Injured Workers' Consultants

Representing injured workers free of charge since 1969

December 13, 2011

Hon. Linda Jeffrey,
Minister of Labour
400 University Avenue, 14th Floor
Toronto, Ontario, M7A 1T7

Dear Minister Jeffrey:

Re: Why the KPMG Report on WSIB Adjudication Is So Upsetting

Injured Workers' Consultants is a community legal clinic that has represented injured workers, free of charge, for over 40 years. We heard your encouraging words at the RAACWI conference and at the December 9, 2011 rally and you have heard the emotion that has gripped our community following the release of the KPMG report on WSIB adjudication and its adoption by the WSIB. We wholeheartedly agree with the concerns already expressed by the Ontario Network of Ontario Injured Workers' Groups, the Ontario Legal Clinics Workers' Compensation Network, Industrial Accident Victims Group of Ontario, the Bright Lights Group and the Ontario Federation of Labour Convention's special emergency resolution on the same issue.

Why is our community so upset, you may ask? In short, it is because in one fell swoop an external consultant with a private insurance mindset – the KPMG multinational - has produced a shoddily researched paper to advocate the disbanding of the key tenets of our public workers' compensation system. To make matter worse, the major recommendations have already been accepted by "WSIB Management," i.e. by President I. David Marshall, a man whose expertise is financial, but who has no significant experience in workers' compensation law or in dealing with injured workers. While the official position of your government seems to be one of reassurance (we are told the government will await Harry Arthurs' report and that "full funding will not be achieved on the backs of injured workers"), KPMG and the WSIB President are moving in the opposite direction. Believe it or not, there is a feeling that we "are caught in a trap" and we want no part of it! Hence the palpable emotion and discontent you must have picked up from injured workers on December 9th.

The WSIB says there will be "consultations" on the KPMG report. But the report itself already says that "WSIB Management" has agreed with the major recommendations. This leads us to believe that these consultations will be a sham. Only if the WSIB

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withdraws its endorsement can they have an open mind and be willing to listen to our community's input.

Madam Minister, if you think that our response is exaggerated, we urge you to consider the above-referenced submissions and the further observations we make in response to the KPMG report.

Incorrect Notions of Workers' Compensation

The report says that the "WSIB administers no–fault insurance for some 240,000 employers and covers some 4 million workers" (p. 5). This is a biased formulation. An insurance company sets benefits at the level the payor wants to pay for. A public workers' compensation system sets benefits at a just level in relation to workers having given up the right to sue. The founder or our system, Justice W. R. Meredith, did not create a system of insurance for employers. He very specifically crated a compensation system for workers. The system was based on a carefully crafted historical compromise: workers gave up the right to sue employers for injuries in exchange for a system based on justice and fairness for injured workers. If the purpose of the system is not understood, how can KPMG properly review its inner workings?

The report was mandated to look at the "accuracy" and "quality" of decisions, yet it ignores the WSIB practice of "deeming" injured workers able to earn wages they do not actually earn, thus artificially keeping real wage loss compensation down. The report says that the pre-1990 system provided "rough justice system of compensation which did not take into account the real impact of injuries on individual workers" (page 6). The implication is that the current system does - an incredible assumption. Has KPMG never heard of "deeming," the major and most controversial method the WSIB has to award long term compensation since 1990? Did they forget their own audit of LMR that found that more than 50% of the injured workers were unemployed but deemed to be fully employed after retraining? Without a proper understanding of "deeming" the report is lacking in credibility.

KPMG Recycles Ideas Already Rejected by Justice Meredith

There is nothing new in the idea that compensation should be cut to account for "age" (p. 14, 28). KPMG may not be aware of the irony, but they are reviving the Canadian Manufactures Association's ideas of 1913 that were soundly rejected by Justice William R. Meredith. Just like KPMG, the spokesperson for the CMA, Mr. F. Wegenast, advocated that the workers' compensation system should "discount" the effect of age or other "body defects" on injured workers. Justice Meredith rejected Wegenast's thesis and in the end the CMA agreed with Meredith's final report.

Here is the exchange between Mr. Wegenast and Justice Meredith:

Mr. WEGENAST: Take a man who has been earning two dollars a day. You pay him as if he is incapacitated, we will say, on dollar a day. Now, he gets that till he is sixty five, seventy-five or eighty years old. In the natural course of things he would not have earned two dollars a day for all that time. He might have been killed or otherwise injured. He might have been injured outside of the employment altogether. What the employer would be asked to do...would be to insure that man not only against the result of occupational injury but also against non-employment for the rest of his days, against accident from other reason, against old age, against invalidity.

THE COMMISSIONER (Justice Meredith): You have hired the man; why should all these problematical things enter into it that he might possibly have been injured in some other way if he had not been injured in that way? He was all right until he got hurt in your establishment.
(Sir William Ralph Meredith, Interim Report on Laws Relating to the Liability of Employers to Make Compensation to Their Employees For Injuries Received in the Course of their Employment Which Are in Force in Other Countries (Toronto 1912), Minutes of Evidence, 6 August, 1912: 75)

The "thin skull principle" goes back many years in jurisprudence. Justice Meredith rejected the discounting of compensation to account for the age process. The approach has always been "take the worker as you find him or her." We find it very ironic that KPMG would revive one of the oldest and most discredited employer representative arguments, and present it as "modern" and needed now.

KPMG notes that injured workers entering the system for the first time are older than before (p. 11). Instead of urging the WSIB to pay more attention to this group of workers, its solution is to reduce entitlement and compensation based on age.

We can excuse KPMG for not knowing the roots of compensation. Its business is much different. But why has "WSIB Management" concurred with the report? As the 100th anniversary of the Meredith report approaches, is the Board celebrating it by adopting views already rejected by its founder?

KPMG Plagiarizes Other Employer Representative Demands

KPMG may not have had the transcripts of the Meredith Commission, but they were surely aware of the demands of the employer representative lobby. The demand for discounting for "aging" has been part of this list for a long time. Here is an example:

"The normal aging process causes the soft tissue in the body to be more fragile. This is not a consequence of employment...Back injuries acceptable under the workers' compensation system should be confined to those cases which result from an acute traumatic event" (Premier's Labour Management Advisory Committee,

Business Caucus, Volume One, "Workers' compensation In Ontario – A Proposal" Document not page-numbered, October 20, 1993**).**

The KPMG idea of dispensing with the "thin skull" principle was already advanced by the employer representative lobby some 18 years ago. Blaming injuries on "old age" is a very old idea in the arsenal of this lobby. There is nothing new or original here. It's the same old pseudo-argument rejected by Justice Meredith and the Workers' Compensation Appeals Tribunal in Decision No. 915 (1987).

KPMG purports to oppose both worker and employer representatives, who, they say, are distorting the system. This is good posture, but if one examines their claim further, it is clear that it is worker representatives, injured workers and Labour who are the real recipients of its ire for supposedly "expanding" the system. Employer representatives have found in KPMG a philosophical ally and stand to get more business opportunities. The expansion of experience rating, i.e. claims management, will bring in more business to this lobby. We also note that KPMG complains that the recurrence policy "creates an incentive for employers not to contest the allowance of a recurrence…" We have no illusion here. KPMG favours an increase, not a decrease, in the adversity of the system. This is fundamentally contrary to what the system was set out to do, and will create further harm and stress to injured workers.

KPMG's suggestions for limiting entitlement to recurrences (p.28), for extending the wait times for NEL re-assessments (p. 36), expanding experience rating (p. 43), and so on are part of an old employer representative lobby "wish list." The interesting observation is that the June 1996 Jackson report and the Mike Harris Government adopted many of the proposals by the PLMAC Business caucus, but not all of them. Some of the ideas rejected then are now part of the updated KPMG list. We can understand KPMG being to the Right of Mike Harris. But what does it say about "WSIB Management"?

"**No Hope for Injured Workers**"

KPMG seems unconcerned about workers' financial stability and appeals rights. It glorifies the "finality" of claims and argues that representation and rights to appeals provide the so called "moral hazard of faint hope." Injured workers understand perfectly what this "insurance terminology" means. It means "no hope" for them. It means "go away." As one injured worker said at the ONIWG conference of November 16, 2011:

"I have been living many days of darkness, I was hoping for a change. Now even hope is taken away from me."

Indeed, there exists a lot of research, some of it presented to the WSIB at the RAACWI conference of November 17 and 18, of a high incidence of depression and stress among injured workers. There exists an urgent need for the Board to be brining positive messages and positive actions forward, yet the contrary has happened.

Worker appeal rights are an important feature of our system. They provide an important forum for fixing the inevitable mistakes of a large bureaucracy. They are often the only time an injured workers has a face to face encounter with a decision maker, something that is in fact already rare as things stand now. A former director of the Appeals Branch told us that the appeals system was an important "safety valve" for the system. This is still valid today. We wonder if KPMG is aware that we once had 2 levels of appeal at the WCB (Claims Review Branch and Appeals Officer) and we are down to a single one now? Instead of lamenting the opportunity to appeal, this right should be expanded, for the sake of justice and the credibility of our compensation system.

Embarrassing Research

Instead of research leading to a recommendation, we have the opposite sequence, and it's an embarrassment.

KPMG wants the "experience rating window" (the time when the Board can reward employers for opposing or "managing" claims) to be expanded to 6 years. The reason given is that "lock-in rates", i.e. the percentage of workers on benefits after 6 years "were approximately 2.5 times higher for Schedule I employers than Schedule 2 employers… A reasonable inference can be drawn that part of this difference is driven by the direct financial incentive on Schedule 2 Employers to secure sustainable return to work outcomes for injured workers" (p. 42).

Any comparison of industries and experience between Schedule 2 (mostly Government employers) and Schedule I employers compares "apples and oranges." Why does KPMG think this a reasonable inference? Could the number be due to the greater unionisation levels in Schedule 2? Could it be the greater availability of modified work in the public sector? Could it be that Schedule 2 employers fight claims even more since they continue to pay for them? Could it be a combination of these and other factors? KPMG and "Board Management" know that Professor Arthurs is looking into employer incentives. But they seem to know the answer before this independent and public inquiry has completed its work!

The report says that there has been "greater consistency and quality in eligibility adjudication", and says that in 2010, 11.3% of registered claims were rejected, as compared to 2009, when 7.9% of claims were rejected (p. 22). Why is a greater denial of claims a sign of greater consistency and quality of decisions? To follow this fully logic, could the rejection of **all** claims be the "greatest" sign of consistency and quality?

What Happened to "Safe" Return to Work?

After Bill 99 was introduced in 1998 our community had several meetings with then WSIB Chair Glen Wright and we made the point that the WSIB was putting too much emphasis on "early", but not on "safe" return to work. We said that workers needed **time**

to heal, or else they would be brought back to work too soon, only to re-injure themselves. As a result, we noted more understanding by the Board about the need to properly balance "early" and "safe" return to work. If needed, we can provide more details and documentation about these past meetings.

KPMG ignores the "safe" part of the law. The word "safe" or the acknowledgment that workers need time to heal is noticeably absent. KPMG glorifies the rapid return to work of injured workers (p. 15-16), without any concern about the law, or the notion that pushing workers back to work before they are ready adds to stress and to re-injury.

We recommend that the Ministry of Labour, the WSIB and KPMG read the article "A Deliberation on "Hurt versus Harm" Logic in Early Return to Work policy" by researchers E. MacEachen, S. Ferrier, A. Kosny and L. Chambers in Policy and Practice in Health and safety, 05.2 2007. This provides an important insight into the difficult balance of helping injured workers return to work when and if they are able.

Any accountant knows that returning an injured worker back to work is good for the WSIB's "income stream." But to do that in a successful and sustained manner for the injured worker, we need a system that accommodates his or her needs.

Convenient Rationale for Reducing Pain and Suffering Awards (NEL's)

The report advocated moving away from the AMA (American Medical Association) Schedule for rating NEL percentages for pain and suffering. The reason given is that other provinces provide for lower percentages of impairment using their own schedule (p. 37). KPMG, once again, compares apples and oranges. Ontario does not cover the same percentage of workers as other provinces do, especially in the "less traumatic injury" area of office work. This difference, which may explain the marginal comparison of NEL awards, is not acknowledged.

What strikes us is the ignorance of history by KPMG and a "WSIB Administration" with no institutional memory. The Board adopted the AMA schedule initially only as a minimum standard, while KPMG is now calling a standard that is "too high." Professor J.F. Burton is the author of the usage of the AMA Schedule in Ontario (The Role of the Permanent Disability Rating Schedule in the Ontario Workers' Compensation Program, A report prepared for the Workers' Compensation Board. August, 1986). He suggested that this schedule was easy to administer, however, may not reflect the true loss of "pain and suffering of injured workers. He recommended that research should be done to make it more accurate and responsive to injured workers impairments (p. 47). This recommendation was echoed by Professor Weiler, the founder of our current system of compensation for permanent disability.

The Board did indeed follow suit, and conducted the most extensive and expensive research ever done in this area, led by Dr. Sandra Sinclair, then Manger in the WCB's Research and Evaluation Branch. According to Board data made available to us, this

massive research took place between August 1988 and January 1991. Approximately 12,000 injured workers were surveyed and 350 individuals were matched to injured workers from the general population. The research was meant to establish more accurate percentages of "pain and suffering" losses.

The result of the survey was that both injured worker values and control group values were higher, on average, than the AMA values. Our clinic was part of a WCB briefing session on this research, attended by Professor Burton and Dr. Sinclair, which took place on July 17, 1991. It was organised by Slavica Todorovic, then Manager of the Consultation Unit of the WCB.

"WCB Management" in 1991 took a different position than today's management. It accepted that the AMA percentages were inadequate and offered a blended option that would increase these percentage awards to reflect, partially, the result findings. In the end, the Board stayed with the AMA schedule. But the Board administration saw it as inadequate, while it is now adopting the opposite position.

KPMG is also unhappy that workers can get the NEL percentage reviewed after 12 months of the original or last determination. They advocate for a longer mandatory wait period for injured workers. They seem to inflate statistics. "This short minimum period results in the re-assessment of over 2,000 cases annually, impacting on both the efficiency and effectiveness of the program." (p. 36). We wonder if this is another form of misleading research:

- Were these 2,000 cases reviewed at the 12 month mark after the initial determination, or is this the total number of re-determinations of the tens of thousands of injured workers who received NEL awards in the past, regardless of the time lapsed since the award?
- Why is it "more effective" to delay a re-determination if the deterioration took place 12 months after the first one? For whom is this delay more effective?

Getting Rid of the "Lock -In" is a Betrayal of Injured Workers.

If a worker is disabled and on benefits for 6 years, the WSIB "locks in", or guarantees, this benefit until age 65. This provision was meant to protect workers from being watched over as if they were on probation from the compensation board. The concern was expressed by Professor Terrence Ison and accepted by Paul Weiler and every government since 1990.

"Other encroachments on civil liberties would also arise out of the actual loss of earnings method. One is that the position of a worker, including his medical condition, his work, and his work opportunities would be the subject to continuing investigating by the Board. It would be almost like a sentence of perpetual probation" (Terence G. Ison, On the Report entitled "Reshaping Workers' Compensation in Ontario, February 1981, p. 16)

Professor Paul Weiler heard this criticism when he reported back the Ontario Liberal Government:

"The oft-voiced refrain in the 1983 and 1984 hearings of the Select Committee of the Legislature on the White paper was as follows: Ontario's disabled workers were being asked to give up the valuable security of a fixed pension, guaranteed for life, protected against inflation, and held as a matter of legal entitlement, in return for an ephemeral promise of continually varying payment for whatever happened to the wage losses attributable to the disability, all held at the grace and discretion of the not terribly popular Workers' Compensation Board". (Weiler, Paul, Permanent Partial Disability: Alternative Models for Compensation, December 1986, p. 5).

Many commentators have forgotten the history and rationale for the "lock-in." Professor Paul Weiler had heard the criticism of the "perpetual probation" scenario by injured workers who were forced to give up the Meredith principle of "compensation as long as disability last." This had meant a pension for life for lifelong disability. Professor Weiler advocated the lock-in occur at the 3 year mark, but the legislation extended it to 6 years. KPMG is now asking injured workers to go back to the system of "perpetual probation." KPMG and employers representatives cannot tolerate the "possibility" of a locked-in worker earning more. Professor Weiler was not disturbed by this. He understood that even the wage loss system he proposed would have some element of rough justice. Some would inevitably suffer a greater loss over their life than the compensation would cover; others might do better than expected. In the meantime, the reality of thousands of injured workers, as we speak, being locked in (or "deemed") at wages they do not have, does not seem to disturb KPMG's sensibilities. As an injured worker observed in one of the study sessions:

"They want finality for the Board, but no finality for us!"

The Myth of Ontario's Overcompensation

An underlying theme in the KPMG report is that Ontario offers benefits and services that are too generous and out of line with other provinces. Ontario used to be the leader in workers' compensation and was not ashamed to be so. Now it is being urged to race to the bottom. In any event we do not believe Ontario is as "generous" as KPMG purports. Mike Harris reduced compensation to 85% of net wages and other provinces do better. British Columbia is moving to coverage of mental stress that surpasses Ontario. Quebec gives a 1 year assistance to help secure work after retraining, and Ontario give only a few weeks. In addition, Quebec has a minimum compensation for permanent wage loss rates, which protects the most vulnerable workers in ways Ontario does not. Manitoba has no ceiling of maximum compensation, which is better than Ontario. The examples can go on and on. We urge you to restore a vision of compensation that looks at what is just for the worker, not 'the least he or she can be put off with,' to paraphrase Meredith' words.

Conclusion

The KPMG report is one of he most damaging reports to injured workers that we have seen in years. It is both mean and an insult to the intelligence of our community and the entire workers' compensation system. Our community values our public workers' compensation system and wants to improve it. But this is not the way. In this spirit, we urge you to reject this report and to work with the WSIB Board of Directors and administration to reverse the present course. The current endorsement of the KPMG recommendations cannot lead to true consultation or consensus.

If anything needs to be reflected upon, after this debacle, it is whether we really need "value for money audits" in the legislation. These audits ask the wrong question. Instead of asking what "value for money" the WSIB gets from a program, the real question is what value for money do **injured workers, and Ontarians**, get from a particular program? We would welcome a reflection on the need for a "social audit" rather than a narrow audit that can produce such a waste of money and principles as the KPMG report.

INJURED WORKERS' CONSULTANTS
per:

Orlando Buonastella

cc. KPMG, David Marshall, Steve Mantis, Sid Ryan, Andrea Horwath