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Briefs

Proposed Compensation Policies for Section 123(3) of the Workers Compensation Act

The Workers' Compensation Board ("WCB", "Board") has requested submissions on its proposed policy provisions relating to the new provisions in the *Workers Compensation Act*, ("Act") arising from Bill 23. Section 123(3) of the Act now provides that the Board may reconsider its own decisions after 75 days "if the decision contains an obvious error or omission."

Introduction

Compensation policy #C14-103.01 RSCM II states that the purpose of Section 123 of the Act is to promote finality and certainty within the workers' compensation system, while still allowing the Board to remedy obvious errors and omissions. It is recognized that while appeals are intended to be the dispute resolution mechanism for initial decision-making and orders, the reconsideration provision is intended to provide a quality assurance mechanism.

We submit that Board policy should define an "obvious error or omission" in decisions with reference to the standards and requirements for initial decision-making. The requirements for Board decision-making are clearly set out in Policy #2.20 RSCM:

> *In making decisions, the Board must take into account all relevant facts and circumstances relating to the case before it, including the worker's individual circumstances. This is required,*

among other reasons, in order to comply with section 339(2) of the Act.

Decisions which do not "take into account all relevant facts and circumstances relating to the case before it," necessarily omit or mistake relevant evidence. While an omission or misunderstanding may be unintentional or accidental on the part of the initial decision-maker, such errors and omissions are rightly corrected through a reconsideration by that decision-maker. This approach is necessary to affect the statutory purpose of the reconsideration power – to ensure quality decision making. Further, the correction of a failure to consider relevant evidence is not and should not be characterized as a "dispute." The goal of finality and certainty for Board decisions should apply to Board decisions which are properly founded on the relevant evidence. Where the Board has considered all relevant evidence, and the party disagrees, that is the decision properly the subject of an appeal and dispute resolution.

However, when a Board decision fails to obtain or consider relevant evidence or when it is founded on a mistake in evidence, the decision is an incomplete consideration of the merits and justice of the case. As such, it does not meet the standards required by Board policy and has obvious errors and omissions vis-a-vis this standard. Appeals are costly to injured workers and to the compensation system and should not be used to remedy such obvious errors and omissions. This is not the intent of the Act and particularly not the intent of Section 123(3).

Concerns regarding proposed compensation policy - Section (e)(ii) "Reconsideration after 75 days"

The proposed Compensation Policy states that after 75 days, new evidence must be of a certain character or status to constitute "grounds" for reconsideration and that absent these grounds, there will be no reconsideration of a decision's "obvious errors and omissions."

However, no such preconditions or "grounds" are suggested by Section 123(3) and the proposed evidentiary requirements are inconsistent with current Board policy for quality decision-making. In effect, the proposed requirements are simply preconditions imposed to restrict the application of a new reconsideration provision and are, for the most part, without merit.

The standard for evidence is, and should remain, whether it is relevant to the merits and justice of the case. For the purpose of reconsideration, it is reasonable to require that new evidence be “material and substantial to the decision” and that it not be trivial in nature.

However, we have the following concerns about the remaining requirements.

Requirement that new evidence must be submitted without “unreasonable delay.”

We agree that policy should state that it is desirable that relevant new evidence be provided without “unreasonable delay.” However, the proposed policy makes this a strict requirement or precondition for reconsideration and as a strict requirement, it is unfair. There are many circumstances when relevant and material evidence may not be known or readily available to a worker or to the Board or that it is believed that the Board had obtained the relevant evidence, when it had not. In most circumstances, any material evidence should be used in a reconsideration of a decision and not be disqualified on the basis of a delay alone. This approach is consistent with using the reconsideration authority for the purpose of quality decision making and ensuring that finality rest on sound decisions, rather than just timing.

Requirement that new evidence “must be objective in nature.”

The proposed policy also seeks to restrict new evidence qualifying for reconsideration to that which is “objective in nature.” This requirement is not consistent with the Board’s general approach to evidence, and in particular, it is not consistent with Policy #2.20 which requires that Board decision-making take into account “all relevant facts and circumstances.” Relevant evidence must be highly probative and material even when it is not “objective” and indeed, much relevant evidence is not “objective” including worker statements, witness statements and expert evidence. In fact, the general rules of evidence do not separate “objective” from “non-objective” evidence but instead address issues of evidence in terms of relevance and reliability. In practice, there is no accepted or reasonable definition of “objective evidence.”

A precondition of “objective evidence” only acts to restrict the circumstances when the Board may reconsider its own decision after 75 days, a restriction not found in the Act nor consistent with Policy

#2.20. In effect, it will allow decisions with “obvious errors and omissions” to be excluded from reconsideration, if the relevant new evidence is not “objective in nature” (whatever that may mean to a Board decision-maker).

This result is inconsistent with the clear intent of Section 123(3) of the Act to correct all “obvious errors and omissions.”

New evidence must require “minimal investigation.”

This requirement imposes a precondition that new evidence must impose little inconvenience to Board decision-makers before the new evidence may be grounds for reconsideration under Section 123(3). There is no principled basis for this requirement. The extent of any additional investigation required will depend on the circumstances of the case as first determined and the significance of the new evidence.

This requirement is also unfair to injured workers (and employers) for several reasons.

1. It provides a double standard for the approach to evidence in decision-making. For the initial decision, Board policy states that workers are not required to bear the burden of proving their case and that the Board must take into account “all relevant facts and circumstances.” These same standards should apply to reconsideration. The requirement shifts the burden for investigating and obtaining relevant evidence onto workers, after a decision has been issued for 75 days. This effectively reverses the onus of proof onto a worker who is seeking to bring new evidence to the Board’s attention, for reconsideration, and insulates the Board from its proper role in quality decision-making.
2. In many cases, a requirement to provide evidence in a form that requires “minimal investigation” will impose a significant burden on workers wishing to bring new evidence to the Board’s attention. For individuals who cannot obtain or access relevant new information in this form, such a requirement denies them access to fair treatment. For these workers, Board decisions with obvious errors or omissions will remain uncorrected. This approach undermines stakeholder confidence in the Board’s commitment to fairness in decision-making.

Policy recommendation

The BCFED proposes the compensation policy for Section 123(3) should provide that new evidence that is substantial and material to the Board decision and which was not considered in the initial decision, may mean that the decision has an “obvious error or omission” for the purposes of Section 123(3). In this case, the decision-maker may reconsider their decision and proceed to weigh all available evidence and conduct investigations in a manner consistent with Board policy before re-determining the matter.

The new decision should be in accordance with Board policy but also include reasons for the determination as to why the new evidence meant that the original decision had an “obvious error or omission” and so was reconsidered under Section 123(3).

Summary

The BCFED submits that by limiting what may constitute “new evidence,” the proposed policy requirements are inconsistent with the intent and purpose of Section 123(3) and with Board Policy #2.20. In practice, these provisions would preclude reconsideration of a certain number of “obvious errors and omissions” and perpetuate the type of unfairness in decision-making which Section 123(3) was meant to cure. This type of barrier is particularly unfair to injured workers who are the subject of most compensation decisions.