Injured Workers' Consultants

Representing injured workers free of charge since 1969

June 26, 2009

Hon. Steve Mahoney, Chair
Workplace Safety and Insurance Board
200 Front Street West,
Toronto Ontario
M5V 3J1

Dear Mr. Mahoney:

Re: **Are Oral Hearings Further Threatened By the KPMG Value for Money Audit?**

We read with interest and apprehension the KPMG Value for Money Audit of the Appeal System and note that there is a recommendation that suggests that the Appeal System Practice & Procedures should further restrict the availability of oral hearings; and that the Appeals Branch has apparently agreed to modify its appeals' procedures to this effect. At least, this is how we read the KPMG report, in their typically technocratic and "hard to access" business language. They do note that value for money audits are mandated by (Mike Harris') Bill 99. The fact that the document is unsigned suggests that it is a mere accounting document, while it makes suggestions that go well beyond "bean counting" and that impact people whose lives are directly affected by the Appeals system.

Oral hearings are already undervalued.

The current Practice & Procedures document is already extremely restrictive in its attitude towards granting oral hearings. It states that "A fundamental objective of the appeal system is to provide every opportunity to resolve cases without a formal hearing." The document adds the notion that an oral appeal can lead to delays and to **an adversarial relationship between the parties** (p. 16). We disagree with this, and firmly believe that oral hearings should be more available to injured workers and that this can and should be done without causing more delays.

We would like to take the opportunity of the Board's current review, following the KPMG audit, to flag this issue for the Board. The existing **Practice and Procedures** document restricting access to oral hearings is based, in our view, on an incorrect theoretical foundation, and leads to less access to justice for injured workers.

815 Danforth Avenue, Suite 411, Toronto, Ontario M4J 1L2
Telephone: (416) 461-2411; Fax: (416) 461-7138
~ A Community Legal Aid Clinic ~

Had KPMG spoken to injured workers, certainly those we deal with, it would have heard that an oral hearing is an important opportunity for the injured worker to be heard, face a senior Board decision maker, and have his/her case properly considered and appreciated in a dynamic, not paper-like fashion. The hearing is often the first time a face to face meeting takes place. Had KPMG spoken to us we would have been able to speak to the numerous instances where an injured worker has expressed satisfaction and even great relief after an oral hearing. Injured workers sometimes even say to us "Even if the decision goes against me, at least I had the opportunity to really explain what happened to me. Had KPMG spoken to us, we would have documented many cases where a paper review resulted in "less justice" than an oral hearing.

The actual quality of decision making is also affected, in our experience. The report did not offer any statistic to this effect, comparing paper versus oral decision, and the availability of representatives to the decision results. We would be pleased to review these if available.

Our statistics indicate more denials at ARO: glitch or trend?

The KPMG audit did not offer any statistics on positive versus negative decisions by the Appeals Branch. It would be interesting to note how this compares to previous years. We have noted that, in our experience, more appeals are being denied. The proportion of claims allowed at the Appeals Officer stage used to be fairly consistent. However there has been a recent marked decrease. In 2008, about 55% of Appeals Resolution Officer decisions were positive. In 2007, about 48% of Appeals Resolution Officer decisions in our files were positive. So far in 2009 only 32% of Appeals Officer decisions have been positive. This appears to be a significant increase in the proportion of negative decisions at the Appeals Branch. Time will tell whether this is a statistical aberration or a sustained trend. But as you can appreciate, **we are worried**.

The Right to be Heard and the Perception of Justice

In trying to decipher the nameless KPMG report, it seems that it does acknowledge that there are many reasons for having oral hearings:

> *"Many factors can influence the oral hearing duration including scheduling conflicts, timeliness of evidence gathering, complexity of issues under appeal, and the balance between the right of the parties to be heard and their (sic) perceived value of the quality of the outcome if another resolution method is chosen". (p. 29)*

This seems to deal with the perception of justice. KPMG acknowledges that parties have the right to be heard and that a paper review is perceived to have less value than a decision where the party has actually appeared before the ARO. We certainly concur with these impressions and, as stated, find that they are more than perceptions. From this

basis, one would have expected KPMG to explicitly suggest more, not less oral hearings. Instead, it left the opposite impression.

The Board has always respected the administrative law principles of fairness and the rules of natural justice. The right to be heard by the decision maker is by far the most highly valued principle of natural justice. An oral hearing is so important in our justice system, not because of a "perceived" value but because of its **real** value in reaching a fair and just result. The oral hearing is respected and has a 'therapeutic' impact for injured workers because they know it allows for a more meaningful and in-depth exploration of the facts and interpretations of the facts.

The justice of an oral hearing should be available to all injured workers, not just those few with legal representatives who firmly insist on an oral hearing. From our vantage point, the proportion of oral hearings in cases where we are not the representative has dropped dramatically in recent years. Many injured workers and even representatives from other organizations tell us they wanted to have an oral hearing but the Appeals Resolution Officer did not. Anecdotally, we also hear from them that the proportion of denied claims in their appeals has increased, which mirrors our own statistics reported above. We are concerned that this has long term implications for the quality of justice at the Appeals Branch.

Consistency between Service Delivery and Appeals System.

The report notes that "the WSIB's service delivery values (e.g. flexibility, transparency, face-to-face accessibility) can also influence the decision to proceed via oral hearing (p. 29)". We do not know exactly what KPMG means, but note that it would be quite a contradiction for the Board, which is in the midst of implementing a new service delivery model that stresses face to face communication, to restrict the same type of communication at the Appeals Brach. If anything, such face to face communication should be enhanced at the Appeals level.

Keep Delay Issues and Right to Oral Hearing Issues Distinct and Separate

The report noted the significant difference between average duration in a 60-day paper decision (33 days) versus 269 days in an oral hearing. We are therefore concerned about the recommendation to strengthen the direction given in the Practice and Procedure document relating to when to grant an oral versus a non-oral hearing. The Board agreed to complete such a review by the end of 2009 and we expect the tendency will be to make oral hearings more restricted in order to save time!

We urge the Board to separate the two issues. The delay in oral hearing resolution can be shortened without affecting the availability, indeed, while extending the availability, of oral hearings, the Board should strive to **balance** timelines with access to decision makers, rather than pit the speed of decisions against access to oral hearings.

Keep Adversarial Issues and the Right to Oral Hearings Distinct and Separate.

We agree the system should not be adversarial, but eliminating appeals is not the way to do it. Eliminating the financial incentives that encourage "claims management" is a major way to achieve this end. We do not have statistics of how many worker appeals also have an employer representative in attendance. An oral hearing may pit the worker against an employer consultant, not necessarily the employer. In addition, an oral hearing with both parties in attendance often clarifies and can potentially resolve lingering misunderstandings and "the discourse of abuse" that created hostility before the hearing.

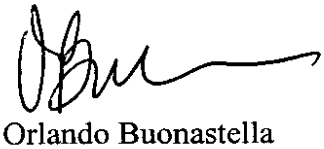
Cost of Living for Members of Appeals' Branch

On a tangential note, the report says the staff of the Appeals Branch received a 3.5% cost of living adjustment for each year covered by the review. We would like to commend the Board for this, as all workers and injured workers should keep up with inflation.

Our Community Wants to be Involved

The WCB/WSIB appeals system is crucial to injured workers, and indeed, is an important "safety valve" for the Board itself. While we view with considerable concern the possible negative consequences of applying a "KPMG approach" to the principle of access to justice, we are very much willing to meet and work with the Board to strengthen the availability and service of our appeals system.

Injured Workers' Consultants
per:



Orlando Buonastella

copies: Jill Hutcheon, John Slinger, Slavica Todorovic,
Ontario Network of Injured Workers' Groups
Ontario Federation of Labour
Ontario Legal Clinics' Workers' Compensation Network