



YUKON WORKERS'
COMPENSATION
HEALTH AND
SAFETY BOARD

SUBJECT: MERITS AND JUSTICE
OF THE CASE

POLICY NO.: CL-54

BOARD APPROVAL:

APPROVAL DATE: February 17, 2004

REVOKED

BOARD ORDER NO.:

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replaced by ENL-02
Merits and Justice of
the Case effective
July 1, 2008

EFFECTIVE DATE: February 17, 2004

POLICY STATEMENT

SECTION

REFERENCE: 6, 19(1), 32, 33, 112(6), 114 *Workers' Compensation Act*,
R.S.Y. 2002

POLICY: MERITS AND JUSTICE OF THE CASE

GENERAL INFORMATION

Every decision of the WCH&SB 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 WCH&SB policies and provisions of the *Workers' Compensation Act* (the Act).

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

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 dependant of a deceased worker.

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 WCH&SB policy, decision-makers have ample opportunity to exercise their discretion to ensure compassion, respect and fairness in all decisions.

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APPLICATION

This policy applies to all decision-makers required by the Act to make decisions concerning claims for compensation, for example, an adjudicator.

POLICY

A. 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 WCH&SB 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.

B. THE PRESUMPTION OF WORK RELATEDNESS

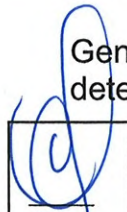
The presumption of work relatedness exists from the outset of the claim. Following submission of the initial reports, the adjudicator will process the claim. During the claim processing, the adjudicator may find it necessary to further investigate, particularly where there is some possibility that the disability 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.

When the Presumption Applies

When processing a claim, adjudicators must ensure that workers who potentially have a claim are dealt with as quickly as possible. Whether the disability arose "out of and in the course of" employment is one of the first determinations an adjudicator 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


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at their workplace. If there is no evidence available as to the cause of the disability, 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.

When the Presumption Does Not Apply

If there is any evidence regarding whether or not the disability 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 disability 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 disability, 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 adjudicator determines that, based on the evidence, the disability was not work related, the worker always has the opportunity to provide further information to the adjudicator. This information may be provided at any time, and will be weighed along with all of the other evidence.

When "The Benefit of the Doubt" Applies

In cases where the decision-maker cannot establish whether or not the disability was work related because the evidence shows the possibilities to be evenly balanced, the Act requires that the benefit of the doubt must be used to find in favour of the worker.

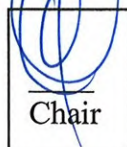
C. WEIGHING EVIDENCE

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.

Responsibility for Gathering Evidence

The worker, the employer and the attending physician are responsible for providing the WCH&SB 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.



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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.

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.)

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.

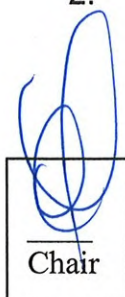
Reasons Required in Writing

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.

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:

1. 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.
2. Subject to paragraph 1. above, decision-makers shall consider all of the following criteria in deciding what weight to give to medical evidence:



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- (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" section), and
 - (g) the findings of any relevant scientific studies referenced by a medical practitioner, as defined by the Act.
3. Where the medical evidence conflicts, and the weight cannot readily be determined by applying the above criteria, the decision-maker may consult with the WCH&SB 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.)

D. BENEFIT OF DOUBT TO THE WORKER

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.



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The principle of benefit of doubt, however, is not to be used:

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

E. DEFINITIONS

The following definitions apply in this policy:

- (a) OBJECTIVE
Perceptible to the senses of another person or a readily observable result.
- (b) 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.

REFERENCES

Policy GC-05, Reviews and Appeals 01-09-04



APPENDIX A

The Process of Weighing Evidence

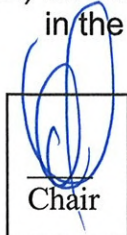
Evidence is an important part of the investigation process. The ability to weigh evidence is critical for effective decision-making.

A. Relevance

- 1.) To determine relevance, the decision-maker must know what issue is being decided.
- 2.) Relevance is not purely a legal test; it is more a common sense test.
- 3.) The question for the decision-maker is whether or not the information has any logical connection to the question being decided.
- 4.) The decision-maker cannot ignore or fail to evaluate relevant evidence in their written decisions.
- 5.) 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.

B. Direct vs. Circumstantial

- 1.) An example of direct evidence: witness sees the worker slip off the platform.
- 2.) An example of circumstantial evidence: witness sees the worker lying on the ground under the platform.
- 3.) Direct evidence confirms the cause and the effect. Circumstantial evidence confirms the effect only.
- 4.) 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.
- 5.) However, circumstantial evidence may sometimes be strong, particularly in the absence of any other evidence.


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C. Credibility

- 1.) When faced with contradictory evidence the decision-maker may have to assess the credibility of individuals, statements or documents.
- 2.) 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.
- 3.) 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.
- 4.) 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.

D. Best Evidence

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

E. Hearsay

- 1.) "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.)
- 2.) Hearsay is considered a poor form of testimony and should always be assigned less weight than direct evidence because:
 - a. The author of the statement is not under oath and not subject to cross-examination.
 - b. Hearsay results in a decision based on secondary rather than primary information, and therefore, support for the reasoned decision is weaker.

