Injured Workers' Consultants
Representing injured workers free of charge since 1969

July 4, 2013

Tom Irvine
Fair Practices Commissioner
123 Front Street West
Toronto, ON M5J 2M2

Dear Mr. Irvine,

Re: Downside risk on new Appeal Readiness Forms

Thank you for taking the time to review our submission about what we strongly believe to be an unfair practice that is part of the WSIB's new appeals system. As you are aware, the new Appeal Readiness Form stipulates that in proceeding with their appeal, injured workers must accept that they may be exposing themselves to a downside risk an a prior decision, which could result in a loss of benefits or other negative consequences.

Specifically, the form states, "The Appeals Services Division may identify a downside risk for a prior related decision. This could result in the reversal of the prior related decision. You will be notified of the downside risk and given the opportunity to either withdraw your appeal or proceed. If you proceed you will be granted a period of 21 days to make a submission on the downside risk issue."

We submit that this is a biased interpretation of Section 121 of the *Workplace Safety & Insurance Act*, which states, "The Board may reconsider any decision made by it and may confirm, amend or revoke it. The Board may do so at any time if it considers it advisable to do so." In other words, while the *Act* does grant the Board the power to reconsider a decision, an objective interpretation suggests that in addition to a downside risk, this reconsideration power could result in an "upside risk," wherein a negative decision is overturned and an injured worker receives increased benefits.

The Appeal Readiness Form, however, does not acknowledge this interpretation, and thus misrepresents Section 121 with its exclusive reference to a downside risk. In effect, this practice serves as a disincentive for injured workers to pursue their right to appeal. Many workers may choose to drop their appeals, not because their case lacks merit, but rather because simply by signing the Appeal Readiness Form, their current benefits and prior favourable decisions are under threat and in danger of being revoked. Indeed, in our consultations with injured workers, we heard on numerous occasions that workers find the downside risk notice to be an intimidating and unfair scare tactic.

In order to remedy this situation, we recommend entirely removing the reference to the downside risk from the Appeal Readiness Form. This is the most effective way of ending the chilling effect on injured workers pursuing their right to appeal. Removing the reference would also remove the biased interpretation of the *Act* that is currently being portrayed in the Appeal Readiness Form. Moreover, given that the WSIB claims that

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nothing has changed in the way that it uses its reconsideration power under Section 121, there appears to be no logical reason to include the downside risk warning in the form. As such, removing the reference to downside risk would allow the Board to remain consistent with its past practice.

While we strongly recommend entirely removing the reference as the best possible remedy to this situation, if this is not possible, we recommend at the very least that the law be explained fully and objectively to injured workers. This would mean clearly communicating on the form that the Board's power to reconsider decisions under the *Act* provides it with the mandate to identify either upside or downside risks. With this modification, injured workers would be provided with a more fulsome interpretation of Section 121. However, this modification still holds the potential problem of encouraging adjudicators to open up an injured worker's entire file for re-evaluation, rather than simply focusing on the issue(s) under appeal. Such an approach would be very administratively cumbersome, and would also mark a change in the way that the Board has approached appeals for the past 98 years, as it has generally simply dealt with the issue(s) at hand. It is for this reason that we recommend this option as a secondary remedy only.

Regardless of which of these two recommended remedies is chosen, it is essential that adjudicators at the Board be well trained in applying Section 121 in accordance with the full spirit in which it was written, rather than simply being trained on how to seek out and identify downside risks.

Thank you once again for your attention to this matter, Mr. Irvine. We hope that through this communication we can move towards an appeals system that provides administrative and procedural fairness and respects the rights of injured workers.

For your reference, we have enclosed our original correspondence with Ms. Slavica Todorovic, Executive Director of the Appeals Services Division, as well as her response to us.

Please do not hesitate to contact us to discuss this issue further. We look forward to hearing from you.

Sincerely,
Injured Workers' Consultants and Bright Lights Injured Workers' Group
Per:

Orlando Buonastella John McKinnon Aidan Macdonald Beryl Brown

Encl.