Gary Newhouse, B.A., LL.B.

Barrister & Solicitor

1415 Bathurst Street
Suite 103
Toronto, Ontario
M5R 3H8

Telephone: (416) 538-2737
Toll-Free: 1-877-294-2444
Fax: (416) 538-1969
E-mail: gnewhouse@sympatico.ca
Web: www.workerscomplaw.ca

September 25, 2012

Ms. Slavica Todorovic
Executive Director, Appeals Services Division
Workplace Safety and Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Todorovic:

Re: Proposed Changes to the Appeals Program

I am making submissions on the proposed changes to the appeals program. My submissions will follow the outline of the Board's consultation paper. I might add that in addition to reviewing the consultation paper I was present at Mr. Teahen's presentation of this topic to the OBA on May 23, 2012.

I would like to provide some context and background regarding my comments.

I have been a participant in the system since September of 1976 as a representative of injured workers, initially as a law student and since April of 1981 as a lawyer. My first attendance as a representative at a Board hearing (Appeals Examiner Inquiry) was in early 1977.

The appeals system at the Board has changed to some extent over the years of my involvement with it. However the essence of a Board hearing has remained the same: oral hearing before an Appeals designate (Appeals Examiner, Hearings Officer, Appeals Officer, Appeals Resolution Officer). It used to be that every appeal was dealt with through a hearing and the Appeals designate was not identified until the actual hearing day.

It seemed apparent to worker representatives that having the right to appeal served as an outlet for injured worker frustration and a mechanism for the Board to "get it right". An oral hearing was vital and statistically it was always the case that it led to more positive outcomes than paper reviews. It ***never*** seemed to be the case that the Board was using (or intended to use) the appeals system to review uncontested prior decisions made in any given claim file, or to render uncertain the finality of earlier positive decisions. In short, although the legislation has always had a reconsideration provision it was never being used as a damper to appeals of ongoing entitlement issues. In extreme cases (i.e. suspicion of fraudulent conduct) the Board could invoke its

reconsideration powers independent of the appeals system of the day and it seemed that the Board felt that this limited use of its reconsideration powers outside of the normal participant-driven appeals process was satisfactory.

Two improvements early on were the provision of comprehensive file access with photocopies of all file material (as opposed to the extremely cumbersome process of permitting an on premises review of a worker's file) and the publication of Board policy.

A more recent improvement was the in advance notification of the identity of the Appeals designate along with the possibility of a resolution by means other than an oral hearing. In obvious cases it was no longer necessary to conduct a hearing.

Government imposed time limits for objections, necessitating a great deal of additional work for all parties in terms of recognizing and making timely objections came into effect as of June 30, 1998. There is nothing in my experience to suggest that time limits led to any improvement in adjudication at any level of decision making in the workers' compensation system. They simply added another hurdle and jurisprudence regarding time limit extensions. A first step in "modernizing" the appeals system (unfortunately requiring legislative intervention) would be to repeal the time limit provisions. This would have the immediate impact of removing the need for time limit extension decisions. It would also permit a return to more comprehensive decision-making.

The current backlog at the Appeals Branch is largely due to the change in decision-making at the Operations level of the Board, as discussed by Mr. Michael Green in his submissions. In effect, the Board has created its own crisis (and increased its administrative costs) in its drive to reduce benefits payments. With a huge increase in negative entitlement decisions it follows that there would be a huge increase in objections. Reform is needed from the top down not within the Appeals Branch, but rather within the Board generally.

The current appeals procedures by and large are quite satisfactory and the current Practice and Procedures document is transparent and a useful source of information regarding how the system works. There is no need for significant change.

The one worrying trend in recent years has been the reduction in oral hearings (note the comments from Mr. Green on this topic). It is suggested that this trend is largely driven by time constraints felt by most Appeals Resolution Officers.

"Modernization" at the Appeals Branch could include consideration of the provision of file access through electronic means, and the use of e-mail as a means of communication. Otherwise much of what is proposed in the consultation paper is really just increased bureaucratization with a corresponding increase in barriers to the substantive resolution of appeals.

Adding “downside risk” to the mix is not “modernizaton” at all, but really an attempt to implement benefits control at the appeals level. Thus the appeals level of the Board will become an even greater threat than an aggressive employer representative who files “shotgun” objections to every positive entitlement decision ever made in a claim. Historically it has been possible to dismiss such “shotgun” approaches with worker representatives secure in the knowledge that for the most part these challenges would amount to nothing. However, if Appeals Resolution Officers are now to be directed to review files with a view to questioning any and all prior decisions in a worker’s favour this is no idle concern. The fear of downside risk possibilities will discourage workers from appealing; anyone who denies this is being disingenuous. Implementation of a downside risk model flies in the face of the Board’s supposed “ongoing commitment to service excellence” and to the Board’s supposed commitment to “fair and transparent final resolution of objections”. The authors of the consultation paper should be ashamed of themselves.

More specific comments on the consultation paper follow, with the use of headings for ease of reference.

Operating Area Decisions

Historically, Operating area decisions have often suffered from poor to no reasoning. Improved reasons can do little harm, although with reasoning based on practice guidelines no longer publicly available and a message from the top that benefits must be reduced, improved reasons will probably not lead to fair decisions.

Time Limits

Time limits have no place in the workers’ compensation system. The current Board practice of a *de facto* one year time limit softened the impact of a 6-month time limit to a limited extent, and should be retained.

Intent to Object Form

Unnecessary. The current practice (a simple bookmark objection letter) is simple and sufficient. It also satisfies the statutory time limit for objections and has been doing so since 1998.

Objection Form

See “Downside Risk” below (and the above comments). Certainly one objection form (i.e. the current form) is reasonable and sufficient.

Objection Intake Team

This team is already in place. If it actually is performing a useful function (as a "central depository for recording Objection Forms") it should be retained. The real issue is not gate-keeping or bean counting, but having a mechanism for ensuring that objection materials are received by the Appeals Branch (rather than being disregarded at Operations), and that the content of the materials relates to a specific decision that has been made. In my experience these materials are often falling into a "black hole" at Operations.

Appeals Triage/Disclosure

This could be helpful but looks more like a delaying device. In my experience the need for additional disclosure is rare and generally met by the requirement for disclosure in advance of a hearing. In a system where the unfortunate goal seems to be to all but eliminate hearings this disclosure element becomes more necessary.

Methods of Resolution

Mr. Green's comments apply, in particular his comments regarding Appendix 5.

Resolutions

It is unclear why an appeals procedure document needs to specify timelines for decision completion. I believe that it is understood by all parties that ARO's attempt to make decisions as quickly as possible.

As an internal "best practices" guideline, it may be reasonable to suggest that an ARO finish a hearing and then immediately following that hearing prepare a written decision. [It would help if the ARO's all had private offices within the Board so that this task could be easily undertaken following a hearing]. In complex all-day hearings the day following the hearing should be set aside for the ARO to attempt to prepare a decision. Most experienced ARO's would be able to advise the parties at the close of a hearing as to whether or not the best practices guideline could be followed in the case at hand. For example, if it had become obvious that further information was needed this probably would have become clear by the end of the hearing, and this could be communicated on the spot to the parties. In these cases the ARO might be prepared to estimate the approximate time to the release of a decision; if not, then so be it.

…/5

Downside Risk

Without a doubt this is the most odious aspect of the consultation paper. As outlined above this is a "game changer" for appeals participants and obviously is designed to discourage injured workers from pursuing valid issues. It is a "gag" or "chill" provision and nothing more. The message to injured workers: keep your mouth shut or you may be even worse off after completing an objection form than you were before! The message to astute representatives: if you can spot a decision that you think can be second-guessed by an ARO, stop the objection now; otherwise you are potentially liable to the client if a decision is second-guessed and entitlement is reversed.

As noted above, this downside risk scare tactic is converting the ARO into a benefits control officer/bully with a mandate to undercut entitlement at an earlier stage than it has already been cut by the decision under appeal. This has never been the mandate (or the approach) at the Appeals Branch, and it is clearly only for financial reasons that this tactic is being considered at the present time. This reflects upper management thinking and there needs to be independence between upper management (and its financially based/performance incentive concerns) and the appeals system. It used to be the case that individual decisions were made without regard to the costs to the system. The merits of a decision had nothing to do with the value of the benefits at stake. This was as it should be.

It is particularly troublesome that the objecting party will not be permitted to withdraw an objection in cases where a downside risk has been identified. Historically, from time to time decision-makers at the WSIAT have identified a downside risk in a particular case. When this has happened the appellant **has always been given the opportunity to withdraw the objection** (or to proceed in full awareness of any specifically identified downside risk).

It is of concern that the downside risk wording has not been included in the draft objection form, although we are presented with two "Options" in the consultation paper. Neither Option 1 nor Option 2 is acceptable. The only acceptable option is to maintain the status quo, where the Board has its reconsideration powers which can be used at any time and at any level within the Board, but very rarely are.

Requiring an authorized representative to sign the downside risk declaration is ridiculous. It looks as if the Board is trying to make the representative complicit in the Board's bullying.

As suggested by Mr. Green, if there are to be "downside risks" there should also be "upside risks".

Conclusion

For the most part the appeals system is working quite well (although it would benefit from more oral hearings) and the delay problem will disappear with proper decision making at the Operations level grounded in adherence to well-established and transparent policies and practices

rather than performance incentives for the President and CEO of the Board. However this type of decision making is unlikely in the current environment and so it follows that more ARO's holding more hearings are needed. Hearings should be scheduled in such a way as to make it possible for decisions in most cases to be rendered immediately following a hearing.

No "process adjustments" are needed regarding the new appeals program; **it should be scrapped altogether** (with the retention of the Objection Intake Team). In particular the concept of "downside risk" that has been largely foreign to the appeals system should remain so.

GARY NEWHOUSE
Barrister and Solicitor

GN/gn