

 <p>Yukon Workers' Compensation Health and Safety Board</p>	Part:	Entitlement		
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MERITS AND JUSTICE OF THE CASE

GENERAL INFORMATION

Every decision of the Yukon Workers' Compensation Health and Safety Board (YWCHSB) must be based on the merits and justice of the case. This means decision-makers must take into account all facts and circumstances relating to the case, as well as all relevant YWCHSB policies and provisions of the *Workers' Compensation Act* S.Y. 2008 (the "*Act*").

The *Act* discusses the presumption of work-relatedness ("the presumption"). If an injury arises out of or in the course of a worker's employment, the injury is presumed to be work-related unless the contrary is shown (see "The Presumption of Work-relatedness").

Decision-makers must assess and weigh all relevant evidence. Where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue must be resolved in favour of the worker, or dependent of a deceased worker.

PURPOSE

The purpose of this policy is to guide those required under the *Act* to make decisions concerning compensation benefits. Within the parameters of the *Act* and YWCHSB policy, decision-makers have ample opportunity to exercise their discretion to ensure compassion, respect and fairness in all decisions.

DEFINITIONS

The following definitions apply in this policy:

1. **Objective:** Perceptible to the senses of another person or a readily observable result.
2. **Subjective:** Pertaining to or perceived only by the affected individual but not to the senses of another person or a result which is not readily observable.
3. **Relevant Information:** Relates directly to an issue or fact under review or appeal, or has a tendency to prove or disprove an issue or fact.

POLICY STATEMENT

1. Merits and Justice

By applying the *Act* and policy provisions to similar situations, decision-makers ensure that each participant in the system is treated fairly, and the decision-making process is consistent and reliable.

The obligation to decide each case on the basis of merits and justice does not authorize a decision-maker to disregard the relevant provisions of the *Act* or YWCHSB policies. These must be taken into consideration and cannot be ignored if they apply to a particular case.

If a decision-maker finds that the facts of the case are not covered by existing policy, the case must be decided on its particular facts, in accordance with the general provisions of the *Act*.

2. The Presumption of Work-relatedness

The presumption of work-relatedness exists from the outset of the claim. Following submission of the initial reports, the decision-maker will process the claim. During the claim processing, the decision-maker may find it necessary to further investigate, particularly where there is some possibility that the injury may not have been work-related.

When decision-makers seek out information, it is not from the perspective of gathering evidence for or against the worker. Rather, it is an active, impartial inquiry to obtain relevant facts, and to seek complete information.

a) When the Presumption Applies

When processing a claim, decision-makers must ensure that workers who potentially have a claim are dealt with as quickly as possible. Whether the injury arose “out of and in the course of” employment is one of the first determinations a decision-maker must make in processing a claim.

Generally, very little information may be necessary to make this initial determination. For example, a worker is found unconscious and bleeding at their workplace. If there is no evidence available as to the cause of the injury, then it may be considered to have arisen out of and in the course of the worker’s employment, and is therefore presumed to be work-related. However, other evidence may later become available.

b) When the Presumption Does Not Apply

If there is any evidence regarding whether or not the injury was work related, then the decision-maker shall weigh the evidence, and the presumption no longer applies.

If the decision-maker determines that, after the information gathering process is complete, the evidence weighs more against the injury being work-related than for it, then the “contrary” in the presumption clause has been shown. The decision-maker is not required to identify an alternative explanation for the injury, supported by evidence of greater weight, in order to make this decision.

In some cases, this may mean that a claim originally accepted based on the presumption is eventually denied because of further evidence to the contrary.

If the decision-maker determines that, based on the evidence, the injury was not work-related, the worker always has the opportunity to provide further information to the decision-maker. This information may be provided at any time, and will be weighed along with all of the other evidence.

c) When Section 19 Applies

In cases where the decision-maker cannot establish whether or not the injury was work-related because the evidence shows the possibilities to be evenly balanced, the *Act* requires that the issue shall be resolved in favour of the worker.

3. Weighing Evidence

a) Standard of Proof

The standard of proof for decisions made under the *Act* is the balance of probabilities – a degree of proof which is more probable than not.

b) Responsibility for Gathering Evidence

The worker, the employer and the attending physician are responsible for providing the YWCHSB with whatever information they are able, or obliged to supply under the law. Where additional information may be required, the obligation is on the decision-maker to make the necessary inquiries.

Where there is an absence of information on an issue, further inquiry is necessary. The absence of information is not necessarily grounds for drawing any particular conclusion.

c) Referrals to Service Providers

It is essential for a service provider to have access to as much information as possible in order to issue a balanced and fair opinion. Decision-makers must forward all relevant information to the service provider providing the opinion. Decision-makers shall not edit or omit information being used in a referral.

d) Evidence and the Decision-making Process

Decision-makers must assess and weigh all relevant evidence. This necessarily involves making judgements about the credibility, nature and quality of that evidence as they determine the weight of evidence on either side of an issue. The decision-maker cannot ignore or fail to evaluate relevant evidence in their written decisions. (See Appendix A for more information on evidence.)

e) Conflicting Evidence

Decision-makers must weigh conflicting evidence to determine whether it weighs more toward one possibility than another. Decisions shall be based on the weight assigned to the evidence.

Where the evidence weighs more heavily in one direction, then that shall determine the issue. If the decision-maker concludes that the evidence for and against entitlement is of equal weight, then the issue will be decided in favour of the worker.

f) Reasons Required in Writing

The decision-maker must provide a reasoned decision in writing, illustrating the rationale for the weight assigned to the evidence, or how evidence for and against is evenly balanced and, therefore, resolved in favour of the worker.

g) Conflicting Medical Evidence

The following general principles shall be applied by decision-makers in situations where conflicting medical evidence must be weighed for the determination of entitlement:

- i) When addressing conflicting medical evidence, decision-makers will not automatically prefer the medical evidence of one category of physicians or practitioners to that of another. However, the opinion of a specialist concerning his/her area of specialty should generally be preferred to the opinion of a general practitioner.
- ii) Subject to paragraph i) above, decision-makers shall consider all of the following criteria in deciding what weight to give to medical evidence:
 - A) the expertise of the individual providing the opinion,
 - B) the opportunity of the individual providing the opinion to examine the worker,
 - C) the timeliness of the examination and report relative to the issue,
 - D) the correctness of the facts and assumptions relied upon by the provider of the opinion,

- E) any issues of bias or objectivity with the opinion,
 - F) objective versus subjective medical evidence (see “Definitions”), and
 - G) the findings of any relevant scientific studies referenced by a medical practitioner, as defined by the *Act*.
- iii) Where the medical evidence conflicts and the weight cannot readily be determined by applying the above criteria, the decision-maker may consult with the YWCHSB medical consultant (or in the case of an appeal committee, the provision in the *Act* for independent medical examinations will govern) to:
- A) determine whether all appropriate medical evidence has been obtained,
 - B) determine if further investigations and/or medical examinations are required, or
 - C) obtain an opinion regarding the weight of the medical evidence. (Where the medical consultant has had prior involvement and a potential conflict exists, the alternate medical consultant will provide the opinion.)

4. Balance of Probabilities

As noted, if there is doubt on any issue because the evidence equally supports one or more decisions, the decision-maker will resolve the issue in the worker’s favour.

This principle, however, is not to be used:

- a) as a substitute for lack of evidence, or
- b) in a purely speculative sense, or
- c) when the issue can be decided on the balance of probabilities.

APPLICATION

This policy applies to all decision-makers required by the *Act* to make decisions concerning claims for compensation.

ACT REFERENCES

Sections 17, 18, 19, 58, 60 and 61

HISTORY

CL-54, "Merits and Justice of the Case", effective February 17, 2004, revoked July 1, 2008.

EN-02, "Merits and Justice of the Case", effective July 1, 2008, revoked January 1, 2014.

APPENDIX A

The Process of Weighing Evidence

Evidence is an important part of the investigation process. The ability to weigh evidence is critical for effective decision-making.

1. Relevance

- a) To determine relevance, the decision-maker must know what issue is being decided.
- b) Relevance is not purely a legal test; it is more a common sense test.
- c) The question for the decision-maker is whether or not the information has any logical connection to the question being decided.
- d) The decision-maker cannot ignore or fail to evaluate relevant evidence in their written decisions.
- e) It is not always possible to determine the relevance at the outset. Sometimes as much evidence as possible needs to be gathered and the question of relevance determined at the end.

2. Direct vs. Circumstantial

- a) An example of direct evidence: witness sees the worker slip off the platform.
- b) An example of circumstantial evidence: witness sees the worker lying on the ground under the platform.
- c) Direct evidence confirms the cause and the effect. Circumstantial evidence confirms the effect only.
- d) Direct evidence is better than circumstantial evidence because it is possible to make wrong inferences based on observed circumstances. For example, while it seems logical to assume that the worker lying on the ground fell off of the platform, he or she may in fact be lying there for any number of reasons.
- e) However, circumstantial evidence may sometimes be strong, particularly in the absence of any other evidence.

3. Credibility

- a) When faced with contradictory evidence the decision-maker may have to assess the credibility of individuals, statements or documents.

- b) Assessing credibility may involve judging the sincerity of the individuals providing information. It may involve judging whether it is plausible that an event or series of events unfolded as recalled.
- c) Credibility is highly subjective, so it must be remembered that this is just one aspect of the investigation and must be considered in the context of all the evidence.
- d) Because a decision-maker concludes that someone is not credible in relation to an isolated fact or memory, this does not mean that the individual's credibility is always in question. For example, someone may honestly believe that what they are saying is the truth, but the weight of other evidence does not support their belief.

4. Best Evidence

- a) Whenever possible, consider original documents rather than copies.
- b) Statements prepared closer in time to the events they are describing are preferable to those prepared later.
- c) Sworn statements have more weight than unsworn statements.

5. Hearsay

- a) "A term applied to that species of testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others." (Blacks Law Dictionary, 6th Ed.)
- b) Hearsay is considered a poor form of testimony and should always be assigned less weight than direct evidence because:
 - i) The author of the statement is not under oath and not subject to cross-examination.
 - ii) Hearsay results in a decision based on secondary rather than primary information, and therefore, support for the reasoned decision is weaker.