Additional Evidence

Parties often provide the Tribunal in advance of hearings or the panel at hearings with additional evidence that does not form part of the information and records that were before the minister when the reconsideration decision was made. Panels cannot admit additional evidence unless they determine that it is supporting evidence, that is to say being evidence that is "in support of" the information and records that were before the minister at reconsideration in accordance with section 22(4)(b) of the *Employment and Assistance Act*.

The role of the panel is to:

1. determine whether the additional evidence is admissible as supporting evidence;
2. state why the panel determined the additional evidence was or was not admissible;
3. if necessary, determine the weight to be given to the admissible supporting evidence; and
4. make findings of fact.

Determining whether the Additional Evidence is Admissible

Section 22(4)(b) of the *Employment and Assistance Act* states:

> … a panel may admit as evidence only
>
> a. the information and records that were before the minister when the decision being appealed was made, and
> b. oral or written testimony in support of the information and records referred to in paragraph (a).

The "information and records that were before the minister when the decision being appealed was made" is referred to as the record of the ministry decision. The appeal record for the Tribunal hearing is initially comprised of the Notice of Appeal and the record of the ministry decision. Ultimately it also includes submissions made by the parties, additional information admitted into evidence by the panel, and the Tribunal decision.

Section 22(4)(b) is designed to strike a balance between a pure appeal on the record of the ministry decision and a hearing *de novo* (a completely new hearing). It contemplates that while a party may wish to submit additional evidence to the panel on the appeal, the panel is only empowered to admit "oral or written testimony in support of" the record of the ministry decision; it provides appellants with a limited opportunity to augment their evidence on appeal but it does not provide them with a hearing *de novo* or new hearing. If the additional evidence substantiates or corroborates the information and records before the minister at the reconsideration stage, the evidence should be admitted; if it does not, then it does not meet the test of admissibility under s. 22(4)(b) of the *Employment and Assistance Act* and should not be admitted.

For example, consider an appellant who argued at reconsideration that he met the 2 year employment requirement for the purposes of section 8(1) of the *Employment and Assistance Act*, but on appeal argues under section 18(4) of the Employment and Assistance Regulation that he was prevented due to circumstances beyond his control from searching for, accepting or continuing in employment as he did not have a work permit. He provides the panel with a copy of a work permit, dated after the reconsideration decision, which allows him to work as of that date. This additional evidence is not admissible under section 22(4)(b) as it is not *"in support of"* of the records of the ministry decision as it neither substantiates nor corroborates the information and records before the minister when the decision being appealed was made.

In contrast, if an appellant appealing the denial of the PWD designation submits a doctor's note verifying the appellant's testimony in the record of the ministry decision regarding the need for help with daily living activities, the doctor's note could properly be admitted as it is written testimony *"in support of"* the information and records, corroborating the information before the minister at reconsideration.

Additional evidence should not be admitted if it introduces an entirely new issue that is not related to the issue in the record of the ministry decision. For example, an appellant may be appealing a reconsideration decision to deny a request for a wheelchair. On appeal, the appellant may present a doctor's prescription for two items, a wheelchair and a hearing aid. The additional evidence in support of the request for a wheelchair is admissible as it is supporting evidence, corroborating the information in the record of the ministry's decision. The portion of the additional evidence that prescribes the hearing aid is not admissible because it raises a new issue, a request for a hearing aid, that is not *"in support of"* information and records before the minister at reconsideration.

Panel members often deal with situations where the admissibility of additional evidence is not so clear. In PWD cases, for example, appellants frequently provide additional evidence on appeal regarding a medical diagnosis or condition. If this medical diagnosis or condition is not contained in the record of the ministry decision, then the additional evidence would not be admissible as it would not be *"in support of"* or corroborate the information and records before the minister at reconsideration. The additional evidence must first be put before the minister for a decision as the panel's jurisdiction is appellate in nature and limited to determining whether the ministry's decision was reasonable. The Tribunal is not mandated to make decisions at first instance.

Panels should request and consider both parties' views on the admissibility of any information that is tendered as additional evidence, record the positions of the parties, and provide reasons for the panel's determination with respect to the admissibility of such evidence. Panels must also ensure parties have an opportunity to comment on the substantive content of the additional evidence.

Determining Weight and Findings of Fact

The panel must make findings of fact based on the evidence. Findings of fact are the primary relevant facts that are "at issue" between the parties and which must be established before the legislation can be applied. If there is contradictory evidence, the

panel will need to determine what evidence it accepts and state why it prefers or gives more reliance or weight to that evidence over other evidence.

Panels may consider credibility in weighing evidence.

Credibility

There are two common errors made when determining credibility of evidence based on the demeanour of a witness or party:

- mistakenly believing someone who is lying
- mistakenly disbelieving someone who is telling the truth

Faryna v. Chorny, [1952] D.L.R. 354 contains the classic statement for resolving issues of credibility. It downplays the idea that demeanour is an indicator of truthfulness or credibility.

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his [or her] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

Consequently, if demeanour is not a good indicator of truthfulness, then it should be possible for a decision maker to resolve credibility issues with some degree of confidence without ever laying eyes on the witnesses or parties.

Some factors to weigh:

- ability to perceive, to recall or to communicate about the testimony
- consistency with undisputed facts
- consistent with other sources of evidence

To resolve a conflict in the evidence, consider the evidence before you in light of all of the surrounding circumstances. Ultimately, the panel must articulate reasons that illustrate its decision making process was justifiable, transparent and intelligible.