Submissions on WSIB Consultation Paper:

Modernization of WSIB Appeals Program

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Injured Workers Consultants is a community legal aid clinic providing legal advice and representation to the injured worker community without charge since 1969. In addition to individual representation, we provide public legal education, assistance to injured worker organizations and we participate in the reform of law and policy in matters of concern to the injured worker community.

Introduction:

The Workplace Safety and Insurance Board makes about a million decisions every year[1]. At present, fewer than 1 % of those decisions are challenged[2]. The right to challenge a decision by an administrative agency and the right to a fair hearing by an administrative tribunal are fundamental principles in our justice system. It has been our experience that the WSIB Appeals Process was working relatively well. Although no data is provided in the consultation paper, the proposed changes to the WSIB Appeals Process are said to be required to address the delay in processing appeals.

All stakeholders will agree that a faster appeals resolution process is desirable. However, these proposed changes severely encroach on the right to appeal and the right to a fair hearing by injured workers who are adversely affected by a decision of the WSIB. They conflict with common law principles of natural justice and with rights guaranteed in the Canadian Charter of Rights and Freedoms.

It is our recommendation that these proposals should be withdrawn. The WSIB appeals system is not in crisis. Both the WCB and the WSIAT have dealt with similar backlogs in the past without resort to such dramatic changes. Simpler solutions exist that will satisfactorily resolve the backlog without affecting the quality of justice in the WSIB appeals system.

[1] WSIB presentation to the Standing Committee on Government Agencies, Queens Park, July 5, 2012.
[2] ibid

The Case for Change:

The consultation paper purports to present a case for change but includes absolutely no data. This lack of data is not appropriate when proposing such a major downgrading in the quality of justice that will be provided to those who wish to appeal one of WSIB's decisions. Although it presents 7 bullet points with anecdotal concerns, there is not only no data to describe the problem, there is no apparent connection between the concern and the changes proposed in the consultation paper.

The consultation paper does not refer to the case for change presented in the KPMG Value for Money Audit of the WSIB Appeal System. In March 2009 the KPMG Report noted the significant difference between the average duration in '60 Day - written appeal' decisions (33 days) versus 269 days for an oral hearing decision. KPMG recommended that "The WSIB should consider strengthening the direction in the Practice and Procedures to clarify the criteria for … files that should proceed via oral hearing and those that generally should not proceed via oral hearing."[3] We stand by the submission that we made at that time, which urged the WSIB 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 timeliness with access to the decision makers, rather than to pit the speed of decision making against access to oral hearings (copy of submission attached in Appendix 1).

The consultation paper also does not refer to the case for change presented in the WSIB Study of Locked in Awards, January 2008. The study reported:

> *What is particularly noteworthy is the trend of an increasing proportion of lost time (LT) claims being locked-in on benefits to age 65, at 72 months post date of accident, as well as the increase in average loss of earnings (LOE) percentage at lock-in, and the percentage of workers being locked in at 100% of wage loss benefits. These increasing trends have resulted in an additional financial burden to the WSIB.*[4]
>
> *Workers within the locked-in population have been found to be older, have a greater number of prior claims;* ***a higher rate of appeals*** *…*[5] *(emphasis added)*

Are the proposed changes to the appeal system directed at reducing the use of the appeals system by this particular group of injured workers considered to be a "financial burden to the WSIB?"

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[3] 2008 KPMG Value for Money Audit of the WSIB Appeals Program, 10 March 2009, page 23.
[4] Study of Locked in Awards, WSIB, January 2008; page 1.
[5] ibid, page 16

We expect to see increasing numbers of appeals in response to the WSIB's financial restraint initiatives that are having a significant effect on benefit payments to injured workers. When WSIB decision making is oriented towards reduction of benefits costs, one can expect to see an increase in the number of injured workers who disagree with an adverse decision in their claim. The current backlog in appeals may be a function of recent trends in WSIB decision making.

For example, on the issue of initial entitlement, there has been a 50% increase in the claims denial rate from 2009 to 2010[6]. By September 2011 there was a $631 million reduction in benefit costs compared to the year before, attributed to a reduction in lost time claims and others[7]. From 2009 to 2011 vocational retraining has been reduced from an average of 19 months to 5 months duration. The program costs were cut from $120.9 million to $86.1 million during that period. That is a 74% reduction in the length of vocational rehabilitation plans[8].

There have also been significant reductions in long term benefits for permanently disabled workers from 2009 to 2010. In 2010 there was a 27.6% reduction in the number of injured workers accepted as unable to return to work compared to 2009[9]. The average annual benefit paid to an injured worker at the 6 year post injury review has been reduced to $15,106 a year compared to the average of $21,144 prior to 2010. That is a 28.6% reduction in the average long term benefit payment to permanently disabled workers[10]. There was a reduction of over 2000 permanent impairments in the first six months of 2011 compared to the same period in 2010. There has been a 31.3% reduction in permanent impairment awards compared to 2010[11].

It appears from the KPMG report that a great deal of data about the appeals process was provided to the KPMG. Similarly, the WSIB Reports to Stakeholders indicate that there is a great deal of unpublished data that would be of interest to stakeholders involved in this consultation. It would be helpful if the WSIB would make this data available in its current consultation with stakeholders about the Appeals Process.

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[6] 2011 KPMG WSIB Adjudication & Claims Administration (ACA) Program Value for Money Audit Report: from 2009 to 2010 the WSIB increased its rate of denial of new claims from 7.9% to 11.3% as a result of "specialized training" and "management oversight" (p.22), nearly a 50% increase in claims denials.

[7] WSIB Third Quarter 2011 Report to Stakeholders talks about "positive trends in our benefits costs" at page 3.

[8] WSIB Third Quarter 2011 Report to Stakeholders states that by September 2011 the average length of a retraining plan was cut to 5 months compared to 19 months in 2009 (p. 3).

[9] supra, note 4; According to the KPMG Review of WSIB adjudication, this reduction was achieved by requiring management approval for a decision accepting that an injured worker is permanently unable to return to work.

[10] WSIB Second Quarter 2011 Report to Stakeholders, page 3.

[11] WSIB Second Quarter 2011 Report to Stakeholders reports, page 3.

As noted above, the Consultation Paper presents 7 bullet points with anecdotal concerns. There is no apparent connection between these anecdotal concerns and the changes proposed in the consultation paper.
These are the bullet points with our analysis:

- Incomplete objection forms are noted. An obvious solution would be to call the person who submitted the form and ask for clarification. Whether the problem is literacy or language barriers or carelessness, it can be solved on the spot. It is not obvious that the proposed solution, to expand the Objection form from 2 pages to 3 pages and add an additional 4 ½ pages of detailed written instructions, will improve the completeness of forms received by the WSIB. In fact, the proposed solution seems counter-intuitive. It is likely to increase confusion and delay, particularly where language and literacy barriers exist, and will result in more incomplete Objection forms being submitted. This will assist the WSIB in speeding up the processing of appeals because there will be fewer appeals, but that is clearly an inappropriate way to solve the WSIB's delay problem.

- Unclear and poorly reasoned front line decisions are cited. We see this problem in our casework with increasing frequency over the past few years but the solution requires no changes to the Appeals Process. We would agree that it would be appropriate for the WSIB to put significantly greater resources to improve the quality of initial adjudication and the consequences would be a reduction in number of objections to initial decisions.

- The lack of a central depository and staff for processing Objection Forms is listed. This is a matter of the WSIB's internal infrastructure and the solution requires no changes to the WSIB Appeals Process.

- The process for the WSIB's front line decision makers to reconsider their decisions when new information arrives is said to lack 'robustness.' As with the quality of initial decisions noted above, we also see this problem in our casework with increasing frequency over the past few years but the solution requires no changes to the Appeals Process.

- The paper cites cases where gaps in information or adjudication are identified by the Appeals Resolution Officer and sent back to the initial decision maker, resulting in delays in the appeal. There is no explanation of how this differs from the concerns in bullets 2 and 4 regarding poor quality initial decisions and the failure of initial decision makers to properly reconsider their decisions when new information arrives. In our casework, we have noticed an increasing trend of Appeals Resolution Officers sending cases back down to initial decision makers for a variety of reasons. Attached as Appendix 1 is a case example that illustrates how an appeal can be delayed while the Appeals Officer and the case

manager debate who should get the required information. We note that in the past the WSIB/WCB hearings adjudicators were given a much more flexible mandate to decide the issues that need to be resolved without technical concern over internal boundaries. The result was a faster and more effective appeals process. It seems counter intuitive to expect that the proposed introduction of additional and longer forms coupled with more extensive reconsideration is going to speed up the time it takes to resolve an appeal request.

- The paper expresses a concern about the time invested by Appeals Resolution Officers in getting cases ready and debating the need for an oral hearing. It is unclear to what extent the WSIB feels this is not part of the obligation to provide appellants with a fair hearing of their concern. However, it seems counter intuitive to expect that the proposed changes, which still require all of this and more, with additional paperwork and discussion, will decrease the time that the WSIB takes to deal with an appeal. For example, the written appeal required to obtain an oral hearing cause months of additional delay that does not exist in the current process. It will download some of the work from the Appeals Resolution Officers to other staff. It cannot shorten the time between an injured worker disagreeing with a decision and getting a decision from the Appeals Branch.

Increased Use of Forms and Paperwork

The current practice of accepting any written indication or even verbal notice of intention to object as sufficient to meet the statutory time limit for indicating an intention to object is fair and wise. The introduction of time limits in the legislation in 1998 was unfair to injured workers and employers and has increased the complexity of the appeals process, bringing delays and generating backlogs of potential appeals. The simple 'bookmarking' approach enables time limits to be observed with a minimum of paperwork and litigation. We strongly disagree with the proposed changes to the discretion to extend the time for appeals and to strictly enforce time limits. That is simply taking away the right to appeal and will lead to more litigation over these procedural issues. Rather than introduce another form and procedure for time limit issues, we would prefer to see the WSIB recommend to the government to remove the time limits from the legislation.

The introduction of a new Intent to Appeal form with four pages of written instructions for completing the form will discourage and delay appellants and increase the time to resolve a disagreement. These new form and procedural changes will lengthen the time between an injured worker disagreeing with a decision and receiving an Appeals Resolution Officer decision, although it may

reduce the length of time the file is technically sitting in the Appeals Branch by tying it up in preliminary procedures elsewhere before giving the file to appeals.

A decision to introduce additional forms must be balanced against the reality of literacy levels of the population. According to Statistics Canada, 47% of Canadians aged 16 and over have difficulty extracting and using information presented in forms[12]. There is little published research on the literacy levels of injured workers. The Canadian Injured Workers Alliance survey of literacy levels of injured workers found that 58% did not complete high school. They also found that people without high school education were three times likelier to have problems with WCB paperwork than those who graduated[13].

We expect the introduction of new and longer forms with longer instructions will increase the number of incomplete forms received by the WSIB and will increase delays by both appellants and the WSIB.

We note that the instructions to be provided with the new forms make reference to relevant documents that are available online such as the Operational Policy Manual and the Appeals Procedures Guide. While we support the Board's efforts to make helpful information available, if it is a helpful resource for appellants it is important to ensure that it is available in other ways. In addition to concerns about language and literacy barriers, According to Statistics Canada, only about half of those Canadians with a household income of $30,000 or less used the internet[14]. With respect to the Operational Policy Manual, this amounts to hundreds of pages of text that could overwhelm an injured worker trying to start an appeal.

In Ontario, new immigrants often find themselves in the most dangerous types of employment where workplace injuries are more likely to occur. When a workplace injury occurs, language and cultural barriers become very significant. In our community legal clinic, many of the injured workers who seek our help do not have English as a first language. The WSIB Chair recently expressed this concern:

> *We're also making sure that we're raising the awareness of the services that are available. I made reference yesterday to the fact that with so many new immigrants who don't speak English as their first language, we're trying to make sure that they can access the system and learn about the system and the board even before they get a job.* Elizabeth Witmer, Hansard, July 5, 2012.

The Consultation Paper ignores the barriers that will be created by new and longer forms for those who do not speak English or French as a first language.

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[12] Reading the Future, Statistics Canada, 1997
[13] The Voice of Injured Workers, Report of Conference Proceedings, September 1992; page 22.
[14] Canadian Internet Use Survey, Statistics Canada, 2010.

Restrictions on Oral Hearings

We are concerned that the proposed restrictions on oral hearings are very drastic measures that will dramatically reduce the quality of justice received by those affected by decisions of the WSIB. As noted above, the complete absence of data in the Consultation Paper makes it impossible for stakeholders to know the problem that the Board is addressing.

The Dimensions of the Problem

The fact the Board has said elsewhere that fewer than 1% of the decisions made by the WSIB every year are appealed suggests that the dimensions of this problem are not dramatic, and that drastic measures are not required. Furthermore, the KPMG report states that only 34% of appeals to the Hearings Branch are decided through the oral hearing process[15]. So we are looking at restricting the use of the oral hearing process, a process which at present is only used to resolve less than 1/3 of 1% of the decisions made by the WSIB.

It would be very helpful to know the rate at which appeals are granted or denied in the written hearing process as opposed to the oral hearing process. Previous WCB/WSIB administrations were willing to share that information with stakeholders.

For example, in the early 1990s there were 2 levels of appeal in the WCB after the front line decision. The first was a written appeal process called the Decision Review Branch. If an appeal was not allowed, it could be taken to the second level of appeal with an oral hearing. The WCB published statistics in 1991 showing that 25% of the appeals were granted at the written appeal level. At the oral hearing level of appeal, 61% of appeals were granted (copy attached in Appendix 2).

These statistics indicate that an oral hearing is a major factor in providing administrative justice. Appeals that went to the oral hearing had already been denied by the written appeal process, and yet the majority of them were granted after an oral appeal process. Is that still the case today? This research suggests that the elimination of oral hearings will result in denial of appeals that should be allowed.

The WSIB has provided some data on the current appeals system to the Standing Committee on Government Agencies. It shows that the percentage of appeals granted by the Appeals Branch has dropped from 36% in 1999 to 25% in 2011[16](copy attached in Appendix 3). The percentage of appeals granted has now reached the level that existed in written appeals in 1991. Is that because, as reported by the WSIB to KPMG, most appeals are now decided through a written

[15] Supra, note 3, page 28.
[16] Document 7.2, New Appeals and Reversal Rate.

appeals process? Does that mean that many of these cases would be allowed if there had been an oral hearing? The numbers suggest that instead of moving forward, we are going back to a time when only one in four appeals was successful (at the old DRB level), but at least at that time injured workers could still get an oral hearing after that. We are concerned that the WSIB is simply passing its backlog on to the Workplace Safety and Insurance Appeals Tribunal, which will now be the only place where injured workers can get a fair hearing.

Principles of Natural Justice

The content of the principles of natural justice required in a given case will depend on the circumstances of that case. The principles of natural justice do not necessarily require that an administrative decision maker provide a formal oral hearing[17]. However, the key is whether the decision maker has acted fairly in dealing with the person's rights. In some cases, only a full, formal, oral hearing will suffice to comply with the duty of fairness[18].

The proposed limitations on the use of oral hearings are problematic in light of the legal requirements of the principles of natural justice. By prescribing a list of 17 broad types of cases "that will be resolved through a hearing in writing," the WSIB has fettered its discretion to comply with the principles of natural justice. Appeals on any issues may involve credibility or complex factual situations, issues where the courts have strongly favoured the right to an oral hearing. For example, there will be no oral hearings on noise induced hearing loss. Yet entitlement may be the subject of a misunderstanding about the amount of time a worker spent near a noisy machine. There will be no oral hearing for medical compatibility, yet entitlement may the subject of a misunderstanding of the repetitive nature of the job. In Appendix 2 is a case example which illustrates the importance of oral hearings.

In those 5 types of appeals where an oral hearing may be held, the use of dual decision makers in each appeal also raises an issue of fettering discretion. A decision maker will look at the appeal and make a decision whether or not the case will proceed to an oral hearing. That decision will be final. Then the case will be passed on to a second decision maker to decide the merits of the appeal. This decision maker is required to apply the principles of natural justice in deciding the case, but cannot allow an oral hearing. The discretion of the decision maker to comply with the principles of natural justice by resolving an appeal through oral hearing has been blocked by the proposed policy.

[17] Re: Singh, SCC, [1985] 1 SCR 177
[18] Administrative Law, Evans, Janisch, Mullan and Risk, Fourth Ed. p.264-65.

The Downside Risk

The consultation paper proposes a very harsh interpretation of the reconsideration power. The reconsideration power has been there since the draft legislation proposed in 1913 with Justice Meredith's Second Interim Report. It exists in many other administrative justice systems. For an organization like the WSIB, making one million decisions a year, it is an important safety valve in a system where it is not possible to always be right the first time.

The *Workplace Safety and Insurance Act* provides:

> Power to reconsider
>
> *121. 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. 1997, c. 16, Sched. A, s. 121.*

This section resides in the spirit of remedial legislation and is consistent with the statutory requirements to consider the merits and justice of each case and to allow the injured worker the benefit of the doubt where evidence is equally balanced. It is not intended and should not be exploited as a 'one way' tool to seek out previously granted benefits and take them away from anyone who wishes to question the Board's front line decision makers.

The proposed policy interpretation of s. 121 empowers the WSIB to review decisions not under appeal in an appellants file and reverse previously granted benefit entitlement with no new evidence or information. It further bars the appellant from withdrawing an appeal. An appellant is also barred from asking for reversal of previously denied benefits in decisions not under appeal. In our submission, this is an 'illegal policy' in that it asserts an interpretation of the legislation that is inconsistent with the scheme of the Act and the principles of natural justice.

On September 18, 2012, our office did a survey at a meeting of 25 injured workers. We explained the "declaration of risk" document and asked who would sign the declaration in order to proceed with their appeal. No one raised their hand. No injured worker would proceed with an appeal at the risk of losing what they had already been granted.

The proposed "declaration" will effectively eliminate the right to appeal, except for those who never received anything from the WSIB. Our community legal aid clinic has been providing legal advice and assistance in workers compensation matters since 1969. We have studied the history of workers compensation in Canada. This is the one of the most draconian, anti-injured worker policy proposals we have ever seen.

The WSIB could learn from the Workplace Safety and Insurance Appeals Tribunal's approach:

> *Identification of a downside risk is rare because in most instances, the Panel will deny the appeal, and maintain the status quo rather than reducing the worker's or the employer's entitlement. This is generally consistent with the Tribunal's appeal function and avoids a "chilling effect" that would otherwise arise. If appellants had to always fear that they could end up in a worse situation, many legitimate appeals would not be brought at all.*[19]

Inconsistent With the Canadian Charter of Rights and Freedoms

The consequences of the proposed downside risk are that no decision of the Board is ever final, no benefits provided are ever secure, and any benefits ever granted are liable to be taken back at any time if the injured worker dares to challenge a decision by the front line decision maker. Section 7 of the *Canadian Charter of Rights and Freedoms* provides:

> *Life, liberty and security of person*
>
> *7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

The proposed downside risk provisions infringe on the security of the person of an injured worker entitled to benefits under the *Workplace Safety and Insurance Act* and do not accord with the principles of fundamental justice. For that reason we expect that the proposal would be found to contravene the Charter of Rights.

Conclusion

The proposed changes to the Appeals Process are deeply flawed. They will increase the overall length of time between an appellant's decision to challenge a front line decision and the appellant receiving the decision of an Appeals Resolution Officer. It is not helpful to the decision making process that the file may technically be in the hands of the Appeals Branch for a shorter time. More procedural steps and more documents will require more time for the WSIB process.

The paperwork changes will deter or derail some appellants, especially those facing language and literacy barriers. The downside risk declaration will have a significant chilling effect, deterring the majority of potential appellants. The number of appeals will drop greatly and of course the speed of appeal decision making will increase, **at the cost of great injustice**.

[19] Decision No. 1756/04, WSIAT, paragraph 12.

At the same time, more forms, longer forms and signed declarations would increase the demand by injured workers for legal advice and representation and tie up the time of the representatives and the WSIB appeals system with pre-hearing forms and procedures. Even at present, the demand for services by injured workers far exceeds the resources available from unions, legal clinics and the Office of the Worker Adviser. Most injured workers appealing a WSIB decision do not have the financial ability to retain a legal representative.

After this consultation began, the Chair's remarks to the Standing Committee on Government Agencies suggest that further discussion may be in order:

> *The other priority that I see and I've heard about is that in everything that the board is doing now, they want to ensure that there is transparency, that people can see what is happening but also understand why decisions are being made…We also want to make sure that in all of the decision-making that takes place, there's fairness to both the work [sic] and to the employer.* Elizabeth Witmer, Hansard, July 5, 2012.

We would be willing to engage in a dialogue with the WSIB based on all the facts and evidence. Although there is a backlog of cases at the Appeals Branch, the WSIB appeals process is not in crisis. Both the WCB and the WSIAT have dealt with similar backlogs in the past without such dramatic changes. Radical changes are not needed. The proposed measures begin with a backlog and end up without a fair appeals system. All stakeholders would like to see appeals resolved more quickly, but not at the expense of justice for the appellants. We ask the WSIB to withdraw the proposed changes.

There are better solutions. Expect an oral hearing in each case. Then there is no time lost in debate. The only exceptions would be where the appellant does not want an oral hearing, or when the ARO reviews the claim file and is prepared to allow the appeal based on that review. In those cases no hearing is necessary and there is no debate involved. Hire additional Appeals Resolution Officers. Give them a flexible mandate to decide the issues necessary to resolve the appeal without ping-ponging the file back and forth with the front line decision makers. Forget about additional forms and stricter enforcement of time limits. The backlog will be taken care of without encroaching on the fairness of the WSIB appeals process. In the longer term, the WSIB can begin to put greater time and effort into the quality of front line decision making.

We urge the WSIB to heed the advice of Sir William Meredith in the closing paragraph of his final report:

> *… it is, in my judgment, of the gravest importance to the community that every proved injustice to any section or class resulting from bad or unfair laws should be promptly removed … Half measures which mitigate but do*

> *not remove injustice are, in my judgment, to be avoided … it would, in my judgment, be the gravest mistake if questions as to the scope and character of the proposed remedial legislation were to be determined, not by a consideration of what is just to the workingman, but of what is the least he can be put off with…*[20]

The workers' compensation system is part of the justice system of Ontario. It is a surrogate for our judicial system. It must provide the same degree of fairness and justice. In our society, every individual has the absolute right to their day in court, even to challenge a $15 parking ticket. Injured workers gave up the right to sue, not the right to fairness and justice.

Respectfully submitted, this 1st day of October 2012.

Injured Workers' Consultants Community Legal Clinic

[20] Final Report, Sir William Meredith, October 1913.

Appendix 1

IWC Submission to WSIB Regarding KPMG Appeals Review

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,
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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.

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~ 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

Appendix 2

WSIB 1991 Appeals Statistics

COMPARISON OF DECISION REVIEW RESULTS WITH HEARINGS RESULTS

1991-1990

	DECISION REVIEW		HEARINGS	
OFFICE	1991		1991	
	DENIED	GRANTED	DENIED	GRANTED
HAM	80%	20%	33%	67%
LON	80%	20%	42%	58%
OTT	68%	32%	48%	52%
SUD	63%	37%	34%	76%
TB	70%	30%	28%	72%
WIN	73%	27%	35%	65%
CONST	81%	19%	50%	50%
COS	78%	22%	44%	56%
COW	80%	20%	29%	71%
ODD	91%	9%	N/A	
TE	79%	21%	43%	57%
TN	74%	26%	37%	63%
TS	74%	26%	41%	51%
TW	72%	28%	42%	58%
COE	N/A		44%	56%
PROV AVE 61%	76%	24%	39%	

REVERSAL OF DECISION REVIEW DECISIONS BY HEARINGS BRANCH

BEFORE AND AFTER CENTRALIZATION

YEAR/AREA	DENIED (%)	GRANTED (%)
1988	-	
PROVINCE	55	45
HAMILTON	51	49
LONDON	47	53
OTTAWA	53	47
SUDBURY	52	48
THUNDER BAY	62	38
WINDSOR	45	55
1989		
PROVINCE	51	49
HAMILTON	46	54
LONDON	56	44
OTTAWA	53	47
SUDBURY	40	60
THUNDER BAY	54	46
WINDSOR	59	41
1990		
PROVINCE	43	57
HAMILTON	40	60
LONDON	41	59
OTTAWA	38	62
SUDBURY	45	55
THUNDER BAY	30	70
WINDSOR	56	44
1991		
PROVINCE	39	61
HAMILTON	33	67
LONDON	42	58
OTTAWA	48	52
SUDBURY	34	76
THUNDER BAY	28	72
WINDSOR	35	65

CHANGE FROM 1988 TO 1991: GRANTED APPEALS UP 36%

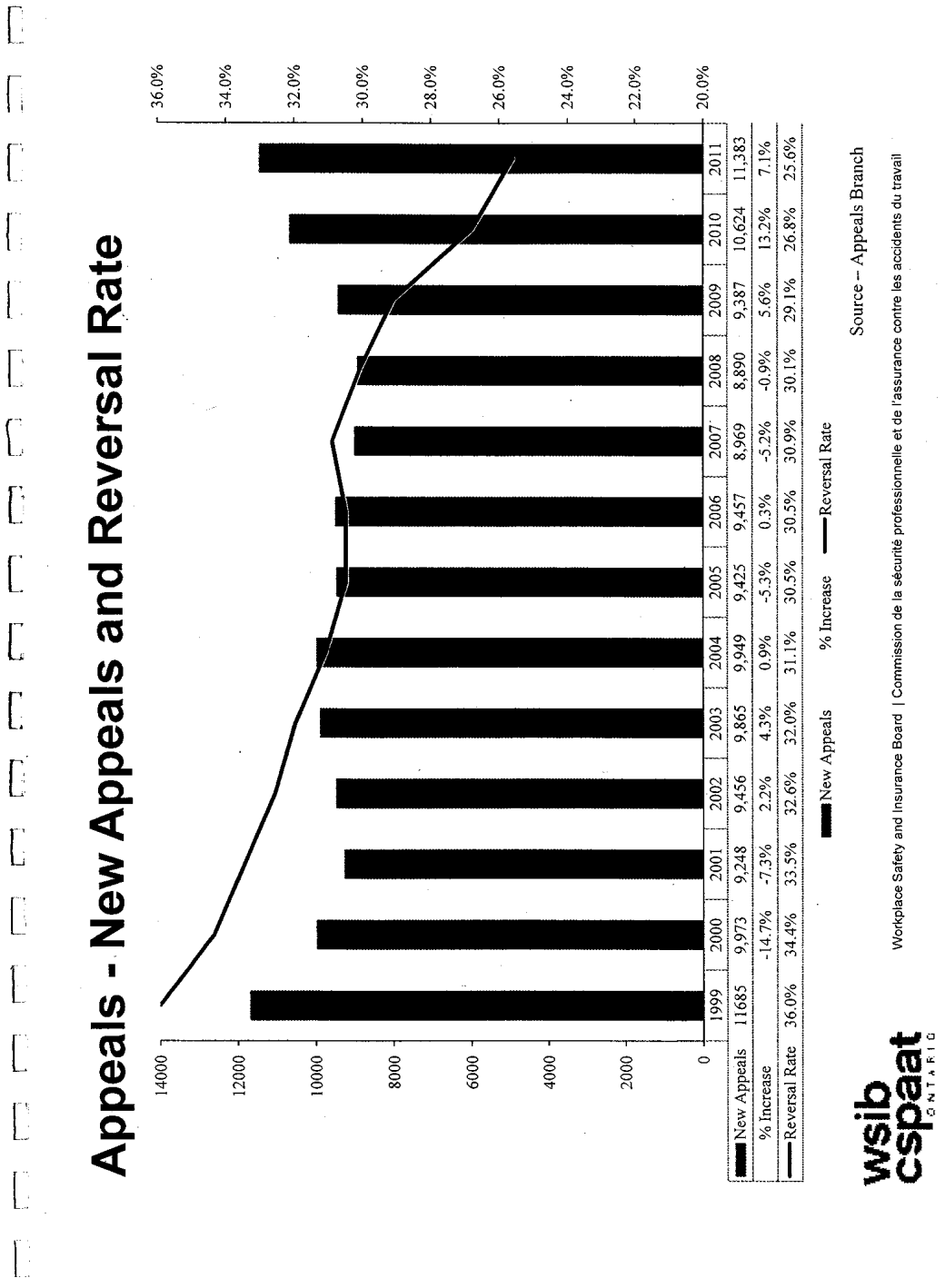
CONCLUSION:

DECENTRALIZED DECISION REVIEW TENDING TO RUBBER STAMP ADJUDICATOR DECISIONS SINCE PART OF SAME "TEAM"

MORE APPEALS FORCED TO GO TO HEARINGS LEVEL WHERE THEY ARE ULTIMATELY WON BUT AT COST OF DELAY/ANXIETY ETC TO WORKER

Appendix 3

WSIB 1999 - 2011 Appeals Statistics



	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
New Appeals	11685	9,973	9,248	9,456	9,865	9,949	9,425	9,457	8,969	8,890	9,387	10,624	11,383
% Increase		-14.7%	-7.3%	2.2%	4.3%	0.9%	-5.3%	0.3%	-5.2%	-0.9%	5.6%	13.2%	7.1%
Reversal Rate	36.0%	34.4%	33.5%	32.6%	32.0%	31.1%	30.5%	30.5%	30.9%	30.1%	29.1%	26.8%	25.6%

Appendix 4

Case Example: Appeal caught in the middle between ARO and EA

This case study suggests that the "lack of training and fortitude" by entitlement adjudicators cause delays in the appeals system.

August 9, 2010: Eligibility Adjudicator (EA) denies recurrence to left shoulder. The reason cited is lack of continuity of health care attention or treatment between January and July 2010.

December 16, 2010: Injured worker (IW) leaves a note at WSIB requesting claims file.

February 3, 2011: Injured worker provides key new information. In the period thought to have "no continuity" she saw company nurse regularly, and was given Advil. The first name of the nurse is provided (Nora). She also said Cathy (lead hand) was aware of problems.

July 29, 2011: IWC fills out Objection Form and expresses surprise the company nurse lead was not followed. Surely it is an important piece of information that should have been pursued. Further medical information is also enclosed, as well as a co-worker statement.

March 6, 2012: ARO returns file to the Entitlement Adjudicator and asks that new leads be followed, old (first aid records) and new (leads from Objection form and medical records).

May 14, 2012: (memo #6) The new Entitlement Adjudicator says company nurse Ingrid "confirms that there is onsite physiotherapy and that a letter is being put together to advise of the dates with them and will be sent by next week".

June 12, 2012: (memo #20): EA learns from lead hand Cathy that IW "most likely saw the nurse and the PT (physiotherapist) at the company who come in regularly to check the staff." Note: no enquiry is made about the promise made on May 14 that a letter on this matter would be sent within a week!

June 19, 2012: (memo #21): The company nurse (Ingrid) says there are "no first aid records to provide." This statement is not questioned as it is a nurse's professional responsibility to keep notes. The question whether these notes could possibly be with the former nurse (Nora) is not raised. The EA also "re-learns" that there is a PT (physiotherapist) who "may have notes" that are relevant, but despite many calls, Ingrid has not provided the information. The EA says she will contact the company again for the PT notes but if no response is obtained by June 15, she will make the decision without the notes! Note: the

internal deadline was met, as a technicality, but to no avail - because the key information gathering was abandoned.

June 20, 2012: The EA writes to IWC and reports on what has been obtained, and confirms that there are records from the PT but were not received. The denial is upheld. The file is sent back to the Appeals Area.

July 19, 2012: IWC urges EA to obtain PT report, and to show the courage of contacting the company physiotherapist to obtain this important documentation about eligibility.

July 26, 2012: A new EA writes in response and said she also requested the contact information for the company physiotherapist to provide information about first aid treatment. The file remains in the Appeals Branch.

Current status: the ARO has suggested a written submission and IWC indicated the EA failed to obtain crucial records identified as necessary. The appeal is "stuck." The file may have to go back to a 4th entitlement adjudicator to do the job that was supposed to be done by EA #1.

<u>What conclusions may be drawn about appeal delays?</u>

1) The Operation area was alerted in February 2011 about key documentation about continuity and did not follow through. It allowed the case to continue going to appeals. After 20 months, job #1 is still not done so more delays are ahead.

2) Once at appeals the ARO noticed there was missing information, including the first aid records

3) The Operating Area appeared to be afraid to push the issue with the employer and demand the information, as was promised on May 14, 2012. There seems to be lack of training and a "fear of the employer" among Entitlement Adjudicators.

4) The Operating Area seems to have an "internal" deadline to go back to Appeals which was met without obtaining the information requested! There is a concern over technicalities and "deadlines" instead of getting the job done.

5) The Appeal Resolution Officer is forced to do the work not done by the Operating Area.

6) The representative is put in a conflict with the ARO who wants to conclude the case (so does the rep) but wants the first aid evidence first requested in February 2011.

Appendix 5

The Importance of Oral Hearings: One example from an IWC caseworker

In 2011 a young man came to our legal clinic seeking our assistance because the WSIB did not recognise his highly disabling ankle condition as related to a workplace injury over10 years before (1999). The WSIB explained its position that there was a lack of continuity of complaint and most significantly, the current condition of necrosis of the ankle bones, could not be related to the simple sprain injury, from a slip and fall, of a decade earlier. On the other hand, the worker indicated to us, that his current specialist was of the opinion that it was related.

Before taking on the case, I spent about three hours listening to the worker and asking questions. It became clear that, while the diagnosis in 1999, was a "simple sprain," the accident was no "slip and fall," but rather a hurried jump from a height, at the call of his foreman, and landing on a skid. The board on the skid broke where he landed and his foot went through and, still with the force of his jump, he fell sideways with the foot caught under the broken board. It also became clear that in the interests of his family responsibilities he returned to work after a number of weeks of healing and physiotherapy, despite the unresolved swelling and pain. He pushed himself through the pain with the aid of significant use of over the counter painkillers until the underlying injury festered long enough that he simply could not continue. He could no longer bear the increasing pain, nor, at a certain point, would his work boots fit on his swollen foot.

We sent in an Objection to the WSIB and in time I received a call from the ARO. He was asked if we had anything more to submit and if not he proposed to make the decision based on the information on file. I protested that we wanted an oral hearing. He indicated that it was not necessary as this was a medical compatibility issue. Due to the our mutual busy schedules, it took, probably six weeks of back and forth telephone messages and conversations regarding whether or not an oral hearing was necessary, before the ARO finally agreed.

The hearing was held and the worker was able, through testimony, to provide a clear account of the nature of the accident and of the years of work and self-administered treatment that ensued. At the conclusion of the hearing, the ARO said: "Now I understand why you insisted on an oral hearing."

It is my experience that inevitably an oral hearing is able to get at an understanding of a claim far more effectively and probably more efficiently than reliance on analysis of the file alone—on any issue. There are many reasons for

this, but one, is that there is often a misunderstanding in a file that carries forward and even snowballs through the memos and/or medical reports. It is far more efficient and effective to untie miscomprehensions and clarify circumstances and correct mistakes in the setting of an oral hearing where the file can be looked at together and the ARO can explore the issue with the worker present.

After the hearing, the worker and I had some tea. “At last, I have been to the Board,” he said. “At last, I have seen someone from the Board and been able to explain my story.” “Do you think my claim will be accepted now?” he asked me anxiously. I said I hoped so, but that one can never be sure. “Well,” he said, “At least I have talked to someone from the Board and he was listening to me. That makes me feel settled that at last my situation is understood.”