MERITS AND JUSTICE IN DECISION MAKING

Submission to the Workers' Compensation Board

March 2019

BCFED

Authority

This document is respectfully submitted on behalf of the Executive Officers of the BC Federation of Labour and represents the views of more than 500,000 affiliated members from across the province of British Columbia.

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MERITS AND JUSTICE IN DECISION MAKING

The BC Federation of Labour (BCFED) represents more than 500,000 unionized workers through our affiliates in all industries across BC. The BCFED is a long-standing major stakeholder at the Workers' Compensation Board ("the Board"). The BCFED advocates for the health and safety of all workers in BC and full compensation for injured workers and their surviving dependents.

The BCFED appreciates the opportunity to provide our submission with respect to the Merits and Justice in Decision Making.

This submission is done in consultation with our affiliated unions.

History of section 99(2) and policy #2. 20

Prior to 2002, section 99 evolved as a provision to direct the administrative decision making at the Board, in the absence of legal precedent or jurisprudence, and was a compilation of various initiatives:

- In 1917, the provision simply stated that the Board was not bound to follow legal precedent. This was to distinguish the new Act from the common law that it was meant to replace;
- In 1918, the provision was amended to add that decisions had to be given "according to the merits and justice of the case." This was to ensure that decisions were not arbitrary or unfair; and
- In 1968, the provision was again amended to add that when there was doubt on an issue and the disputed possibilities are evenly balanced, the issue must be resolved in favour of the worker.

Section 99 then remained unchanged from 1968-2002.

In 1989, the BC Court of Appeal ("BCCA") considered the role of Board policy vis-a-vis section 99 in *Testa v. British Columbia (Workers' Compensation Board)*[1]. In that case, the BCCA found that the Act provided the Board with a large discretion in decision making and that the Board was

[1] [1989] B.C.J. No 665, 36 B.C. L.R. (2d) 129, 58 D.L.R. (4th) 676.

patently unreasonable when it ignored its statutory discretion and made a decision based "*on the blind application of a policy laid down in advance*."

In 1991, the Act was amended to create a new governing structure – the Panel of Administrators ("POA") – and to grant the new POA a specific authority to create policy (Section 82). The new POA then published policy #96. 10 in the Rehabilitation Services and Claims Manual Volume I ("RSCM I") to give guidance to Board decision makers, in keeping with the *Testa* decision. The policy stated in part:

> *In the adjudication of individual claims, the Board is not "bound" by either internal policy directive or by external authorities in the field of compensation, at least not in the sense of the word "bound" as understood at common law. However, in issuing internal directive, the Board gives general indication of how it will act when certain circumstances come before it. When these circumstances arise, the applicable directive will normally be followed. It is recognized that there is an infinite variety of circumstances that can arise and that it is not possible to lay down in advance policies to finally determine every conceivable situation. …. Therefore, regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy. There will also be situations arising from time to time which are not covered by existing policy.*

In his 2002 review, the core reviewer found this particular policy "confusing" because it said both that policy was NOT "binding" and that officers were *generally* required to follow applicable policies. He then recommended that Board policy be binding. In response, the Act was amended to include section 99(2) stating that "the Board must make its decision based upon the merits and justice of the case, but in so doing, the Board must apply a policy of the board of directors that is applicable in that case."[2]

[2] Discussion Paper on "The Application of Policy and of Section 99" was issued on June 3, 2002. [Discussion Paper 2002] Much of the material is relevant to this same discussion today.

Submission addressing policy#2. 20 of the *Rehabilitation Services and Claims Manual, Volume II*, ("RSCM II")

The Policy, Regulation and Research Division ("Division") has requested submissions regarding policies of the Board relating to section 99(2) of the *Workers Compensation Act* ("Act"). This is the submission of the BC Federation of Labour ("BCFED"), addressing policy #2. 20 of the *Rehabilitation Services and Claims Manual, Volume II* ("RSCM II").

This consultation arose from a recommendation in the Compensation Policy Review, *Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy* ("CPR") to amend policy #2. 20 RSCM II and to incorporate the requirement that the Board "must make its decision based on the merits and justice of the case." The Division proposes two policy options for policy #2. 20: the status quo (Option 1) and an amendment as set out in Appendix A of the Discussion Paper (Option 2).

For the reasons given below, we support Option 2 but submit that additional provisions must be added to the policy as well. In our view, Board policy must provide discretion to all Board decision makers in order to move towards a worker-centred compensation system.

INTRODUCTION

For years (1918-2002) the *Workers Compensation Act* ("Act") required that board decisions be made based on the merits and justice of the case. Section 99 read:

> *The board is not bound to follow legal precedent. Its decision must be given according to the merits and justice of the case and, where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue must be resolved in accordance with that possibility which is favourable to the worker.*

Over the years, numerous court decisions found that the "merits and justice" requirement meant that Board decisions had to be based on evidence and fairness. The decision maker had to consider relevant evidence and not take irrelevant factors into account, and the decisions

could not be arbitrary, unfair or patently unreasonable. Under the Act, the decision maker had to carefully consider individual circumstances to determine the "merits and justice" of the case.

In June 2002, the Act was amended and section 99 was divided. Section 99(2) now reads:

> *The Board must make its decision based upon the merits and justice of the case, but in doing so the Board must apply a policy of the board of directors that is applicable in that case.* [3]

This new provision put the "merits and justice" requirement in a new context and the issue arose: what is the interaction between the application of binding policy and the consideration of the "merits and justice" of the individual case?

Policy as guidelines

Under the previous Act, Board policy had the legal status of guidelines. Policy was not to be "blindly applied" and Board decision makers had to ultimately make decisions according to the "merits and justice" of the case.[4] This meant that in each case, they had to consider the evidence and individual circumstances and decide whether, in all those circumstances, Board policy should or should not be applied. The discretion to apply or not apply policy was fundamental to making a decision on "merits and justice." If a policy was "blindly applied," the policy unlawfully fettered the discretion of the decision maker.

This approach, and the policy reasons underlying it was captured in the former policy #96. 10 RSCM I. An excerpt includes the following guidance to decision-makers:

> *…in issuing internal directive, the Board gives general indication of how it will act when certain circumstances come before it. When these circumstances arise, the applicable directive will normally be followed. It is recognized that there is an infinite variety of circumstances that can arise and that it is not possible to lay down in advance policies to*

[3] Discussion Paper on "The Application of Policy and of Section 99" was issued on June 3, 2002. [Discussion Paper 2002] Much of the material is relevant to this same discussion today.
[4] *Testa v. British Columbia (Workers' Compensation Board* [1989] B.C.J. No 665, 36 B.C. L.R. (2d) 129, 58 D.L.R. (4th) 676.

finally determine every conceivable situation. Furthermore, there is the obligation on the Board to decide each case in accordance with its merits and justice and the right of individual persons affected under the rules of nature justice to present argument and evidence on their own behalf. Therefore, regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy. There will also be situations arising from time to time which are not covered by existing policy.

Binding policy – rules and guidelines

After 2002, the courts determined that section 82 and section 99(2) of the Act gave Board policy the legal status of subordinate legislation[5.]

However, not all Board policy has the same character. The Division describes Board policy as falling along a spectrum between *proscriptive* (restricting discretion in accordance with pre-determined rules) and *discretionary* (having rules providing discretion to decision makers to consider an individual worker's circumstances on a case-by-case basis).[6] WCAT decisions have described Board policy in much the same way and found that the current Act allows the Board to create both types of policies, with the policy type being determined by the language of the policy itself.[7] Thus Board policy can be assessed, on a policy-by-policy basis, to determine what discretion, if any, it gives to the decision maker. For ease of reference, this submission will refer to Board policy which restricts a decision maker's discretion as "**rules**" and policy which allows discretion as "**discretionary policy.**"

Policy #2. 20 is meant to give overall guidance to interpreting section 99(2) for both types of policies.

[5] *Schulmeister v. WCAT* 2007 BCSC 1005' *Chima v. WCAT* 2009 BCSC 1574; *Young v. WCAT* 2011 BCSC 1209 and many others.

[6] "Issue Memo: Prescriptive vs. Performance-Based Policy" (March 1, 2018).

[7] WCAT 2003-01800, Decision of the WCAT Chair under section 251, re the lawfulness of policy #67.21 RSCM I re section 33(1) of the Act and Noteworthy WCAT decision WCAT 2004-03646.

Policy as rules or guidelines: A policy choice

The Act does not require the Board to publish policy "rules" which completely restrict the discretion of a decision maker, but it allows it to do so. It is fair to say that after 2002, the Board embraced rule-based policy and this type of policy became the dominant model at the Board.

This approach is clearly seen in its particular policy choice for #2. 20 RSCM II. As noted in the 2002 Discussion Paper, the Board had policy choices about how to balance the dual requirements of section 99(2) including an option of continuing the "wide discretion" approach of policy #96. 10 RSCM I.[8]

Instead, the Board drafted the current policy #2. 20 RSCM II which focuses first and foremost on a requirement that the policy "must" be applied. Policy #2. 20 mentions only in passing that there is also a requirement to make a decision on the merits and justice of the case and overall, the policy appears to implement section 99(2) by making the two requirements sequential: the decision maker determines if the facts are sufficient to apply a policy, and if so, the policy must be applied. No further investigation or consideration of the merits is needed as there is no option for a decision maker to not apply an applicable policy in light of special circumstances. This approach makes sense for only policy "rules" which are to be applied without any discretion.

In brief, the "merits and justice" requirement of section 99(2) is given almost no consideration in policy #2. 20, suggesting that, from the Board's policy perspective, there is little discretion to exercise after a policy rule is applied.

This approach to Board decision making, as being one primarily of applying rule-based policy without discretion, has had a profound effect on the Board's decision-making culture. Decision makers are now more familiar, and perhaps more practiced at, the application of rules, and Board decisions typically include long recitations of policy. Discretion, even if offered in discretionary policy, is not necessarily identified or properly exercised. Various court cases have

[8] Discussion Paper 2002

commented on situations in which decision-makers fettered a discretion which a policy otherwise conferred.[9] Some Workers' Compensation Appeals Tribunal ("WCAT") decisions have also commented on the Board's fettering or non-application of discretion which the policy or Act conferred.[10]

The CPR has identified this approach as one which is a significant barrier to the development of a decision-making culture supportive of injured workers. This is a key conclusion of the CPR, which set out the issue in detail:

> *The focus on managing the claim primarily by reference to policy requirements rather than identifying the broader objective of determining what is needed to restore the individual worker to safe, productive and durable employment has left too many workers without a suitable job to return to and without adequate financial compensation to cover the loss where that employment is not reasonably available.*
>
> *Providing the necessary supports to promote maximum recovery and achieve safe, productive and durable employment requires a more worker-centred approach to managing the claim especially for the more complex cases that don't fit neatly in the case management system. The inability of the case management system to fully identify and address the individual barriers that are impacting the injured worker's ability to return to a job that restores his or her pre-injury earnings often results in a disputed claim and a resort to the more adversarial appeals system. The delay in resolving the matter in dispute often means that finding a timely, workable solution is lost.*[11]

[9] For example, in *Young v. WCAT* 2011 BCSC 1209, the court found that the "very purpose" of the words "reasonably available" in policy #40.12 RSCM I was to prevent a decision being made only on statistics. The policy required the decision maker to consider a number of factors in the individual case to determine whether it was possible or likely that the job would be available to the worker.

[10] In WCAT 2011-02371, the panel noted that the ASTD Practice Directive was systematically applied as a binding rule and commented: *Any such inflexible application of a practice directive to the exclusion of other relevant considerations amounts to a Board officer fettering his discretion by treating the Practice Directive standard as binding. A further discussion with respect to fettering of discretion by the inflexible application of Practice Directive #C3-2 can be found in WCAT-2011-02266.*

[11] CPR, page 13.

There was a similar finding in the comprehensive WCB Review in Alberta.[12]

Given the endless variation in types of injuries, disabilities, occupations, workplaces and general employability factors in compensation cases, it is not just difficult to effectively the address the many situations through rule-based policy – it is impossible. However carefully crafted, policy cannot foresee all circumstances and without some discretion, it will inevitably result in a degree of failure or injustice or both. It is injured workers who pay this price.

Adding discretion back into decision making is foundational to the concept of a worker-centered approach to support injured workers. However, it would also foster a system which demonstrated respect and empathy for injured workers and treated them as individuals, not just passive recipients subject to rules. This is a necessary part of constructing a worker-centred compensation system. As the CPR noted in his policy review, there is a need to provide more discretion in Board decision making and that "giving some role to merit-based decision making is at the heart of a worker-centered approach to the application of policy in a fair and compassionate way that is responsive to the worker's circumstances."[13]

Finally, there is the issue of equity. As noted by the CPR:

> *…where that system does not have sufficient flexibility to consider the merits and justice of the individual worker's case, it erodes the principle of fairness and equity that is integral to the worker community's confidence in the system.* [14]

[12] Summarizing their consultation, the Review noted: "*Many said that the strict construction and interpretation of policies have led to a rule-bound culture that values efficiency and cost control at the expense of collaboration, creative solution-making, and common sense.* "Working Together: Report of the Alberta Workers' Compensation Board (WCB) Review Panel, June 2017, p. 26.
[13] "Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy, Report to the Board of Directors, Workers' Compensation Board of B.C., March 31, 2018, page 12.
[14] CPR, page 13.

Submission

The element of discretion needs to be brought back into Board decision-making as a whole, and that element can and must be added through an amendment to policy #2. 20. It is well within the Board's authority to make this policy choice in its interpretation of section 99(2).

The proposed amendment for policy #2. 20 as set out in Appendix A of the Discussion Paper (Option 2) addresses some key issues. The proposed amendment recognizes that each individual policy creates a framework to direct Board decision making. It also recognizes, implicitly, the different types of policy and that when a policy provides for discretion, the Board is required to exercise it based on the merits and justice of the case.

However, Option 2 recognizes the discretion provided on a policy-by-policy basis only. We submit that policy #2. 20 must be amended to restore discretion of some type, to all Board policy, and so give effect to the "merits and justice" requirement of section 99(2).

Section 99(2) of the Act requires that Board decisions must be made according to the "merits and justice" of the case but in doing so, must apply Board policy. Both of these requirements have an important role in achieving justice and consistency in Board decision making. This policy is to direct Board decision making under section 99(2).

The primary requirement is that Board decisions be based on "the merits and justice of the case". Therefore, in every case, the decision maker must obtain and consider evidence which is relevant to the issue at hand. The decision maker must also identify the relevant policies.

The requirement of section 99(2), that decisions must apply Board policy, is understood to include all Board policies, including this policy, policies on evidence and decision making and policies regarding the issue at hand.

The BCFED recommends the following:

- In making a decision, based on the "merits and justice" of the case, the decision maker must consider the relevant individual circumstances and the relevant Board policy

regarding the issue at hand. The decision maker will then determine whether that policy should be applied or whether there are grounds for a change and for a departure from that policy. While the policy will normally be applied, the decision maker has the discretion not to apply that policy as long as this is required by the "merits and justice of the case."

- The Board approve an extensive and ongoing education and training program for all WCB staff upon implementation of the "merits and justice" decision-making approach.

CONCLUSION

The BCFED strongly urges the WCB Board of Directors to amend policy #2.20 RSCM II to restore discretion to all Board decision making under binding policy. This would give a balanced interpretation to the dual requirements of section 99(2) of the Act.

The BCFED believes this amendment is at the heart of ensuring there is a return to the original intent of the historic compromise where workers surrendered their right to sue employers for workplace injuries in return for a guaranteed no-fault compensation system to be paid for by employers, in return for immunity from lawsuits, and the intent that workers had the right to have their cases adjudicated on the "merits and justice" decision-making approach.

The BCFED thanks the WCB Board of Directors for the opportunity to provide input into this important issue.