Ontario Legal Clinics'
WORKERS' COMPENSATION NETWORK
Réseau d'échange des cliniques juridiques
de l'Ontario sur la loi des accidentés du travail

Reply c/o: Injured Workers' Community Legal Clinic, 815 Danforth Avenue, Ste. 411, Toronto, ON M4J 1L2 Tel: 416 461-2411 Fax: 416 461-7138

5 June 2023

Jeffery Lang, Chair
Workplace Safety and Insurance Board
200 Front Street West
Toronto, Ontario
M5V 3J1
By email to: Corporate_SecretarysOffice@wsib.on.ca

Dear Mr. Lang:

Re: KPMG Value for Money Audit (VFMA)
Dispute Resolution and Appeals Process

The Ontario Legal Clinics' Workers' Compensation Network is comprised of lawyers and legal workers who handle workers' compensation cases from Ontario's 71 community legal aid clinics. Community legal aid clinics provide legal advice and assistance without charge to those who are financially eligible. Most of our clients have permanent impairments and come from vulnerable and disadvantaged communities. The members of the Workers Compensation Network are involved in individual representation, public legal education and development of law and policy reforms. Many of our members have practiced workers' compensation law for several decades. The Network is a group of the most highly experienced workers' compensation advocates in the province.

The introduction of the *WSIA* in 1997 included the requirement that the WSIB conduct an annual VFMA of at least one of its programs. The purpose of the VFMA was to ensure that the Board's programs are efficiently and effectively run. Stakeholders have been allowed to participate to varying degrees in these audits. As representatives, we participate by answering auditor's questions and advising on potential improvements in the compensation system. Unfortunately, on more than one occasion, we have observed auditors with little genuine understanding of the workers compensation system produce a report that is antithetical to the basic principles of workers compensation, the administration of justice and the principles of fairness.

The 2022 VFMA of the dispute resolution and appeals process engaged stakeholders and yet produced recommendations far from anything discussed. The acceptance by the Board of Directors does not indicate due appreciation of their impact on injured workers and the overreach of the auditors' report. When you have read our concerns listed below, you will see that we feel the KPMG report bears no resemblance to a value for money assessment. This report is a direct attack on injured workers right to appeal decisions of the WSIB. The auditors' recommendations should not be used as a starting point for discussions about changes to the workers compensation system. We urge the Board of Directors not to undertake an overhaul of the appeals system on the basis of these flawed assumptions, poor research, and ineffective comparators.

The VMFA recommendations will negatively impact injured workers' access to justice. If the WSIB adopts its recommendations, many of the most vulnerable injured workers won't be able to appeal their decisions and will not receive full compensation under the *Workplace Safety and Insurance Act*. Facing draconian 30-day time limits to appeal decisions they don't understand, they won't appeal. Or, if they manage to appeal, they will be pressured into settling for something less than their full entitlement under the WSIA.

The auditor's findings that make a number of errors which demonstrate a lack of understanding of the compensation system.

The Auditors did not understand the law and are not qualified to assess matters of administrative law

The purpose of the VFMA is to ensure that Board programs are run efficiently and effectively. The auditors make recommendations that go beyond this function and the authority of the WSIB.

KPMG suggests that the WSIB can choose to enforce a one-year time limit to submit the Appeal Readiness Form (ARF). The Board can't because the law doesn't allow it. As the WSIB appears to recognize in its response, it has no statutory power to create a new time limit. Once a worker has met their time limit under *WSIA* s. 120, the Board can't impose an additional time limit.

KPMG suggests that the WSIB "establish a roster of qualified representatives" and examine the system of compensation to the representative community. Further, it suggests that the WSIB should tie compensation to representatives "level of effort throughout the decision process". An informed reviewer would know that the WSIB doesn't fund representation, it cannot control representation and it cannot be held responsible for the cost of representation of appellants. The WSIB cannot determine compensation for representatives. It would be entirely inappropriate for either the WSIB or the Law Society of Ontario to interfere with workers' or employers' solicitor-client relationships with respect to compensation.

KPMG suggests that the WSIB can bypass the statute and refuse to hear some appeals based on subject matter. It suggests that some decisions like NEL decisions are based on "standardized calculations" and so appeals are "effectively redundant". An informed reviewer would know that NEL decisions are complicated, often incorrect, and often changed on appeal: 24% of NEL decisions were allowed or allowed in part by Appeals Resolution Officers in 2021. Many NEL appeals are premised on the interpretation of medical evidence that should be included/excluded in the NEL assessment, the potential impact of a pre-existing condition, whether the AMA Guide was properly interpreted based on the medical condition(s), a review of a workers' activities of daily living, etc. Clearly, these appeals are not as straightforward as KPMG suggests in their gross simplification.

It should be noted that the WSIB has no ability under the statute to refuse to hear certain appeals, making KPMG's recommendation moot. Section 119(3) of the WSIA provides that "The Board shall give an opportunity for a hearing."

KPMG suggests that the WSIB can choose to enforce a 30-day time limit on decisions that are "combined" with a RTW decision. This is incorrect. Under s. 120(3) of the WSIA only decisions

concerning return to work or a labour market re-entry plan have a 30-day time limit. Injured workers have 6 months to object to all other WSIB decisions.

These are critical errors and misstatements made by the auditors in their report.

The auditor's proposals will reduce WSIB benefit expenditures and not protect injured workers' legal rights

The report implies that there are too many worker appeals and that they are not resolved in an appropriate amount of time, causing undue delays in the return-to-work process, which is at odds with the WSIB's "Better at Work" ideology. The remedy for these perceived ills is to radically transform the Dispute Resolution and Appeals Process.

KPMG's narrative does not fit the facts. There is no crisis in appeals. Since 2000, there has been a substantial reduction in the number of worker appeals. From 6,800 worker appeals in 2000, the WSIB appeals caseload has dropped to 4,305 appeals in 2021 – this represents a 37% decline. Excluding 2020 by virtue of the COVID-19 Pandemic, the WSIB has exceeded its targets for the percentage of appeals resolved within six months since 2017. In fact, KPMG outlines that the number of appeals resolved within 6 months for the first quarter of 2022 was 92% - 12% greater than the 80% target established by the Board. The auditors have manufactured a crisis that doesn't exist to legitimize their radical proposals which will negatively impact compensation for injured and ill workers. The recommendations in the report are unnecessary and an overreaction.

If there was a need to address these issues in a review, the auditors should have examined all possible causes. Staffing levels are an obvious starting point when reviewing the dispute resolution and appeals process. A review of this data was not undertaken by KPMG. It would have been useful to review the historical trend in the number of staff in the applicable positions and departments. What proportion of staff resources is dedicated to policing time limits and supervising forms submission as opposed to deciding claims? What advice was received from CUPE, which represents front-line staff at the WSIB? This report appears to be based on views from high level management who are not familiar with the day-to-day workings of the system.

An informed reviewer would consider the significant number of denied reconsideration decisions and worker appeals at the WSIB compared to the WSIAT. Freedom of Information (FOI) data provided by the WSIB reveals that the number of denied worker appeals has steadily increased since 2000. Between 2017 and 2021, 65%-68% of worker appeals were denied by the ARO. However, when these worker appeals proceeded to the WSIAT, the majority of decisions were overturned. Only 27%-35% of worker appeals were denied at WSIAT – a marked difference revealing flaws in adjudication at the Board.

A report published by the Industrial Accident Victims Group of Ontario reviewed one year's decision by the WSIAT and found[1]:

- In 110 appeals, the Tribunal found that the WSIB failed to respect the medical advice of the worker's treating physicians about return to work.

[1] No evidence : The decisions of the Workplace Safety and Insurance Board, Yachnin, Maryth / Industrial Accident Victims' Group of Ontario: https://iavgo.org/wp-content/uploads/2013/11/No-Evidence-Final-Report.pdf

- In 175 appeals, the Tribunal found that the Board's decision was contrary to all, or all discussed, medical evidence.
- In 81 appeals, the Tribunal found that the Board's decision was made without any supporting evidence
- In 75 appeals, the Tribunal found that the Board denied benefits based on "pre-existing" issues without adequate evidence.

An informed reviewer would have examined the quality decision-making at the operating level and the Appeals Branch. The problems with adjudication at the WSIB is so endemic that the WSIAT Early Intervention Process, where the Tribunal pre-screens appeals through Alternative Dispute Resolution, saw 8 % of all Tribunal decisions for the last 3 years allowed or allowed in part without the need for a hearing. These problems with adjudication were already cited in the WSIB Operational Review conducted by Sean Speer and Linda Dykeman.

The auditors did not provide a complete picture of the varying time limits to object to workers' compensation decisions in other provinces. There is no mention of the fact that there are provinces with more liberal time limits to object to workers' compensation decisions.

The auditors have not addressed efficiency or effectiveness, the auditors have taken a narrow approach to recommendations that will reduce appeals of WSIB decision and this will make life more difficult for injured workers.

Making it Harder for Workers

KPMG's report recommends the introduction of 3 new time limits and the reduction of 1 existing time limit. This would require legislative change, a political decision which should be based on the fundamental principles of workers compensation and administrative law and which is outside the scope of a value for money audit. We are concerned that the WSIB responded favourably to these recommendations when they will make navigating an already cumbersome bureaucracy even more difficult.

In the current system, injured workers have to submit their Intent to Object (ITO) form within 30 days for RTW decisions and 6 months for all other decisions, in order to protect their right to appeal. There is no requirement for mediation and no deadline to submit supplemental information or the Appeals Readiness Form (ARF).

KPMG's recommendations would turn the current system upside down:

1. The Intent to Object form would have to be submitted within 30 days of the decision;
2. The injured worker would be required to submit supplemental information within 30 days of the ITO (60 days after the decision);
3. Injured workers would have to complete Alternative Dispute Resolution (ADR) and the reconsideration process within 30 days of the supplemental information being submitted (90 days after the decision); and
4. The ARF would have to be submitted 9 months after ADR/the reconsideration process (1 year after the initial decision).

In short, 4 time limits would have to be met in 1 year, compared to 1 time limit under the current legislation. Underlying these recommendations is a lack of understanding of how the WSIB process functions and what the law states. These are impractical recommendations that work neither in theory, nor in practice.

For example, here are just some of the outcomes to be expected under a system based on KPMG's recommendations:

1. Injured workers will be forced to proceed in their appeal with insufficient evidence due to the time crunch for submitting supplemental information (60 days from decision). This virtually guarantees a losing appeal for injured workers. It often takes months to receive clinical notes from health care practitioners and it can take 1-3 years to obtain a medical specialist's report. The WSIB staff are aware of this, as Case Managers often have to send and resend requests for medical information.

2. Injured workers will not meet the time limits and their appeal will be closed because they are trying to collect evidence in their claim, which often takes a significant amount of time, per point #1.

3. Injured workers who experience language barriers or mental health challenges, and injured workers with low capacity will often be overwhelmed and not fully comprehend the decision or the 3 time limits to be met in 90 days. This is a major impediment to access to justice. The WSIB should endorse recommendations that make the process more straightforward and simple, not more complicated.

4. A 2021 study by scientists from the Dalla Lana School of Public Health, University of Toronto, the Institute for Work & Health and Monash University[2], found that injured workers' mental health can deteriorate when dealing with the WSIB. The study revealed a high prevalence of mental illness following physical workplace injuries. They recommended that it is vital to understand how modifiable elements of the workers' compensation system may be contributing to poor mental health. This study highlighted one potential contributor to poor mental illness among claimants. They found that workers' compensation claimants in Ontario who reported poorer interactions with their case manager had a higher prevalence of serious mental illness 18-months following their injury/illness. Recommendations to implement new time limits within a short timeframe and the need for frequent communications with the Board will add further stress to injured workers' lives, and in many cases, will lead to new mental health issues or exacerbate injured workers' existing mental health challenges.

5. It often takes weeks for WSIB correspondence to arrive at injured workers' homes. This would give injured worker's fewer than 30 days to submit the ITO. On top of that, mail gets sent to the wrong location and the most vulnerable workers may not have regular access to a phone,

[2] The association between case manager interactions and serious mental illness following a physical workplace injury or illness: a cross-sectional analysis of workers' compensation claimants Ontario; Orchard C, Carnide N, Smith PM, Mustard C, https://doi.org/10.1007/s10926-021-09974-7

email or a mailbox, especially if they move around often, meaning that they will have even less time to respond.

6. The WSIB sends the claim file to the injured worker once the ITO has been submitted. It usually takes 2-4 weeks to receive claim file access; although, there are many instances of the Board exceeding this timeframe, and in some cases, not providing access for months. Therefore, in some circumstances, injured workers would have to meet time limits without having access to their claim file. That would be fundamentally unfair.

7. It can takes months for injured workers to secure legal representation – in many cases, more than 90 days. At the office of the Worker Advisor the average wait time for someone to review a file is over 7 months, as high as 17 month in some offices. This will result in an increase in self-represented injured workers who will be unwillingly pushed through a complicated appeal system of which they have little or no knowledge. By introducing these new time limits, the WSIB will cut off the ability for injured workers to secure legal representation for their appeal.

8. With the proposed time limits, more and more legal representatives will have to reject prospective clients because of the time constraints. Worker files often exceed 1000 pages and legal workers will not have the flexibility to drop their existing responsibilities to review a new file and take steps to meet a deadline in a matter of days.

9. The additional workload placed on WSIB employees will be significant. Three time limits in 90 days will negatively impact an already overburdened staff. The likelihood of errors and mistakes grows immensely with the proposed time limits.

10. The introduction of time limits for workers compensation appeals in 1997 unnecessarily increased the rate of appeals and created a large, expensive bureaucracy to process new forms and police deadlines. Before 1997, a decision could be appealed at any time. Therefore appeals were filed when the worker obtained supporting evidence and was ready to proceed. The 1997 changes created a 'use it or lose it' appeal right. Most benefit decisions need to be appealed in order to protect the appeal right even though the worker does not know at that stage whether they will need to or be able to appeal. With 3 new time limits, the Board would have to dedicate significant additional resources to police additional time limit issues and process new forms – resources which are better allocated to deciding claims. It's our position that no new time limits should be introduced and that the time limit introduced in 1997 should be scrapped. This is guaranteed to reduce the caseload at the appeals branch and free up significant staff resources.

The Auditor's recommendations will result in appeals suppression. The time limit recommendations provide "value for money" - fewer worker appeals, fewer claims allowed - to the WSIB, but at the expense of justice for injured workers.

KPMG's report recommends increased ADR mechanisms at the Board to resolve disputes early. Mediation requires a neutral mediator. The WSIB is both the opposing party and the judge that has denied the injured worker benefits, it cannot be the mediator.
The WSIB has increasingly adopted insurance-based practices in its decision-making. It has adopted quotas for appeals and it is reasonable to expect that the WSIB will adopt quotas for early resolution,

thereby creating pressure on decision-makers and injured workers to settle early. Injured workers in the appeal system because their compensation has been cut off or reduced are desperate and vulnerable. That pressure from above will create pressure on injured workers to accept less than they believe they are entitled to avoid a lengthy appeal process. Most injured and ill workers are not represented and are not fully aware of their rights.

It is especially alarming that the auditors recommended the WSIB "consider exploring incentive/disincentive schemes to resolve disputes early through ADR and reduce the number of cases going through the costly and time consuming appeals process." The WSIB should not hold injured and ill workers hostage by offering speedy payment of reduced benefits. The use of increased ADR is particularly troublesome for injured workers who have low capacity or those who do not speak English. The likelihood injured workers' legal rights will be violated is a genuine concern. This recommendation will cut claim and administration costs but will not provide justice to injured workers.

The auditors recommend several additional measures that will make appeals harder for vulnerable injured workers. In addition to the time limit changes, they suggest that workers be burdened with new procedural barriers including an obligation to clearly outline the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy before their appeal will even meet their time limits under *WSIA* s. 120. This obligation is contrary to the Act, which requires at s. 120(2): only that an objection must be in writing and must indicate why the decision is incorrect or why it should be changed. It requires legal advice which, as noted above, will not be accessible within the time limits. As well, there is a recommendation to require an electronic ARF "which only allows forms with complete data fields to be submitted" (p. 20). Workers who have low literacy, limited English, or don't understand workers' compensation won't even be able to complete their appeal forms.

At one time the official motto of the Workers Compensation Board of Ontario was "Justice, Humanely and Speedily Rendered." These recommendations fall afoul of the now widespread recognition across the administrative justice sector that courts and tribunals need to remove barriers to accessing justice, including enforcement of technicalities against self-represented persons.

The concerns raised by the auditors surrounding "fragmented appeals" failed to appreciate the history of the appeal practice and procedure. Appeals are fragmented because of the time limit to appeal. There are dozens of decision points in the course of adjudication of a WSIB claim and every one of them has to be appealed starting a discrete appeal process. Before the introduction of time limits, multiple issues could be combined logically and holistically a single appeal when the injured worker is ready to proceed.

If the WSIB would like to get rid of "delays" and fragmented appeals, better adjudication at first instance is also required by applying the proper weight to evidence from injured workers, and even more so when there is no evidence to the contrary. This includes applying proper weight to reports from treating health care practitioners, particularly when there is no evidence to the contrary from a medical practitioner who has actually examined the worker.

Fragmenting could also be reduced by using a single decision-maker deal with the injured worker and the whole workplace history of injury, including prior workplace injury claims. Delays result from

shuffling issues off for others to decide, such as psychological entitlement, NELs, health care etc., as these issues directly impact Loss of Earnings decisions and return-to-work decisions.

It was not mentioned by the auditors but the 2018 Appeals Practice and Procedure Guidelines stated that the ARO will be responsible for ruling on benefits only to the extent that reliable information is either contained in the file or readily available to the ARO. Therefore, where the ARO accepts entitlement for an impairment or for a period of impairment/disability, the ARO will also resolve the nature, level and duration of benefits to the extent that available information permits. This practice guideline was removed from the 2020 Appeals Practice and Procedure Guide leading to fragmented decision making and the possibility of 'ping-ponging' issues back and forth from operations to appeals.

Time to Reflect on the Role of the VFMA

If a VFMA was done to make sure that the WSIB met generally accepted accounting principles, stakeholders would welcome seeing the Board undergo regular audits. However, auditors such as KPMG should not review the scope of legislation and the administrative justice system - subject matter experts would be more appropriate.

As the 2022 example demonstrates, the VFMA process has become an overreach of responsibility. Auditor recommendations that reflect a lack of understanding of the workers compensation system, that run afoul of the law, that fail to examine the problems raised from all angles, and that are selective with the facts relied upon do not help the WSIB to improve the compensation system.

Stakeholders would welcome the opportunity to have an honest conversation about the shortcomings of the WSIB's appeals process. Labour and injured worker organizations have already expressed alarm at these proposals and the WSIB has proposed another consultation. However, the vast majority of people that would be adversely affected by the proposed changes are injured workers. Written consultations and internet based meetings would exclude many of them. An honest conversation with the people affected requires proper notice to injured workers of the proposed changes and public, in person meetings where injured workers can speak to the WSIB. The VFMA recommendations, as this letter demonstrates, won't solve the problems that exist and instead will delay long needed improvements to the workers' compensation system. We as that you share our concerns with the Board of Directors and we would be pleased to meet to discuss these concerns.

Yours respectfully,
Ontario Legal Clinics' Workers Compensation Network,
per:

John McKinnon,
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copy: Minister of Labour, Immigration, Training and Skills Development