INJURED WORKERS
COMMUNITY LEGAL CLINIC

REPRESENTING INJURED WORKERS
FREE OF CHARGE SINCE 1969
A community directed not for profit legal aid clinic

January 13, 2023

Ms. Nicole Bisson
Director, Appeals Services
Workplace Safety and Insurance Appeals Tribunal (WSIAT)

Sent by email to: Nicole.Bisson@wst.gov.on.ca

Dear Ms. Bisson & Staff,

Re: WSIAT's New Pre-Hearing Process Consultation

Injured Workers Community Legal Clinic is a legal aid clinic with a province-wide mandate. We have specialized in the area of workers' compensation since 1969. As a legal aid clinic, our services are provided to people with little or no income for no charge. In addition to legal advice and representation, our mandate includes community development, public legal education and participation in law and policy reform.

We appreciate the opportunity to participate in this consultation pertaining to proposed changes to pre-hearing processes at the WSIAT. We will highlight the proposed changes that we believe will be helpful/unhelpful to injured workers, legal representatives and the WSIAT.

What's new on the revised Notice of Appeal (NOA)?

Our clinic is staunchly opposed to time limits in workers' compensation claims. As it pertains to WSIAT, we are opposed to the requirement for the injured worker to submit the NOA within six months of the Board's final decision. As a result of the introduction of time limits, many injured workers have unknowingly lost their right to appeal their claims due to not submitting the right form at the right time. This creates a great injustice. On top of that, time limit extension appeals create an increased case load at the Tribunal, slowing things down. We would emphasize that removing time limits would make the system more just and efficient. WSIAT should collaborate with the WSIB and the Government to eliminate unnecessary time limits that only exist to reduce the number of appeals.

Eliminating the six month time limit to submit the NOA following the final decision at the Board is even more reasonable a solution due to the fact that the WSIAT's proposed NOA is more comprehensive and requires more time to complete than the current NOA. If WSIAT implements this proposal for the NOA, then the time limit issue must also be addressed.

Re the proposed changes to the NOA:

Moving the request for ADR to the NOA form can allow some appeals to get resolved more quickly. However, we echo ONIWG's position that in order for this to be effective, the decision as to whether ADR is appropriate must be made prior to the completion of the Hearing Ready form.

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We support the option to receive case materials electronically via E-Share. Using sustainable practices is a positive step; however, we also want to emphasize that some injured workers require a physical file due to a lack of access to computers, the internet or the knowledge to navigate online. Because of this fact, we want the WSIAT to confirm that the delivery of physical case records will always remain an option moving forward. This should explicitly be referenced in the practice guideline.

The option allowing parties to indicate their preference for hearing format in the NOA form makes sense. We would submit that the hearing format selected by the injured worker should generally be confirmed by the Tribunal. Only in very limited circumstances should the worker's hearing format request be denied. The importance of respecting the injured worker's decision is due to the fact that hearings at the WSIB are increasingly done in writing, despite injured workers' request for oral hearings.

Freedom of Information request #22-094 revealed that in 2000, there were 2,372 oral hearings at the Board and 4,428 hearings in writing at the Board. By 2021, there were only 586 oral hearings at the Board, compared to 3,719 written hearings. The gap between oral and written hearings expanded greatly over time.

Additionally, the denial rate at the Board has increased over time, peaking at 68% in 2018 before dropping slightly to 65% in 2021. The 2021 denial rate for oral hearings was 52%, compared to 67% for written hearings. That 15% difference in denial rates between the two hearing formats is significant, and should not be overlooked. At the end of the day, the denial rate in general and the denial rate for written hearings in particular is concerning and indicative of a Board process that is not functioning in the interests of the people it is meant to serve: injured workers.

Ultimately, the increase in written hearings and the extremely high denial rates at the Board do not allow the injured worker to feel satisfaction with the legal process, causing frustration amongst many. As the Tribunal is the final level of appeal for workers' compensation claims, it is perfectly reasonable that it respects the hearing format preference of the injured worker. This should be explicitly outlined in the practise direction document.

We support the increased options on the NOA form regarding "language." The expansion of options increases inclusivity and it will lead to more accurate results, especially for injured workers who may not be aware of the option for interpretation services.

New Consent Form

Severing the "consent to release case materials" issue from the Notice of Appeal (NOA) and the creation of a new Consent Form are proposals that we support. The current practise of providing consent in the NOA form before the Case Record has been received and reviewed and before the Employer has determined whether they will participate in the Appeal is a primary example of putting the cart before the horse.

Completing the new Consent Form subsequent to receiving the case record will provide injured workers the opportunity to review the case materials before they are sent to any participating parties. This will mitigate non-pertinent and sensitive information from being released to participants.

Ultimately, it is reasonable that the Consent Form only be required for completion once the Employer has confirmed their participation in the Appeal. Therefore, it is unnecessary and premature to have the injured worker provide consent when the NOA is filed.

However, there must be an ongoing requirement to review access and provided updated consent, considering that new documents and information come to file often.

We strongly disagree with the four week time limit to complete the consent form. Claims can range from hundreds to thousands of pages, preventing the injured worker and/or their legal representative from thoroughly reviewing the file. Moreover, our clinic often retains clients while their appeal is at the Tribunal, so we are often reviewing their materials for the first time. The four week time limit is insufficient and will likely lead to fewer legal representatives accepting clients due to the time crunch. We propose that injured workers and their representatives should have at least 12 weeks to complete the form.

We strongly disagree with Point 6.2 on page 46 in which WSIAT may close the appeal if the appellant worker doesn't return the consent form within 4 weeks. The possibility of closing the claim if the consent form is not submitted is excessive and unreasonable - the proposal should be terminated.

Eliminating the 2-year notice period and the Hearing Ready Form

These proposals appears to be central to WSIAT's drive to reduce delays. We do not see how eliminating the 2 year process will improve delays, nor do we see how completing a Hearing Ready form will expedite this process. From what we have seen, there is little in the way of how WSIAT will internally improve their processes (i.e. turnaround time for receiving and mailing a case record).

Our concerns about the Hearing Ready form are similar to our concerns about the Consent Form. Four weeks is simply not enough time to complete said forms and produce everything that is required. A tight timeframe will create unintended consequences: 1. Representatives will refuse to accept new clients because of the limited timeframe, causing more and more workers to self-represent or the workers will continue to search for a new legal representative, which often takes many months – this defeats the purpose of the proposal to reduce delays; 2. A significant amount of representatives will have to write to the Tribunal requesting more time to complete the Hearing Ready form – this will cause a backlog of appeals with inactive status – again, defeating the purpose of the four week proposal; and 3. If the WSIB rejects the request for inactive status, the result will be lower quality submissions made by injured workers or their representatives.

We strongly disagree with Point 4.2 on page 54. The Tribunal should not close the appeal because the hearing form was not submitted within the four week period. This penalty is unreasonable and excessive.

With that being said, ultimately, we strongly disagree with the introduction of the Hearing Ready form and prefer that it be withdrawn. A simple and straightforward form that is worker friendly should be developed in its place.

Disclosure

Like ONIWG, we share significant concerns related to sending all evidence simultaneously with a Hearing Ready letter four weeks after receiving the Issues on Appeal letter. Reviewing and gathering information takes a significant amount of time – in many cases, four weeks is simply not enough. Moreover, there is no need to submit evidence, submissions, witness information/statements, case law, etc. at the same time. This is not how things are done now and there is no need to modify what appears to be working.

Furthermore, anything beyond that 4 week period would be considered late – and would have to be handled as a preliminary matter. This 4 week time crunch does not make sense, as the hearing date would not yet be scheduled. Another case of putting the cart before the horse.

We would submit that disclosure should continue to be tied to the hearing date. In short, the three-week timeline should be maintained.

Closing Process

The Tribunal has proposed eliminating the 60 day letter sent to parties pertaining to closing their appeal. We are of the position that this second letter should continue to be sent to parties. Unfortunately, the proposals appear to be making it easier to close claims in a number of situations. This is concerning and should be addressed considering the substantial negative impact closing an appeal can have on an injured worker.

Conclusion

At the end of the day, this process should be made as simple and straightforward as possible for injured workers. However, these cumbersome forms and the limited timeframes are not beneficial for those who rely on the system. In fact, these proposals will likely exacerbate problems for injured workers and their representatives.

Thank you for reviewing our submission. Should you have any questions, please contact us via email: chris.grawey@iwc.clcj.ca. We look forward to continuing these conversations in future consultations.

Sincerely,
INJURED WORKERS COMMUNITY LEGAL CLINIC
Per:

Chris Grawey
Community Legal Worker