticized the employer for focusing on the resident's complaint rather than addressing his prior conduct. There was evidence that the petitioner had "brushed off" the resident's inappropriate behaviour at the time and did not report it because of his dementia.

The Board dismissed the petitioner's claim and the Review Division confirmed the Board's decision. On appeal to WCAT, the petitioner alleged that the incidents involving the resident were the predominant cause of her mental disorder. The panel concluded that the incidents were neither traumatic nor significant stressors, but if they were significant stressors, they were not the predominant cause of the petitioner's mental disorder. The panel found the predominant cause of the petitioner's mental disorder was her reaction to the employer's exercise of its authority to manage the workplace, and the way the employer did so was not threatening or abusive.

On judicial review, the court rejected the petitioner's argument that the panel failed to apply the required modified objective test set out in Board policy. The court found there was evidence that the petitioner had attributed her mental disorder to the employer's actions rather than to the incidents involving the resident. The panel's finding that the petitioner was not credible was not patently unreasonable. The panel's finding that the incidents involving the resident were not significant stressors was not patently unreasonable. The panel was required to and did consider all the evidence including the petitioner's subjective response to the incidents. The panel's finding that the employer's conduct was not a significant stressor because the employer had not engaged in reprehensible or egregious conduct was not patently unreasonable. To find the employer's letter warning the petitioner of the potential consequences of continued behavioural issues was threatening or abusive would undermine the purpose of the statutory exclusion in section 135(1)(c).

Campbell v. British Columbia (Workers' Compensation Appeal Tribunal), 2023 BCCA 245

The appellant/petitioner was a forestry worker who was driving home when his vehicle collided with a logging truck. He filed a lawsuit against the driver and owner of the logging truck and the road maintenance company. The defendants raised the statutory bar to civil action. The road maintenance company applied to WCAT for determinations under section 257 (now section 311) of the Act of the status of the plaintiff, and itself. The truck driver and truck owner did not make a separate application for determination of their status under the Act but did make submissions as to their status. WCAT determined that each of the parties was either a worker or employer under the Act, and that the appellant/petitioner's injuries arose out of and in the course of his employment.

On judicial review, the appellant/petitioner argued that WCAT should not have determined the status of the truck driver or truck owner because they had not filed separate applications in the prescribed form, with the result that he was effectively denied proper notice and an opportunity to be heard with respect to their status. The court noted that the version of WCAT *Manual of Rules of Practice and Procedure* in effect at the time did not require use of a prescribed form and held that while the petitioner/appellant's counsel did not receive formal notice, they had sufficient notice and an opportunity to make submissions with respect to the status of the truck driver and owner.

The British Columbia Court of Appeal held that it was not procedurally unfair for WCAT to determine the status of the truck driver and owner without giving formal notice to the appellant/petitioner because the status of those parties was raised in the pleadings in the personal injury action and were the primary focus of examinations for discovery. The absence of submissions from the appellant/petitioner on those issues was not due to a lack of notice.

Rear v. British Columbia (Workers' Compensation Appeal Tribunal), 2023 BCSC 1513

The petitioner's work involved mainly desk work and keyboarding. The petitioner experienced gradually increasing pain in her hands and wrists over a period. Despite ergonomic adjustments to her workstation, the petitioner's symptoms persisted, and she stopped working. The Board conducted a workplace assessment to determine whether the petitioner's tendinitis was work-related. However, the assessment was conducted on the new workstation configuration. The assessment was very brief. A BMA reviewed the assessment and gave the opinion that the petitioner's tendinitis was not work-related. The Board denied the petitioner's claim, and that decision was confirmed by the Review Division.

On appeal to WCAT, the petitioner provided a workplace assessment conducted by an expert ergonomist. The petitioner submitted that the ergonomist's assessment was more thorough than the Board's assessment and was conducted on a recreation of the petitioner's original workstation. The ergonomist provided a detailed report setting out his observations and related them to the Board's policies. The petitioner also submitted a report from her family physician. The WCAT panel noted the ergonomist's assessment was based on the original workstation configuration. The panel accepted many of the ergonomist's observations. The panel noted the differing medical opinions, but concluded there was sufficient evidence to reach a conclusion without obtaining assistance from an independent health professional. The panel relied upon the Board's assessment and the BMA's opinion, concluding that the petitioner's workplace activities were not of causative significance with respect to her hand and wrist condition.

On judicial review, the court found the panel's reliance on the Board's assessment and the BMA's opinion was patently unreasonable because they were based on the reconfigured workstation. Also, the court noted that it was patently unreasonable for the panel to draw conclusions on matters requiring medical expertise that were contrary to the uncontradicted reports of the ergonomist and family physician.

Lawrence v. Workers' Compensation Appeal Tribunal, 2023 BCSC 1695

The petitioner had been employed as a powerline technician. Conflicts developed between the petitioner and some co-workers. The petitioner believed that his co-workers were engaged in unsafe practices and that it was his duty to ensure that safe work practices were followed.

The petitioner filed bullying and harassment complaints against some co-workers, and some co-workers filed complaints against him. His employer subsequently suspended him with pay. A few weeks later they had a meeting with him for the purpose of investigating his behaviour. The petitioner had a panic attack and walked out. Eight days later his employer terminated his employment, claiming that he had abandoned it.

The petitioner filed a prohibited action complaint under section 49 of the Act against his employer. He reported that his raising of safety concerns and his raising of bullying and

harassment concerns were factors in his employer's decision to first suspend, and later to dismiss him. The Board found that his suspension was not a prohibited action but that his dismissal was. WCAT denied the employer's appeal and allowed the petitioner's cross-appeal in respect of the Board's remedy, increasing the compensation his employer was required to pay him.

The petitioner also made a mental disorder claim for compensation under s 135 of the Act. He alleged that his co-workers bullied and harassed him because he raised safety concerns at work. The Board dismissed his claim, the Review Division upheld the Board's decision, and WCAT dismissed his appeal. WCAT found that events at work were not traumatic events nor significant work-related stressors and that even if they were they were captured by the employment decision exclusion set out in section 135(1)(c) of the Act.

WCAT then dismissed the petitioner's application for reconsideration of the original WCAT mental disorder decision. WCAT found that the original decision was not procedurally unfair and that the information that the petitioner had submitted as new evidence did not satisfy the criteria in section 310 of the Act.

The petitioner sought judicial review of only the mental disorder reconsideration decision.

The court dismissed the petition, finding that the original decision was not procedurally unfair, and the reconsideration decision was not patently unreasonable. The court also found that certain findings in the original decision were not patently unreasonable, such as those relating to whether there was a traumatic event or significant stressor. The court found that it is for a panel and not a medical expert to determine whether a stressor is significant under the Act, and that the employer decision exclusion is not limited to for-cause dismissal of an employee.

The court rejected the petitioner's argument that the reconsideration panel was biased because the decision was allegedly inconsistent with the prohibited action decision. The court agreed with the reconsideration panel that disagreeing with another panel on a point of law is not evidence of bias. The court also found that, more fundamentally, a successful prohibited action does not mean that a mental disorder claim must also be successful. Both kinds of complaints are subject to different statutory provisions and legal analyses.

The petitioner also made various other allegations of bias, including the fact that the employer was represented by a law firm which lists a former premier on its website. The petitioner submitted that the premier created WCAT and appointed the vice chair, and that this gave rise to an apparent conflict of interest. The court found that the fact that a person associated with the employer's law firm may have appointed a decision maker twenty years ago does not give rise to a reasonable apprehension of bias.

In respect of the new evidence aspect of the reconsideration decision, the court found that WCAT was not patently unreasonable. In respect of each document that had been submitted as new evidence, the panel made a reasoned determination of whether the evidence in question was new or could have been obtained with reasonable diligence.

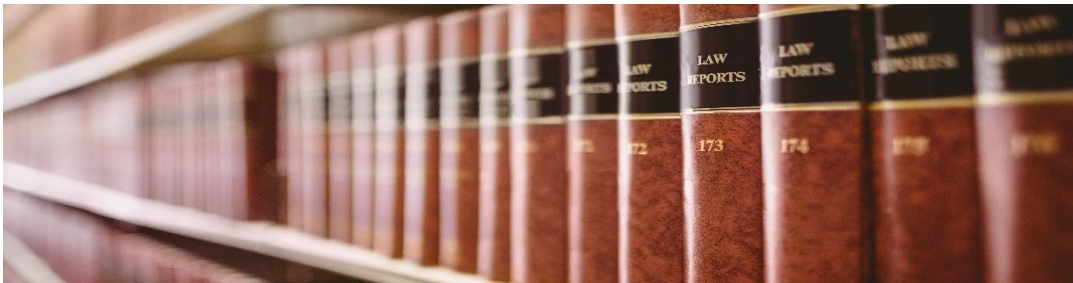
Where appropriate, she also considered whether the evidence was material or substantial to the questions in issue. Further, the reconsideration panel had the authority to consider those threshold questions because the chair's power in section 310 has been delegated to vice chairs.

Sanders v. Workers' Compensation Appeal Tribunal, October 11, 2023, unreported Vancouver Registry S217468

The petitioner made a claim to the Board for a low back injury which she attributed to using a hydraulic hammer on an excavator. The Board denied her claim and the Review Division upheld that decision. The petitioner did not appeal to WCAT. The petitioner returned to work at modified duties. About a month later, the employer terminated her employment. The petitioner filed a prohibited action complaint with the Board. The Board dismissed the complaint, concluding that although the petitioner had referred to safety concerns about the excavator, she attributed her termination to making a bare claim for compensation, which cannot support a prohibited action complaint.

In the WCAT appeal the panel found that the petitioner took the position at the Board that she was terminated because she made a claim for compensation, but at WCAT she changed her position to argue that she was terminated both for making a claim for compensation and for raising safety concerns about the excavator. The panel found that the petitioner had "in essence" attributed her termination to making a bare claim for compensation, and the safety concerns raised only later did not alter that. As a result, the panel concluded the petitioner had not established a *prima facie* case of prohibited action. The panel also determined, in the alternative, that if there was a *prima facie* case, that the employer had rebutted it and established that the petitioner's employment was not terminated for a prohibited reason. The panel relied on certain behaviour by the petitioner that the panel found had motivated the employer's decision.

On judicial review, WCAT consented to setting the decision aside on the grounds that it was patently unreasonable for concluding that the petitioner, in her submissions, had only linked her termination with filing a claim for compensation. The petitioner had also identified safety complaints she had made while employed. WCAT further agreed that the decision was patently unreasonable for not considering relevant evidence relating to the safety concerns the petitioner had raised, including the petitioner's evidence that she had raised a safety complaint with a construction supervisor about trucks driving up a ramp in the dark, and the fact that on the day before she was terminated the Board had investigated equipment the petitioner had complained was unsafe.



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 2023, WCAT created a professional learning and development committee to make recommendations to update the program and ensure it continues to provide relevant and effective learning opportunities.

The WCAT education group, led by the Vice Chair Quality Assurance, organized a variety of educational and training sessions. Members of WCAT attended these either sessions virtually or in-person both as participants and as educators or facilitators. WCAT is registered as a continuing professional development provider with the Law Society of British Columbia.

The following is a list of the sessions in 2023 that WCAT participated in:

February 2	<ul style="list-style-type: none"> ● Procedural Fairness – A Discussion
March 1	<ul style="list-style-type: none"> ● Clear Writing Workshop
March 2	<ul style="list-style-type: none"> ● WCAT Decision Writing Workshop
April 6	<ul style="list-style-type: none"> ● Permanent Psychological Disability: The Vocational Rehabilitation Process and Long-Term Disabilities - Adjudication and Entitlement
May 4	<ul style="list-style-type: none"> ● Permanent Physical Functional Impairment (PFI) Benefits – A Discussion
May 26	<ul style="list-style-type: none"> ● Age 63 Determinations
June 1	<ul style="list-style-type: none"> ● InterOrganizational Conference: <ul style="list-style-type: none"> ○ Gender Diversity in Legal Writing ○ Introduction to Accessibility
October 5	<ul style="list-style-type: none"> ● Loss of Earnings Benefits Appeals – A Discussion ● Judicial Reviews ● Post Decisional Matters
October 24	<ul style="list-style-type: none"> ● Complex Regional Pain Syndrome
November 2	<ul style="list-style-type: none"> ● Mental Disorder Appeals – A Discussion ● Prohibited Action Appeals ● Asthma, Allergies, and Dermatitis in the Workplace

In addition, some WCAT vice chairs attended the virtual BCCAT)Annual Education Conference offered as a series with events scheduled on October 11, 18 and 25, 2023. Some vice chairs also attended the Continuing Legal Education (CLE) Society's Administrative Law Conference, which was held on November 23, 2023, in-person and virtually.

OUTREACH

As the final level of appeal in the British Columbia Workers' Compensation system, WCAT seeks to ensure that stakeholders and those appearing before it are well informed about our operations and practices.

In 2023, WCAT attended meetings with the following groups and provided information about important initiatives and general operational updates. WCAT also received constructive feedback about our processes and took questions about our initiatives.

- BC Federation of Labour
- BC Nurses' Union
- Employers' Forum
- Workers' Advisers Office (WAO)

As well, WCAT participated in the Canadian Labour Congress Winter School as presenters, provided an overview of WCAT to advisers at the Workers' Advisers Office, and presented to the CCAT on WCAT's response to the Truth and Reconciliation Commission's Calls to Action. WCAT also participates in various provincial and national meetings, such as the October 2023 Access to Justice Symposium sponsored by the Workplace Safety and Insurance Appeals Tribunal in Ontario.

UPDATE ON LEGISLATION AND PROCEDURES

Statutory Changes in 2023

There were no amendments to the *Workers' Compensation Act* in 2023.

Practice and Procedure

Items 12.1 and 12.2 of WCAT *Manual of Rules of Practice and Procedure* (MRPP) were amended to reflect changes to the Workers Compensation Act made in 2022 and brought into force in 2023, which permit an employer, worker, or dependant of a deceased worker who is a party to an appeal to request that WCAT retain a health professional to provide independent assistance or advice in the appeal.

Section 304 Lawfulness of Policy Referrals

Section 304 of the Act (formerly section 251) states that WCAT may refuse to apply an applicable policy of the board of directors of WorkSafeBC only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If a WCAT panel determines that a policy should not be applied, the issue is referred to the WCAT chair for review. The appeal is suspended until the chair or the board of directors decides whether the policy should be applied or not.

There was one referral to the chair in 2023 (A2200622). However, there were no decisions made by the chair under section 304(3) of the Act.

WCAT Decision A2200795

The WCAT panel referred policy item C6-41.00 to the chair of WCAT under section 304 of the Act to determine whether a part of the policy is so patently unreasonable it is not capable of being supported by the Act and Regulations. The part of policy item C6-41.00 in question purports to preclude the Board from making a second determination of a worker's retirement date pursuant to section 201(3) of the Act and section 36 of the *Workers Compensation Amendment Act, 2020* (Amendment Act) if the worker has reached the date of retirement previously determined by the Board.

The worker injured his knee in 2008, at the age of 54. The Board accepted the worker's claim for a left knee medial meniscus tear and permanent aggravation of pre-existing osteoarthritis for which he was granted a permanent partial disability award payable to age 65. The worker turned 65 in January 2019, at which time the Board stopped paying permanent disability benefits. The worker did not retire at age 65 but continued working as a construction labourer.

In June 2019, the worker informed the Board that he was experiencing increased left knee symptoms and required surgery. The Board reopened the worker's claim and paid him wage loss benefits starting in October 2019 while he recovered from the knee surgery. The Board ended payment of wage loss benefits in November 2019 when the worker's knee condition stabilized.

Although the worker was found to have increased functional impairment, the Board informed him that it could not provide any permanent disability benefits because of the previous decision on the duration of permanent disability benefits (to age 65). The decision letter referred to policy item C6-41.00, noting that the worker was not eligible for a new determination of retirement age because he had already reached the previously determined retirement age of 65. The Review Division confirmed the Board's decision. The worker appealed that decision to WCAT.

The Amendment Act changed section 201 of the Act with respect to determining the duration of payment of permanent disability benefits by reference to the worker's retirement age.

Sections 201(1)(a)(i) and (ii) of Act provide that if the worker was under the age of 63 at the time of injury, permanent disability payments may be made until the date the worker reaches 65 years of age (subsection (1)(a)(i)), or if the Board is satisfied that the worker would retire after reaching 65 years of age, the date the worker would retire as determined by the Board (subsection (1)(a)(ii)).

The Amendment Act added subsection (3) to section 201 of the Act. Section 201(3) provides as follows:

- (3) A determination made under subsection (1)(a)(ii) as to a date on which a worker would retire after reaching age 65 may be made after a worker has reached age 63, and the Board may, when making the determination, consider the worker's circumstances at the time of that determination.
-

The Amendment Act included a transition provision, section 36, which provides as follows:

36. A determination may be made under section 201(3) of the *Workers Compensation Act*, as added by section 18 of this Act, whether or not a determination has been made under section 201(1) of that Act before the date section 18 of this Act comes into force.

Policy item C6-41.00 states, in part:

The determination of a worker's retirement date for the purposes of the duration of permanent disability benefits decision under section 201 is made once, unless section 36 of the Workers Compensation Amendment Act, 2020, applies. Under section 36, another determination may be made after the worker has reached age 63 if:

- the worker was under 63 years of age on the date of injury,
- a previous determination was made under section 201(1) before January 1, 2021, and
- the worker has not reached the date of retirement as previously determined by the Board.

The panel interpreted section 36 of the Amendment Act as conferring a discretion on the Board under certain circumstances to make a new determination of the worker's retirement date under section 201(1)(a)(ii) and section 201(3) of the Act even though the worker's retirement date was previously determined. The specific circumstances under which a second determination is permitted are that the worker was under 63 years of age at the time of injury, and that the previous determination of retirement age was made before January 1, 2021.

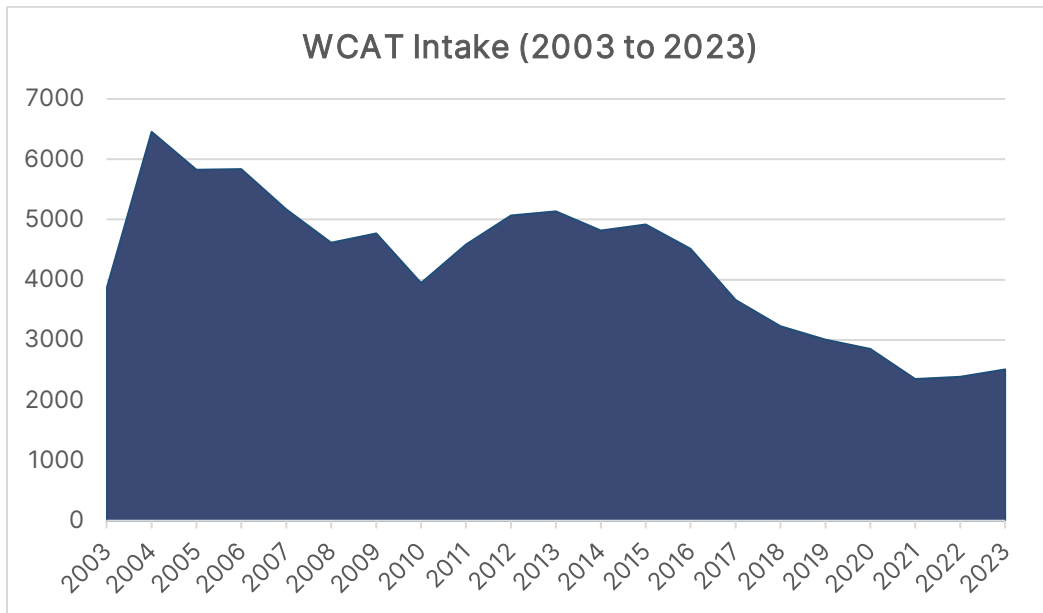
The panel found the requirement in policy item C6-41.00 that the worker has not reached the date of retirement as previously determined, fettered or extinguished the discretion conferred by the Act and the Amendment Act, and was not supported by the Act. Accordingly, the panel concluded that requirement was patently unreasonable and should not be applied in the appeal. The panel referred the policy to the chair under section 304.

TRENDS AND PLANS

Trends

The trends identified below are based on statistical and other information gathered in 2023. As well, given the benefit of 20 years of data, some metrics are analysed from a longer-term perspective.

1. Growth in intake in 2023; growth anticipated to continue in 2024



As seen in this chart, the volume of intake (new appeals and applications) has decreased steadily from 2016 to 2021.

In 2021, WCAT experienced a historically low level of intake (2,352 new appeals and applications). The decrease in appeals in 2021 followed a decrease of 18.9% in Board claims in 2020, which was precipitated by the shutdown of many workplaces in spring 2020. The impact of Board claim volume on WCAT's intake is delayed by the time it takes for the claim and review process.

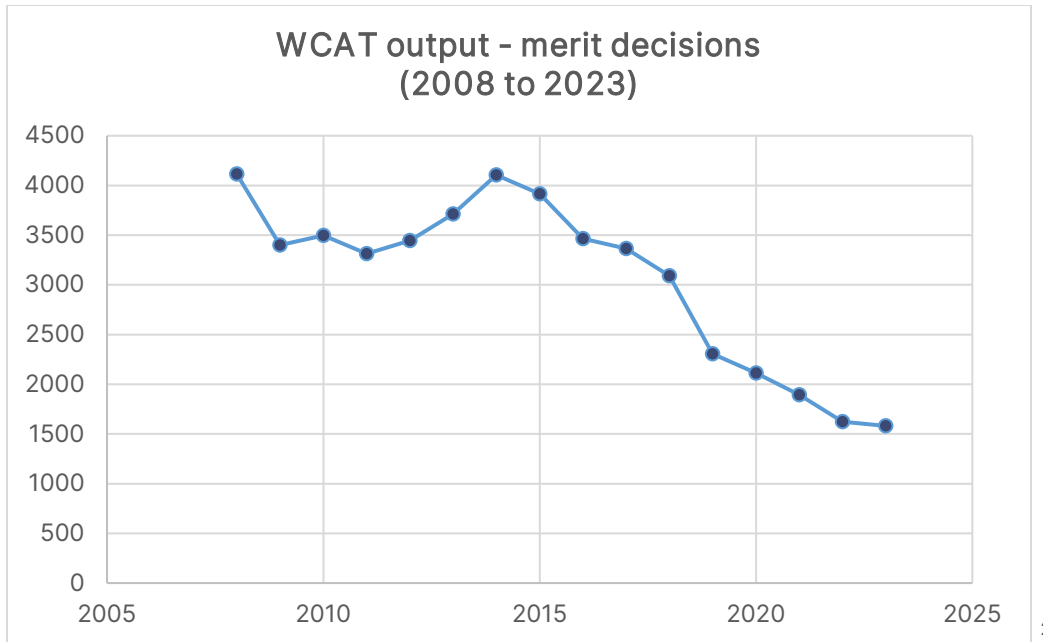
Since 2021, WCAT's intake has increased by 7%. The rate of increase accelerated in 2023 (5%) when compared to the rate of increase in 2022 (2%).

Based on an analysis of historical intake and appeal rates, the volume of new appeals and applications is expected to be between 2,400 and 2,600. It is likely that WCAT's intake will be closer to the higher end of the forecasted range.

However, it is difficult to say whether the increase in intake will continue beyond 2024. While there could be a potential reversal of the downward trend in intake since 2016, more data from a longer period needs to be gathered and analysed, particularly considering the historical patterns of intake.

2. Decrease in merit decision output in 2023 due to fewer numbers of Vice Chairs and complexity of appeals; situation expected to improve somewhat in 2024

While there was a 3% increase in WCAT's 2023 overall output (summary and merit decisions issued), the number of merit decisions issued decreased by 2.5% from the previous year.



The downward trend in WCAT's merit decision output since 2014 corresponds with the decreasing overall intake noted above. In 2019, WCAT experienced the sharpest decline in its merit decision output, dropping 25% from the 2018 level of 3,091 to 2,307 in 2019.

Aside from decreasing intake, other factors affected WCAT's merit decision output since 2019.

Despite hiring four new vice chairs in 2021, the attrition rate of WCAT vice chairs was high from 2019 to 2022. This was primarily due to the demographic characteristics of the vice chair complement, resulting in retirements during and after the COVID-19 pandemic. While the attrition rate slowed in 2023 due to the hiring of four new vice chairs, analysis shows that 54% of the current vice chairs will be eligible to retire in the next five years.

Moreover, the complexity of WCAT's work has increased significantly. One indicator shows that the proportion of types of appeals considered complex grew from 7% of WCAT's overall output in 2018 to 17% in 2023. Yet, this indicator alone does not adequately capture all appeals which are complex.

² The above chart excludes figures from 2003 to 2006. This is to avoid the analysis from being skewed. During that time, WCAT eliminated the backlog of appeals and applications transferred to it.

It is expected that the volume of merit decisions will improve somewhat in 2024. It is expected that there will be an increase in the decisions made by the vice chairs hired in 2021 and 2023. As well, the retention of vice chairs may stabilize or improve with increased remuneration rates afforded to WCAT as a Level 5 tribunal.³ However, there is no indication from other parts of the workers' compensation system that the complexity of WCAT's work will diminish. This will have correlated impacts on WCAT's inventory and time to decision statistics in 2024. While WCAT expects to hire more vice chairs in 2024 (see Plans section below), the impact of the new hires will not be immediate given the duration of WCAT's training and learning period.

3. Majority of appeals arise from decisions of Board review officers, were initiated by workers, and relate to compensation matters in 2023; expected that this will continue in 2024

Over 20 years of its operations, 90% of WCAT's appeals and applications arose from decisions of Board review officers, with the remaining 10% coming directly to WCAT from decisions of Board officers. Most appeals throughout WCAT's history concern compensation matters and are mostly initiated by workers. It is expected that these historical trends will continue in 2024 and beyond.

4. Oral hearings increased in 2023 due to significant increase in in-person hearings as COVID 19 pandemic concludes; uncertain whether this will continue in 2024

Since 2010, WCAT has decided most appeals after a review of the written submissions. This trend continued in 2023. However, there was a notable increase in 2023 in the number of oral hearings held. This was buoyed by the significant increase in the number of in-person hearings.

However, it is difficult to predict whether the increase in in-person oral hearings will continue in 2024. WCAT's stakeholders, like all British Columbians, have adapted to COVID 19 being endemic in our society. While this may mean that individuals are more comfortable with attending an in-person oral hearing, it is expected that the use of videoconferencing technology will remain a strong preference due to the convenience for parties.

5. Impact of IHP amendment minimal in 2023; potential impact in 2024 remains unknown

The amendment concerning requests for an IHP came into force only in the spring of 2023. While WCAT received more than 50 requests throughout the year, most of those requests were still pending at the end of the year. Thus, it is yet unknown whether there will be an increase in the numbers of IHP processes commenced by WCAT panels in the future. There is a potential that the number of requests from parties could increase in 2024, as WCAT's stakeholders become more familiar with the mechanism.

³ On September 25, 2023, the Province of BC's Appointee Remuneration Committee classified WCAT as a Level 5 tribunal under [Treasury Board Directive 1/24](#) – Remuneration Guidelines for Administrative Guidelines and Regulatory Boards.

6. Modest increase in volume of appeals involving Indigenous parties in 2023; expected to continue in 2024

Although the rate of increase in the volume of appeals involving self identified Indigenous parties slowed in 2023 (8% in 2023 compared to a 59% increase in 2022), it is expected that a modest rate of increase will continue into 2024. Indigenous parties at WCAT, who are mostly workers, continue to opt to work with a WCAT navigator at a very high rate. While the representation rate for compensation appeals grew for both worker and employer appellants overall, there does not appear to have been a corresponding increase for the representation rate for Indigenous parties at WCAT.

Plans

The WCAT chair is responsible for the general operation of WCAT. Section 280(2)(c) of the Act also outlines that the chair's responsibilities include developing a three-year strategic plan and an annual operations plan for the appeal tribunal.

WCAT is in the process of developing its three-year strategic plan for 2024 to 2027. Our 2024 annual operations plan will address the trends noted above, as well as other factors in our environment that impact WCAT's operations.

Some of the highlights of our plans for 2024 include:

1. Recruit qualified vice chairs as a priority means to address increasing intake and other operational challenges

WCAT recognizes that trends #1 and #2 represent significant operational challenges that directly impact parties and stakeholders. We will increase the number of vice chairs in 2024 by conducting two rounds of hiring in the spring and winter. We will also continue to work to retain experienced and knowledgeable vice chairs who wish to move to semi-retirement by offering them flexibility to work on an as needed (per diem) basis. We recognize that these actions will not likely have an immediate impact in 2024; but they are necessary to maintain an adequate complement of vice chairs to meet WCAT's statutory mandate.

Also, WCAT will continue to monitor intake, output, inventory, complexity of decisions, and time to decision metrics to identify any trends or significant developments and to respond as required.

2. Continual improvement of WCAT Online Services and other enterprise systems

In 2023, WCAT successfully launched its web-based portal to allow workers, employers, and their representatives access to digital appeal information, appeal status, and documents. A dedicated WCATHelpDesk was created to assist parties and their representatives with the registration process. This was a successful example of people-centred design and incorporated lessons learned during the rapid shift to digital services at the outset of the COVID-19 pandemic. WCAT is actively working on the next iteration of this portal, which will allow parties and their representatives to start new appeals and applications with WCAT digitally.

In 2024, there are planned improvements to WCAT's Scheduler application. This application is key to the scheduling of WCAT's oral hearings, as well as assignment of work.

3. Professional Learning and Development Committee

In 2023, a Professional Learning and Development Committee was formed to report to the chair and give WCAT's executive recommendations on the purpose, scope, and methodology of WCAT's professional learning and development policy for vice chairs. The committee, composed of vice chairs with interest or expertise in the area and led by the vice chair of quality assurance and training, delivered its recommendations in late 2023. WCAT's executive is reviewing them in-depth in 2024. However, in the interim, changes were made to allow for more flexibility in the 2024 learning schedules for vice chairs.

4. Deepening our commitment to reconciliation

As the volume of appeals involving Indigenous parties continues to grow, the number of trained panels and navigators assigned to these appeals increased in 2023. This involves a significant commitment on the part of vice chairs and staff to unlearn biases, acquire knowledge in new areas, and apply approaches to adjudication and appeal processing that adhere to WCAT's statutory role while recognizing the unique circumstances and current barriers faced by Indigenous Peoples in Canada. In 2024, we will continue our successful Indigenous law co-op student program for its third year. We will also continue to work with an Indigenous lawyer who acts as a training resource and advisor to WCAT. WCAT also continues to share its experience with reconciliation work within the workers' compensation system and the tribunal sector in recognition of being part of the administrative justice system.

5. Equity, Diversity, and Inclusion (EDI) and other workplace culture improvements

In 2023, WCAT retained Inclusive Excellence Strategy Solutions Inc to build awareness amongst its leaders about the need for EDI. This work will continue in 2024 with a special focus on developing recommendations to improve the recruitment process for vice chairs and decrease/eliminate barriers for equity-deserving groups. As well, EDI key performance measures will be developed, WCAT-wide training conducted, and structures formed to improve WCAT's workplace culture.

As well, WCAT will implement in 2024 a new government-wide performance development platform for its unionized and excluded employees. This flexible tool helps staff to develop and monitor performance goals on an individualized basis within WCAT's key priorities, while encouraging regular conversations and dialogue with supervisors.

WCAT is also committed to improving its organizational structure and policies in 2024. After 20 years of operations, many internal policies will benefit from a fresh perspective. As well, gaps in organizational structures will be addressed in 2024 to respond to emerging and evolving business needs.

6. Accessibility

In 2023, WCAT's Registry continued to study and respond to accessibility issues. There was a positive launch of the appeal officer role this past year. By streamlining the delivery of Registry processes, the appeal officer role will achieve efficiencies, increase staff engagement in their work, and provide a single point of contact for parties. As well, in 2024, WCAT's Accessibility Committee will be formed with leadership from the Registrar. This committee is tasked with developing an accessibility plan for review and endorsement by WCAT's executive. WCAT will also formally commit to improving accessibility in its 2024 to 2026 Strategic Plan.

COSTS OF OPERATION FOR THE 2023 CALENDAR YEAR

Category	Cost
Salaries	9,581,599.64
Employee Benefits and Supplementary Salary Costs	2,478,183.47
Per Diem – Boards and Commissions	525,624.55
Travel	26,551.40
Centralized Management Support Services*	1,778,595.46
Professional Services	410,740.91
Information Technology, Operations, and Amortization	1,924,577.69
Office and Business Expenses	333,946.72
Building Service Requests and Amortization	346.56
TOTAL EXPENDITURES**	\$17,060,166.40

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

** The costs of operations include forestry coroner's inquest charges.

VICE CHAIRS

Section 234(2)(b) of the Act provides that the chair is responsible for establishing quality adjudication, performance, and productivity standards for vice chairs, and regularly evaluating the vice chairs 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 continues to be regularly evaluated on an ongoing basis.

EXECUTIVE AND VICE CHAIRS WITH SPECIAL DUTIES AS OF DECEMBER 31, 2023		
Name	Position	End of Term
Luningning Alcuitas-Imperial	Chair (OIC #675)	December 31, 2024
Debbie Sigurdson	Registrar	February 28, 2029
David Newell	Tribunal Counsel	January 31, 2025
James Sheppard	Vice Chair, Quality Assurance and Training	February 28, 2029
Beatrice K. Anderson	Deputy Registrar	February 28, 2029
Lesley Christensen	Deputy Registrar	February 28, 2029
Hilary Thomson	Deputy Registrar	October 15, 2025
Randy Lane	Vice Chair and Team Leader	February 28, 2025
Julie Mantini	Vice Chair and Team Leader	February 28, 2027
Susan Marten	Vice Chair and Team Leader	February 29, 2028
Terry Yue	Vice Chair and Team Leader	January 5, 2025

VICE CHAIRS AS OF DECEMBER 31, 2023			
Name	End of Term	Name	End of Term
W. J. (Bill) Baker	February 29, 2024	Warren Hoole.....	September 30, 2024
Anand Banerjee	October 15, 2025	Cynthia J. Katramadakis.....	March 31, 2029
Hélène Beauchesne	March 31, 2027	Joanne Kembel.....	February 29, 2028
Sarwan Boal	February 29, 2028	Courtney LeBourdais	May 28, 2026
Larry Campbell	October 15, 2028	Lori Leung	December 21, 2027
Melissa Clarke	September 30, 2025	Deborah Ling	June 21, 2028
Jyoti Dasanjh	September 12, 2024	Cheryl McKitrick	May 28, 2026
William J. Duncan	February 28, 2025	Chad McRae	October 15, 2028
Scott Ferguson	June 21, 2029	Renee Miller	April 30, 2027
Willa Forbes	May 28, 2026	Anthony Moffatt	May 28, 2026
Sherelle Goodwin	January 5, 2025	Herb Morton.....	February 28, 2025

VICE CHAIRS AS OF DECEMBER 31, 2023			
Name	End of Term	Name	End of Term
Barbara Murray.....	October 15, 2028	Simi Saini.....	September 5, 2026
Elaine Murray	August 31, 2024	Dawn Shaw-Biswas	September 12, 2024
Kristina Nelles	September 12, 2024	Shelina Shivji.....	March 31, 2027
Christopher Ramsay.....	September 12, 2024	Tony Stevens.....	February 29, 2028
Dale Reid	February 28, 2025	Andrew Waldichuk	April 30, 2029
Deirdre Rice	February 28, 2027	Sherryl Yeager	February 28, 2029
Ellen Riley	January 5, 2028	Lyall Zucko	January 5, 2025

VICE CHAIR DEPARTURES IN 2023	
Name	Departure Date or End of Term
Brian King	October 5, 2023
Guy Riecken	April 14, 2023