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'IN UNITY THERE IS STRENGTH'

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ONIWG Response to WSIB Appeals "Modernisation"

The Ontario Network of Injured Workers' Groups is the largest injured workers' network in Ontario. As noted by professor Arthurs, while we have few resources and no paid staff (we were de-funded by the Harris government), we seek to put forward the concerns and aspirations of injured workers. We have extensive experience with the appeals system and are very disturbed to see the direction in which it is being steered and offer our comments in the hope that the appeal system will be improved, not destroyed.

Why does the "case for change" made by the WSIB ignore the issue of "bad adjudication"?

The case for change is set out on pages 3 and 4 of the 42 pages document "Modernisation of the WSIB Appeals system". Several systemic inefficiencies are identified. Unfortunately, the main reason for the 4,500 inventory of unassigned appeals is not listed. We think the reason is due to the change in adjudication that has occurred in conjunction with the KPMG report on adjudication and the appointment of a cost-cutting WSIB administration that is solving the unfunded liability "on the backs of injured workers". The Ontario Network of Injured Workers' Groups letter to the Premier dated March 15, 2012, on page 2, documented many areas where injured workers benefits and entitlements had been cut back (50% increase in denials to accident recognition, average vocational rehabilitation cut from 19 to 5 months, 29% reduction in long term benefits for the permanently impaired, 31% cut in permanent impairment awards, 4.5% reduction in medical aid). Clearly, these cuts have produced an increase in the number of appeals.

Why is the WSIB unwilling to wait and learn from the Jim Thomas consultation?

In his Consultation Discussion Paper "WSIB 2012 Policy Review" (July 2012), Mr. Jim Thomas indicates his awareness of the concern that WSIB adjudication has become more restrictive, and invited submissions on this:

"**I recognize that some stakeholders are concerned about the way in which the WSIB, in recent years, appears to be adjudicating claims using more limited or restricted interpretations of terminology than in the past. They question what is going on behind the scenes, so to speak, and wonder, as a result, whether this consultation process is one of supporting a different WSIB agenda. While I expect I may hear more about these concerns during the consultation process, I want to be clear that I am chairing this process with no preconceived ideas or outcomes" (p.7).**

Why would the Board not want to hear what Mr. Thomas thinks about this stakeholder concern? Would this issue not be pertinent to the issue why there is an appeals backlog? Would solving the issue of correct adjudication not be more important than attacking it from the "appeals angle"? Why is the WSIB in such a rush to change the appeals system before it can reflect on its own process to fix the adjudication process on 4 major areas examined by Mr. Thomas?

We think the WSIB is putting the cart before the horse and is making a major mistake in timing.

Why did the WSIB not hold face to face consultations on this document?

The appeals system is very important to injured workers, employers and the Board itself. We wonder why the WSIB has not felt it necessary to have hearings or public meetings on the proposed changes. Rather, it is insisting that changes **will** be implemented. The ONIWG was not consulted. This is strangely different from the Work Reintegration policy, which at least held focus groups with injured workers and produced a summary of its findings in the report called the "Work Integration Engagement of External Stakeholders Report" dated November 2010. This step was strangely bypassed this time around.

ONIWG is disappointed that no "face to face" engagement was sought with injured workers on this issue and this adds to our suspicion that there is a plan to significantly undermine access to justice. Our members wonder aloud whether the WSIB is willing to listen or whether the consultation process is a "farce". Nonetheless, we want to be on record expressing our deep concern.

The "Case for Change" in the document is inconsistent with the proposals for change.

The reasons provided by the WSIB for the backlog that are the following. 1) **Objection forms are incomplete** – no statistics are offered but this issue can be resolved by education and a simple phone call; 2) **initial decisions are not clear**

enough – no statistics are provided but this issue requires better training; 3)**absence of a central repository for recording Objection Forms** – this is easily solved by the WSIB; 4) **cases have information gaps and have to go back to adjudication** – no statistics are given, but this issue has a training/education solution for the WSIB and representatives; 5) **20% of cases are withdrawn from the appeals area** (no breakdown of statistic – how many were represented? etc.); 5b) **there is "lack of appeal preparedness" that causes postponements or post hearing submissions** (no statistics are provided here) – this issue is resolved via better education and communication; 7) **significant investment of time by Appeal Resolution officer to call the representative and clarifying why an oral hearing is requested when the nature of the case suggests it is not warranted**") – no statistics are provided – what is not acknowledged is that there is a huge advantage in a pre-appeal discussion with the ARO and the notion that they waste time clarifying why an oral hearing is not warranted is rather "condescending". The IW may think a face to face hearing is necessary, surely dealing with that demand should not be seen as a waste of time!

None of these issues leads to the gutting of the appeal system that is being proposed by the end of the 42 page document. The acknowledgment of risk proposal is not mentioned at all in the "case for change" until it surfaces later as a "solution".

"Bad Apples" or Bad Procedures?

The document hints, without providing statistics, that there are "bad apples" among representatives who are ill prepared for hearings. We wonder if it is a case of presenting a bad apple to destroy the entire apple cart. After the paralegal regulation, all representatives today are licensed or supervised by professional associations. If there are problems with "bad apples", the WSIB should engage these associations without reducing access to justice for **all** injured workers.

Since the WSIB hints at "bad apples" it should also look at its own apple cart, so to speak. Are there no "bad apples" at the Appeal Services Division? Are there not AROs who are ill prepared for hearings? We find that appeal withdrawals are often encouraged by some AROs. We also find that the WSIAT has better rules to allow cases under appeal to remain in "inactive status" to allow multiple issues to come to a single appeal, rather than multiple and fractured appeals. We are willing to meet the Board and give detailed case examples and offer solutions to this problem.

Why is the Board taking the lead from KPMG instead of William Meredith?

We were very disappointed to find no reference in the 42 page document about the importance of the appeals system to injured workers. The WSIB appeals system is part of the administrative justice system. It is a very important mechanism for access to justice. The document takes the approach that the system is a **mere cog in the WSIB decision making machinery**. Perhaps, by implication, injured

workers can now only get a fair review and fair appeal process at the WISAT. Has the Board given up on seeing itself part of the administrative justice system?

Justice William Meredith set up the workers compensation system as a system of "justice for injured workers". The system he set up was called "remedial legislation", which conjures up the idea (and it is enshrined in the Interpretations Act) of a law designed to **help** injured workers. In the last paragraph of his 1913 Final report, he said that injured workers deserved "full justice…not half measures".

The WSIB document, instead, takes its ideological inspiration from the 2011 infamous KPMG Value for Money on Adjudication. This document provided a new **neo-conservative corporate** vision of the appeals system that views "access to justice" as waste of time and indeed, a hindrance to be eliminated. While the traditional view would have called a fair appeal process "access to justice", KPMG called the appeals system an aspect of a "litigious culture". The Canadian Oxford Dictionary defines "litigious" as: "**fond or given to litigation or carrying on lawsuits, especially <u>unreasonably so</u>**" (emphasis added).

The KPMG report said:

"This litigious culture has placed pressure on the WSIB to extend decision making timelines to respond to ever-increasing demands by the representative community to ensure that all possible evidence in gathered and considered as part of the decision making process" (WSIB adjudication & Claims Administration (ACA) Program Value for Money Audit Report, KPMG, p. 13).

Not surprisingly, KPMG finds it problematic that representatives (and injured workers) want all possible evidence to be gathered and considered as part of the decision making process!

The concept of access to justice should be paramount in any review of the WSIB appeals system. Instead, the WSIB seems to share the view that its own appeals should not provide a high standard of administrative justice. We get the impression that the new appeals system will be a mere **production line rubberstamping the decisions already made by the Board**. It will be fast and "efficient", but at the expense of justice and fairness.

The "rubberstamping trend" is already noticeable today. In documents released by the WSIB to the Standing Committee on Government Agencies, we note that the "reversal rate" at appeals has declined from 36% of cases in 1999 to 25% in 2011. We think there will be even more "rubberstamping" if the new changes take effect. Instead of a chance for injured workers to rectify bureaucracy, the appeals system will simply "justify" bureaucracy.

<u>Why is the WSIB instilling the fear to appeal</u>?

The document says that before filing an appeal, the injured worker must sign a declaration of risk. He or she must sign a statement that says that he/she is aware that there may be a "downside risk", i.e. benefits being reduced (p.9). If the appeal resolution officer finds that a "previously granted entitlement decision" needs to be reversed, the injured workers will not be given the opportunity to withdraw (p.9).

The ONIWG conference on June 26-28 and other community meetings we have had felt that this would result in injured workers being **afraid to appeal**.

We are left with the very uncomfortable conclusion that the WSIB intends to deal with its appeal backlog and appeal system going forward by **actively discouraging** injured workers from accessing the appeal system. This is despicable: the WSIB should be promoting full access to the appeal system, not **threatening** that if an injured worker launches an appeal, he or she might lose other entitlements!

The "downside risk threat" is illegal

The document says that the "downside risk'" (reversing other entitlements not under appeal) is conferred to the Board by section 121 of the Workplace Safety and Insurance Act. This section has been in the Act since 1915, and was not used in this way for 97 years, as the legislation was intended by Justice Meredith to be "remedial", i.e. meant to help accomplish the aim of helping injured workers. So what new insight into the law did the new WSIB administration have after 97 years? What report recommended such a **regular and retaliatory** use of "downside risk"?

We know of no report or legal opinion that provided this interpretation. But we can state with confidence that Section 121 is not a "downside risk" law and neither does it call for automatic review of benefits. Section 121 says:

"**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."**

The words "confirm, amend or revoke" do not mean "reversal of previously granted entitlements". They could equally mean an "**upside risk**", that is, granting **greater** benefits or entitlements.

Likewise, the power to reconsider any previous decision needs a further reflection: is it **advisable** to do so? Are there special circumstances that warrant it? The WSIB "appeals modernisation" document proposes that every injured worker be warned about other benefits being questioned from the "downside risk" perspective.

The new WSIB administration should **withdraw** the "acknowledgment or risk" requirement when appeals are launched. It should abandon its "downside risk only" interpretation. Section 121 has never been used to undermine the appeals system and access to justice. We urge the Board to **increase access to justice**, instead of making injured workers **fear** the appeal system.

The importance of "face to face" appeals

It is very disturbing to see that the WSIB wants to further restrict the opportunity of the injured worker and the representative to have "oral" hearings. This is often the first time that the injured worker can actually speak to a decision maker in person. The information on file is usually limited or "one-dimensional". IWH scientist Ellen McEachern, in her research paper "The 'Toxic Dose' of System Problems: Why Some Injured Workers' Don't Return to Work" documented how communication be phone or letter is an inadequate substitute to "face to face" interaction with the Board:

"We found problems in how the workers' compensation system interacted with injured workers, which seemed to prolong and complicate claims. These were lack of face to face contact, communication by letters that were difficult for workers to understand, and the slow pace of workers' compensation decision-making about claim entitlement…the physical and emotional condition of workers following a work injury, and medications they might be consuming, can affect memory and concentrations and render telephone and letter interactions ineffective." (E. McEachern, Journal of Occupation Rehabilitation, Feb. 7, 2010, p. 10).

In a study of Quebec injured workers dealing with the appeal system, Universite' du Quebec a Montreal researcher Katherine Lippel documented the positive effect of a "person to person" hearing for injured workers:

"**For many, being listened to, sometimes for the first time, by someone connected to the compensation system, had a comforting effect, particularly when they were able to say what they wanted to say, unimpeded by their own anxiety or by intimidation from the opposing party. Many emphasized the quality of the attention they got from the appeal commissioners, and the importance of this in reducing their stress. Some came out feeling validated, even before receiving the tribunal's ruling. Most are proud to have "gone through with it", and, with exceptions, the workers we met did not regret having participated in the CLP hearing, even if, in some cases, the judgement was disappointing**". (K. Lippel, "Managing Claims or caring for Claimants: Effects of the Compensation Process on the Health of Injured Workers, 2007).

The WSIB "Appeals Modernisation" Paper also acknowledges the importance of face to face hearings, but then turns around to dismiss it:

"**The Appeals Services Division recognizes that, especially for workers, oral hearings can be seen as the preferred method of resolution, allowing them to make their case "face to face". However oral hearings contribute significantly to delays and don't always provide additional evidence that could not have been provided in writing. Therefore, most cases will be resolved through a hearing in writing**". (p. 39).

We do not agree with this conclusion. If oral hearings are preferred **especially for workers**, why not enhance them? Since the WSIB is concerned about customer satisfaction, why not satisfy its principle "customer": the injured worker? Why can oral hearings not be handled on a timely basis? Why can the WSIB not improve the timeliness of getting oral hearings instead of reducing their availability in the name of "faster" decisions?

What is the Real Reason for the further reduction in "face to face" appeals?

Oral hearings, or "face to face' hearings used to be the only or principle method of handling an appeal until the mid nineties. The system was able to handle them quite well. By the 2008 VFM audit of the appeals system, statistics showed that **oral hearings had become a minority of the cases in the appeals system.** Oral hearings were held in only 36% of the appeals, while 19% of the cases were done via the 60-day-option (usually a paper review, as done by the disbanded Decision Review Branch) and in 25% of the cases the ARO was able to reach agreement for the written submission format. Incidentally, this suggests that the lamentation in the document that AROs find it difficult to convince parties to appeal in writing is at the very least excessive.

By way of summary, then, 36% of hearings were "face to face", while 44% were not. The rest of the cases (20%) went back to the adjudicators for more information. (March 10, 2009 KPMG Value for Money Audit of the WSIB Appeals System, p.12).

The WSIB has not provided any information on the "reversal rate" for the different methods of resolution:

What is the "reversal rate" for the 19% of cases taking the paper 60-day option?

What is the "reversal rate" for the 25% of cases that proceed via written submission?

What is the "reversal rate" for the 36% of cases with "face to face" hearings?

The WSIB must provide this information so that we can make and educated guess why they are proposing the reduction of oral hearings. We suspect it is to further reduce the reversal rate.

The WSIB should make oral hearings available to all injured workers who request them. **We can have a "person to person" hearing when we challenge a traffic ticke**t! Surely appeals that affect benefits and entitlements to a disadvantaged group such as injured workers should get (at least) the same level of access to justice!

Why is the WSIB proposing a more bureaucratic and complex appeal system?

In the name of making the system less complex, the WSIB proposed changes will create more complexity. For example:

*the "Worker Instruction Sheet: Intent to Object to a WSIB Decision" has 3.5 densely written pages of instructions and a reference to the massive OPM manual that the injured worker is supposed to look up.

*The "Worker Instruction Sheet: Objection Form" is 4.5 densely written pages long. The worker is advised to go in the internet to see the much longer document called "Appeals System Practice & Procedures". This will have an overwhelming effect.

*if the worker wants to object to the release of medical records to the employer, a **new form** will be required, called "Objection to Employer Access Form", which is not yet part of the package (p. 23).

*the employer is advised he/she can send in new information, like a recent "third party medical assessment", a codeword for ordering the worker to submit to a company-paid medical examination (p. 16). This can trigger a new objection by the injured worker under Section 36 of the Act. We start with one appeal, and end up with two at the same time!

*The (illegal) and mandatory "acknowledgment of risk" form will create a legal quagmire for the injured worker and the representative if one is involved. The injured worker wants to deal with one issue, and the entire file may be under appeal and only "downwards".

*If the injured worker still wants to go ahead with the appeal, he or she may be required to sign a "waiver of liability" form. The representative will want to assume no responsibility in case the appeal results in further cuts to benefits.

*If an injured worker or the representative wants an oral hearing, a request must be done in writing. A Manager, not the Appeals Resolution Officer in charge of the appeal familiar with the file, will deal with the request.

*If the Appeals Manager disagrees, a further written submission will be necessary with a final decision coming by the Manager. The system will spend time and effort on methods of resolution, not the actual timely resolution of appeals!

*The WSIB now employs one employee, the ARO, who was familiar with the file, to deal with the issues and the method of resolution. Now it will employ 2 employees, who will have to spend twice the time to achieve the same thing done by one employee in the past. Perhaps the Manger position can be used to hold hearings, rather than handle procedural paperwork whether oral hearings are necessary or not!

Conclusion

The ONIWG opposes the main direction of the WSIB appeals modernisation proposal. The ideas proposed have little to do with "modernisation". They restrict access to justice. The speed of the process is important, but not at the detriment of fairness and access to justice. We are disappointed that the WSIB has ceased to see the appeals system as important feature of the administrative justice system.

We urge the WSIB to scrap this "rubberstamp" and "**fear mongering**" vision of the appeals system. We want a healthy and fair minded appeal system consistent with the Meredith justice principles. **Justice must be done and must be seen to be done!**

Our community has extensive practical and legal experience with the appeal system. The social science research backs up the anecdotal evidence of our injured worker members who have had dealings with the Workers' Compensation system. As with other important changes at the WSIB, our community is willing to help improve the system. Is the WSIB willing to accept our aid, to create an appeal system that renders justice speedily and humanely?

Yours Truly,
Ontario Network of Injured Workers' Groups
per:

Peter Page, President

cc Dalton McGuinty, Premier of Ontario
Linda Jeffrey, Minister of Labour
John Gerretsen, Attorney General
Andrea Horwath, NDP leader
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