



## Policy Amendment Proposal EN-02 Merits and Justice of the Case

This policy amendment proposal relating to merits and justice of the case will reflect the issues consulted on during the engagement for the *Workers' Safety and Compensation Act* (the 'Act') and will align the amendments made in the new legislation.

The new Act comes into force July 1, 2022. The intended effective date of the proposed policy amendments will be July 1, 2022.

The proposed amended Merits and Justice of the Case policy will reflect minor changes to ensure consistency with the provisions of the Act.

A five-year policy review plan will be developed later in 2022. After July 1, 2022, all amended policies to align with the new Act will be prioritized for a more detailed review.

The purpose of this policy is to explain how decision makers exercise their decision-making authority in accordance with the Act and regulations while ensuring compassion, respect and fairness.

### Relevant sections of the Act

The following sections of the Act are relevant:

N/A

**Proposed minor changes to this policy** are highlighted in yellow

- changes to section references, language and definitions
- revisions to the general presumption in accordance with the Act
- revise title of balance of probabilities to be in accordance with Act changes
- addition of exceptional circumstances as removed from other policies

### Board Orders/Regulations

N/A

### Current policy

[EN-02 Merits and Justice of the Case](#)

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## Policy Amendment Proposal EN-02 Merits and Justice of the Case

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The board of directors is providing this policy amendment proposal to stakeholders seeking their input, comments, questions and suggestions.

Some questions for consideration:

1. Are there any general comments about this policy proposal?
2. Are there any gaps in this policy proposal?
3. Additional comments?

The views of our stakeholders are important to us. All feedback will be considered prior to the board of directors approving any amendments.

Engagement on this policy proposal closes on **April 30, 2022**. Please provide your feedback by:

1. Downloading a [fillable form](#) on our website and sending it as an attachment to [Policy.Feedback@wcb.yk.ca](mailto:Policy.Feedback@wcb.yk.ca)
2. Emailing comments directly to [Policy.Feedback@wcb.yk.ca](mailto:Policy.Feedback@wcb.yk.ca)
3. Receipt in our building by April 30, 2022, by mail or drop off at  
*Yukon Workers' Compensation Health and Safety Board  
401 Strickland Street  
Whitehorse, Yukon Y1A 5N8*

By the end of May a summary of all feedback on this policy amendment proposal will be published on our website at [www.wcb.yk.ca](http://www.wcb.yk.ca)

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## Policy Amendment Proposal

### EN-02 Merits and Justice of the Case

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**Preventing** work-related injuries is the most important job in any workplace. The *Workers' Safety and Compensation Act* establishes the responsibilities of all workplace parties to work together to ensure the physical and psychological health and safety of workers. When injuries do occur, workers and employers must continue to work together to facilitate an injured worker's early and safe return to health and work.

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#### **Purpose**

This policy explains how decision makers exercise their decision-making authority in accordance with the Act and regulations while ensuring compassion, respect and fairness.

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#### **Definitions**

**board** means the Workers' Safety and Compensation Board

**objective** means perceptible to the senses of another person or a readily observable result

**subjective** means 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

**relevant information** means relating directly to an issue or fact under review or appeal, or has a tendency to prove or disprove an issue or fact

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#### **Policy Statement**

##### **1. General**

The board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions that arise under the Act.

The Act further provides that every decision of the board must be:

- a. based on the merits and justice of the case; and
- b. made in accordance with the Act and the regulations and the policies and codes of practice of the board.

##### **2. 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.



## Policy Amendment Proposal

### EN-02 Merits and Justice of the Case

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 **board** 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.

### 3. Presumption

To determine whether an injury is work-related, the decision maker must weigh the evidence and decide whether the injury both arose out of and occurred in the course of the worker's employment. However, in some cases **there is** not sufficient evidence to determine **both** that an injury **arose** out of and **that it** occurred **in** the course of a worker's employment.

The presumption ensures that the worker receives compensation in cases where one criterion can be established (either arises out of or occurs in the course of) but there is insufficient evidence to determine the other criterion.

See policy [EN-01 Arising Out Of and In The Course of Employment](#) for further information.

### 4. 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 board** 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.

#### *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 will not edit or omit information being used in a referral.



## Policy Amendment Proposal EN-02 Merits and Justice of the Case

### *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 will be based on the weight assigned to the evidence.

Where the evidence weighs more heavily in one direction, then that will 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 will be applied by decision makers in situations where conflicting medical evidence must be weighed for the determination of entitlement:

- a. 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 their area of specialty should generally be preferred to the opinion of a general practitioner.
- b. Subject to paragraph i) above, decision makers will consider all of the following criteria in deciding what weight to give to medical evidence:
  - i. the expertise of the individual providing the opinion;
  - ii. the opportunity of the individual providing the opinion to examine the worker;
  - iii. the timeliness of the examination and report relative to the issue;
  - iv. the correctness of the facts and assumptions relied upon by the provider of the opinion;



## Policy Amendment Proposal EN-02 Merits and Justice of the Case

- v. any issues of bias or objectivity with the opinion;
- vi. objective versus subjective medical evidence (see Definitions); and
- vii. the findings of any relevant scientific studies referenced by a medical practitioner, as defined by the Act.

Where the medical evidence conflicts and the weight cannot readily be determined by applying the above criteria, the decision maker may consult with **the board** medical consultant 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.

### 5. Benefit of doubt

As noted, when the disputed possibilities are evenly balanced on an issue, the issue must be resolved in favour of the worker.

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.

### 6. Exceptional Circumstances

There may be rare or exceptional circumstances where there is no policy or the existing policy does not sufficiently cover the particular circumstances or application of the policy would lead to an unintended result.

In these situations, the decision will be made on the merits and justice of its own particular facts in accordance with the general provisions of the Act and regulations.

However, a decision maker cannot use exceptional circumstances to disregard, override or exceed the authority of the relevant provisions of the Act and regulations.



# Policy Amendment Proposal

## EN-02 Merits and Justice of the Case

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### Related Policies

[EN-01 Arising Out Of and In the Course of Employment](#)

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### 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



## Policy Amendment Proposal

### EN-02 Merits and Justice of the Case

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, 6<sup>th</sup> 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.





## Policy Amendment Proposal

### EN-02 Merits and Justice of the Case

- ii) Hearsay results in a decision based on secondary rather than primary information, and therefore, support for the reasoned decision is weaker.