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Section Title: Board and Corporate Administration
Subject: Decision Making
Effective Date: July 1, 2019

POLICY PURPOSE

This policy outlines:

- the source of the WCB's authority to make decisions;
- the procedures that WCB decision makers must follow when making decisions under *The Workers Compensation Act* (the Act); and
- the key legal principles and concepts that must be applied when making decisions under the Act.

Scope

This policy applies to all WCB decisions that are subject to reconsideration or appeal.

Background

The WCB is a statutory corporation, which means its powers come from legislation. The Act gives the WCB broad and exclusive jurisdiction to examine, investigate, and make decisions on all matters and questions arising under the Act. WCB decisions can be appealed to an independent statutory body, the Appeal Commission, but they are not generally subject to review by the courts.

The WCB is also a quasi-judicial, administrative tribunal. Its processes are more informal than a court, but like a court, the WCB is responsible for adjudicating and enforcing the rights and obligations of workers, employers, and any other parties under its jurisdiction. This means that WCB decision makers function, in some respects, like judges. They must make findings of fact by examining, and weighing, all of the evidence before them. They must then apply the law and WCB policies to the facts to arrive at a decision in each case.

While the Act is the primary source of law governing WCB decision makers, the general laws of Canada and the Province of Manitoba, including the common-law (law made by the courts), also impose requirements.

A. POLICY

1. Procedural Fairness

WCB decision makers must make decisions that are consistent with the Act, regulations, and policies, while following procedures in keeping with the rules of procedural fairness set out by the courts. The courts have said that anyone directly impacted by decisions of administrative tribunals has certain procedural rights (i.e., the right to a fair process as opposed to a specific outcome).

Because WCB decisions are not subject to review by the courts, and because WCB decisions have a significant impact on the lives of the individuals affected by them, the WCB is subject to a high standard of procedural fairness. This means WCB decision makers must:

1. Act without bias;
2. Inform parties of their rights and obligations under the Act;
3. Inform parties of the rules, criteria and evidentiary standards that will be used to evaluate the evidence and make the decision;
4. Provide parties with an opportunity to state their case and present evidence;
5. Consider all of the evidence;
6. Ensure that the individual who considered the evidence makes the decision; and
7. Provide timely written decisions and explain the reasons for the decision by applying the law and WCB policies to the facts.

While WCB decision makers may gather evidence by telephone, or in person in some circumstances, parties are generally expected to provide evidence and any arguments in written form.

2. The Inquiry Model: Evidence and Burden of Proof

The inquiry model is a defining characteristic of the workers compensation system. It is a model of adjudication distinct from the adversarial model used by the court system. In court, parties to a dispute must prove or disprove their claims and attempt to refute the opposing party's evidence. A judge or jury acts as an impartial arbiter.

In the inquiry model, decisions are also rendered impartially, but the responsibility (i.e., the "burden") for gathering, assessing, and weighing evidence lies with the decision maker. Workers and employers are required by the Act to report their information, but they neither have to prove nor disprove their claims.

WCB decision makers must continue to seek evidence until they are satisfied there is sufficient evidence upon which to make a decision. Evidence may include: material objects, oral or written

testimony, eye witness accounts, photographs or video, emails or notes, medical reports and examination findings, or anything that helps prove or disprove a fact.

Although workers and employers do not bear the burden of proof in the workers compensation system, they are responsible for co-operating with the decision maker's efforts to gather evidence. In the absence of such cooperation, the WCB must make a decision based on the limited evidence available to them.

3. Statutory Considerations

Another defining characteristic of the workers compensation system is that decisions are always based on the merits of each case. This means that previous decisions do not create binding precedents and each case must be evaluated individually. At the same time, the WCB strives to be consistent in its application of the Act, regulations and policies, which will often lead to similar outcomes in similar situations.

In claims adjudication, section 4(1) of the Act sets out the legal test for paying compensation to injured workers. Each case of inquiry begins with the same fundamental questions:

- Does the person work for an employer in an industry covered by the Act?
- Is the person a worker under the Act?
- Was there an accident, as defined in the Act?
- Did the person sustain an injury (includes illness and disease)?
- Was the accident work-related (did it "arise out of and in the course of employment")?

The last question, regarding work-relatedness, is often the deciding issue. For this reason, it has its own policy (WCB Policy 44.05, *Arising Out of and in the Course of Employment*).

In assessment, compliance or prevention matters, different statutory considerations will apply, depending on what is being decided.

Sometimes, applying the law and policy to the facts is simple: the evidence is clear, unambiguous, and uncontested. Often, however, the evidence is less clear cut. For this reason, workers compensation tribunals rely on standards of proof and causation to facilitate decision making.

4. Standard of Proof: Balance of Probabilities

Standard of proof refers to the degree of certainty that a decision maker must have before being satisfied that facts are true. In workers compensation the standard of proof is known as "balance of probabilities."

Balance of probabilities simply means that the evidence is assessed for what is *most likely* or *most probable* or *what is more likely to be true than not true*. It is a lesser standard than the more commonly known "beyond a reasonable doubt" standard of criminal proceedings.

Decision makers must assess each piece of evidence to determine its relevance, credibility, and reliability. This helps them decide how much weight to attach to each piece of evidence. Decision makers may attach different weights to individual pieces of evidence. When the evidence is conflicting, decision makers must determine whether the evidence as a whole weighs more heavily toward one possibility than another possibility.

In cases where the evidence is balanced, the decision maker has to either find more information or reassess the quality and credibility of the evidence and "re-weigh" it.

5. Causation

WCB decision makers also need to apply standards of causation where the connection between an activity (or exposure) and its effects needs to be determined. This is necessary in claims-related decisions where there are multiple potential contributing causes to an injury or illness, which complicates the critical question of whether or not the injury is work-related.

The standard the WCB uses in most cases is known as the "but for" test. In making a decision regarding entitlement to compensation, the WCB decision maker must be satisfied that a worker's injury would not have occurred **but for** employment-related factors.

There may be several factors, some work-related and some not, that act in combination to cause an injury. The "but for" test means that work activities or exposures must have been necessary for the worker's injury to have occurred. Work does not have to be the only factor, or even the primary one, for the test to be met, but work must be a *necessary* factor.

The WCB applies a separate standard of causation, known as "dominant cause," to occupational diseases as set out in Section 4(4) of the Act. Dominant cause is a more stringent causation test than "but for" because it requires the work to be the dominant or principal cause of the worker's disease, not just a necessary one.

In all cases where causation is at issue, the balance of probabilities standard of proof still applies to the decision making. The decision maker must be satisfied that it is more likely than not that work was a necessary cause of injury, or the dominant cause of occupational disease.

6. Presumptions

The Act also provides for a number of presumptions. In law, a presumption is where a connection between facts, or a connection between facts and a certain outcome, is assumed to be established where those connections may otherwise be difficult to establish. In other words, it removes the obligation for the connection between facts, or facts and a certain outcome, to be proven.

Many presumptions of law, including those found in the Act, are rebuttable, which means that the presumption will not apply if the evidence establishes, to the degree required by the applicable standard of proof, that the connection established by the presumption does not, in fact, exist.

The main presumptive clause in the Act is contained in subsection 4(5), which states that where it is evident that an accident arises *out of the employment*, it is presumed that it occurred *in the course of the employment*, unless, on a balance of probabilities, the contrary is proven, and *vice-versa*.

The Act's other presumptive clauses relate to specific injuries or conditions listed in subsections 4(5.2) to 4(5.8) of the Act. When the criteria set out in these subsections of the Act are met, it is presumed that the relevant test for causation has also been met, unless, on a balance of probabilities, the contrary is proven.

7. Timeliness in Decision Making and Requirements for Written Reasons

Courts have held that one of the purposes of empowering administrative tribunals like the WCB to make decisions is to provide timely access to justice for parties. Courts have also held that in most circumstances an appeal of an administrative decision cannot commence until a final decision has been rendered in a particular case.

The WCB has an obligation to render timely decisions. Doing so ensures that parties can exercise their appeal rights under the Act while evidence is still fresh and parties are still available to answer questions.

To meet the requirements of procedural fairness, WCB decisions must be communicated in writing. Decision letters must explain the reasons for the decision, identify the evidence that was considered, and describe how the Act, regulations, and policies were applied to the evidence in arriving at a decision. Decision letters must also notify parties of their right to request a reconsideration and their right to appeal.

B. LEGISLATIVE & POLICY REFERENCES

The Workers Compensation Act

WCB Policy 20.10, *Reconsiderations*

WCB Policy 44.05, *Arising Out of and in the Course of Employment*

WCB Policy, 44.05.30, *Adjudication of Psychological Injuries*

WCB Policy 44.10.20.10, *Pre-existing Conditions*

WCB Policy 44.20, *Disease/General*

History:

1. New policy approved by Board Order 19/19 on June 20, 2019, effective July 1, 2019.