SUBMISSIONS- WSIB APPEALS MODERNIZATION CONSULTATION 2012
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1. The Case for Change

I do not agree with the Consultation Paper's analysis of the reasons for the appeals backlog. The key factor is a change in decision-making at Operations on a number of issues. The Board's financial difficulties are well-known and upper management has attempted to effect benefit control without changes in policy (by use of private training of decision-makers). This results in many more decisions which are outside of any reasonable interpretation of Board policy and hence many more appeals. The answer to this problem lies with upper management fixing its lack of transparency, by making any benefit changes publicly after appropriate consultation. It has not done so to date.

The problems identified in the Consultation Paper have always existed in the system, and the appeals process was able to address them well, without the backlog that we see today. Appellants and their representatives (be they workers or employers) have about the same level of skill and preparedness that they always have had. Operations level decision-makers are as capable as before, but have received training that encourages or obliges them to make decisions that are not reasonably consonant with the Act or Board policy. The difference is a change in approach by upper-level management; this change has not served the Board well and in particular, has stressed the appeals system.

2. Oral hearing guidelines

The Consultation Paper provides that an Appeals Manager will make the decision whether the appeal should be heard orally or in writing. Appendix 5 provides the guideline for how this decision is to be made:

"Generally, an oral hearing will not be held where the facts are not in dispute and/or oral testimony would not add to the information contained in the claim file.

The following issues will be resolved through a hearing in writing:

- Pension commutations
- Pension arrears
- Pension or non-economic loss (NEL) award quantum/redetermination
- Noise-induced hearing loss
- Entitlement to Health Care Benefits
- Entitlement to less than two weeks' lost time benefits
- An employer request for SIEF relief
- Issues relating to payment of interest
- CPP benefit offset
- Earnings basis
- Medication
- Request for an IME
- Medical Compatibility
- Time limit to object

….."

In my view, these hard-and-fast rules about the type of hearing process will lead to poorer decisions, and less capable decision-makers, in the long run. The present process where there is a discussion between the parties and the decision-maker, and an oral hearing ordinarily does take place where either one of the parties or the decision-maker would prefer is better.

I would like to elaborate in the context of some of the issues above:

a. Earnings Basis

Normally, these issues can be resolved without a hearing. However, sometimes the issues do turn on credibility- whether a person is a dependant contractor or a worker often turns on credibility and sometimes a worker is hurt before the first pay cheque is issued and there are real questions of credibility which underlie a decision about the pay rate and hours.

The other difficulty in these cases is the comfort level with numbers possessed by the decision-maker and by the parties/representatives. In some cases, all participants are capable of addressing arguments in writing and going through the figures in this way. In other cases, one or more of the parties/representatives or the decision-maker may benefit from going through the figures orally. It is important to understand that many decision-makers come from a Claims background; in Claims, most earnings basis decisions are made by Payment Specialists. By insisting that new Appeals Resolutions Officers never hear earnings basis appeals orally, the proposed document would lead to less opportunity for development.

I should add, in passing, that this issue is not unique to the Appeals Resolution Officer level. The same issue exists for the Appeals Tribunal, but the Tribunal does not have the same hard-and-fast rule as is proposed.

b. Non-Economic Loss Quantum

For psychotraumatic disabilities and chronic pain NEL assessments, testimony will sometimes add to the file material. Often, Operating level decisions are made without the benefit of a NEL assessment, and it is helpful for decision-makers to hear testimony to clarify points that may be unclear or potentially contradictory in the medical evidence. The Tribunal routinely holds hearings in this type of case (and in fact, will require it even if the parties do not necessarily wish it), because of the usefulness of hearing direct evidence in many psychotraumatic disability and chronic pain cases.

For organic conditions, the issue is simply comfort with numbers. Again, most new Appeals Resolution Officers do not come from a background where NEL adjudication is familiar. It is certainly helpful for the Appeals Resolution Officer to have the discretion

to request that a hearing take place so that the relatively complex calculation can be reviewed orally at a pace so that everyone in the room is comfortable.

c. Pension Arrears

This issue can usually be resolved in writing, but sometimes oral evidence is beneficial where the medical evidence is ambiguous.

d. Medical Compatibility

There is no such thing as a "medical compatibility" issue. There are medical entitlement issues which may or may not turn on medical compatibility. "Medical compatibility" is used in at least two different contexts. The first is the secondary condition context- for instance, secondary conditions after limping from a leg or back injury. The second is the recurrence context. In both contexts, but particularly the recurrence context, testimony (about continuity issues for instance) will often assist a decision-maker. This is a judgment call, and particularly ill-suited to hard-and-fast rules. It is important for new Appeals Resolution Officers to go through the process of making decisions about the process, and probably to conduct more hearings early on in their career than they might later on.

3. **Downside risk**

The proposed provisions are fatally flawed. They are unbalanced between workers and employers. There is no logical reason for expanded "downside risk" without expanded "upside risk" unless the changes to the appeals system are part of a general effort by the

Board to control benefits. This is, of course, threatening to the very heart of a long-standing system, which has had, by and large, the confidence of both the worker and employer communities for many decades.

An example will illustrate. The worker has a fall from a ladder in 2008. There is no question at the time that the worker has hurt her back, but there are issues about right shoulder entitlement and left knee entitlement with the employer and worker taking a different view of the situation due to the mechanics of the accident. Operations decides three months after the injury that the worker has entitlement for her right shoulder but not entitlement for her left knee. Neither the worker nor the employer appeal and the worker returns to work. In 2013, there is further lost time due to a combination of low back, right shoulder and left knee issues; Operations denies entitlement to further loss of earnings benefits. The worker appeals and the employer participates. The Appeals Resolution Officer can fairly determine that the initial entitlement for the right shoulder and left knee are related to the 2013 loss of earnings issue; under the proposal, the ARO is free to reconsider the right shoulder issue previously decided in favour of the worker but is not free to reconsider the left knee issue previously decided against her. Why would this be so? The effect is to compromise the neutrality of the Appeals Resolution Officer position.

There are two alternatives. One is to leave the matter the way it is. The other is to give Appeals Resolution Officers equal authority to reconsider in an upside way as they have in a downside way. A form of this "whole person" type of appeals process was once used at the Appeals Tribunal, but has long since fallen from favour. I would not suggest that it be implemented in a time where the appeals system is backlogged, as it is definitely more time-consuming.

4. **Summary**

The proposed changes would lead to an appeals system that would lack confidence from the stakeholder communities. The best course is to leave the appeals system as it is, and fix the Operations-level decision-making issues that arise from upper management's decision to control benefits without policy change.

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