

24 August 2023

Appeals Services Division  
Workplace Safety and Insurance Board  
200 Front St W, Toronto,  
ON M5V 3J1

By email to: [appealsfeedback@wsib.on.ca](mailto:appealsfeedback@wsib.on.ca)

Dear Appeals Services Division:

**Re: Consultation on Changes to the ASD Practices and Procedures Document**

Injured Workers Community Legal Clinic has been providing legal advice and representation without charge to the injured worker community since 1969. As a community legal aid clinic, our mandate includes participation in law and policy reforms affecting the injured worker community.

**Expand the Consultation**

We encourage the WSIB to expand this consultation for several reasons. There has been little publication of the proposed changes and consultation process, and no publication of the extension of the deadline for submissions to August 25th. Holding a consultation in July and August minimizes stakeholder participation because most will be short staffed due to vacation schedules. Many organizations including IWC have not had an opportunity to fully analyse the changes due to participation in the WSIB's contemporaneous appeals consultation on the KPMG value for money report and the WSIAT consultation on its appeals process.

**Reflecting on the views of the architect of the current system**

Paul Weiler's 1980's report "Reforming Workers' Compensation in Ontario" is the basis of the current legislative system. We urge the current review to consider the importance that Professor Weiler gave to the idea that justice had to be done as also be seen to be done. In his report Reforming Workers' Compensation in Ontario, Weiler noted many people perceived the WCB had become a "faceless, impersonal, even dehumanizing organization, one which puts injured workers through a mail-order assembly line" (p. 92 Weiler) and that workers want full

opportunity to make the best case they can to the Board. “The manner in which the Board proceeds must engender a sense of confidence in its decisions, must give legitimacy to its rulings, which renders them tolerably acceptable even when they are adverse” (p. 93). Our comments will reflect the need to avoid this state of affairs. We can report that Weiler’s comments about the way the Board was seen in 1980 are very much the same for most injured workers that we represent. The solution is thus identical.

### **Focus on the Default Hearing Method**

We will focus this submission on the proposed change of the default hearing method. Our colleagues in the community legal clinic system, Northumberland Community Legal Clinic, Hamilton Community Legal Clinic, The Legal Clinic Perth and IAVGO have commented on other practice and procedural issues and we endorse those submissions.

Most of the submissions on the KPMG Report deal with this issue extensively and should be incorporated into the feedback you consider in your review of the P&P document. The method of hearing is the central element in the concept of a fair hearing in administrative law. As an administrative board the WSIB is required by law to provide a fair hearing. A change to the method of hearing should be made by the Board of Directors on the basis of independent legal advice and with the goal of improving access to justice, not made by staff via an annual review of practices and procedures.

### **WSIB Appeals System Not Second Class**

The WSIB appeals system should not be second class. Choosing written hearings as the default gives the impression to workers that the “real” hearing is at WSIAT and the WSIB appeal is “second class.” It creates the expectation of another denial, so soldier on or give up! Most injured workers see the decision maker for the first time at the WSIAT level, the last level of appeal. Why does the WSIB not use the same standard as the WSIAT? What image does this convey? There should be a reflection on why the WSIAT has chosen the in-person oral hearing as the default. Only a small minority of WSIAT appeals are by written submissions. Many submissions on the KPMG report noted the huge number of appeals granted by WSIAT. Could this be because of the extensive use of the written appeal process by the WSIB? Is the reliance on the file alone a barrier to justice?

### **Why Not Consider Appellant Satisfaction?**

The WSIB may fear that in-person hearings would slow down things. But getting it right the first time would actually speed up access to justice. The WSIB corporate reports often refer to customer service standards and customer satisfaction. While we do not feel that it is appropriate to label injured workers as customers, the WSIB is not a supermarket, but the WSIB has a customer satisfaction survey that is quoted often. However, there has not been a specific customer satisfaction survey of the people using the appeals process. Why not let the

“customer” decide the form of appeal? Would that not guarantee “satisfaction” from a justice and access to justice perspective? If the WSIB values satisfaction, it should be valued in the appeals system.

### **Injured Workers Have The Most To Lose**

When an injured worker’s compensation benefits are at stake, the injured worker should choose the hearing method. Injured workers have the most to lose in the appeal process no matter who disputes the issue. The appeal has the biggest impact on the worker, their presence in person should be given preferential status. The Ontario courts and the OLRB are returning to in person hearings. If there is a preference it should be determined by the worker whose economic survival and psychological well being are at stake.

### **Why Are The WSIB And WSIAT Not Evolving In The Same Direction?**

The WSIAT has developed a new practice direction #5 on hearing formats. The WSIB could simply adopt this (copy attached). It has been developed with the benefit of legal advice on the principles of administrative justice for the purpose of ensuring a fair hearing. Oral hearings are the default hearing method. The preference of the appellant is important. The appellant may chose in person, video or telephone. There is a list of a small number of issues identified as suitable for written appeals. However, if the appellant does not agree with the WSIAT’s decision to have a written appeal, there is an objection process to resolve this. This is a fair hearing process.

### **Consider Self-Represented Injured Workers**

We urge you to consider the “Statement of Principles on Self-represented Litigants and Accused Persons” adopted by the Canadian Judicial Council in 2006. The Judicial Council said “Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.” We do not see any consideration of the unrepresented injured workers. We believe a significant proportion of injured workers are not represented in the WSIB appeal process. What are the statistics? What are the demographics of this group? Are written appeals the best vehicle for them? We suspect not. Unrepresented injured workers are particularly wary of the power of the WSIB over their future. If they are told the appeal is going to be in writing, many are not going to disagree with the WSIB in case it hurts their chance to win the appeal.

It is our impression that many injured workers in the appeal system, represented or not, have limited language and/or literacy skills and can best understand the process and express themselves through an in-person appeal process. We are confident this group, or a big part of it, is better versed in oral rather than written communication. In these cases ARO’s must have the skills to listen to them and make the best decision possible. Written appeals are likely to result in automatic denials for this group.

**Is access to justice your focus for these changes?**

A change to using the written appeal method as the default hearing process will have a major negative impact on access to justice for injured workers. If the WSIB sees some benefit for injured workers in such a change, it should be explained publicly and discussed with injured workers at public hearings. This step should not be taken in a minor review of ASD procedures.

Respectfully Submitted,  
Injured Workers Community Legal Clinic

Per:



Orlando Buonastella



John McKinnon



# Workplace Safety and Insurance Appeals Tribunal (WSIAT)

[www.wsiat.on.ca](http://www.wsiat.on.ca)

## Practice Direction #5

### Hearing Formats

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#### 1.0 This Practice Direction

- explains the purpose of hearings at the WSIAT
- identifies the types of hearings conducted
- identifies what the WSIAT considers when determining the hearing format
- explains how to object to the hearing format

#### 2.0 Hearing Objectives

2.1 The WSIAT has the power to review all relevant evidence, including new evidence that was not considered by the WSIB. The WSIAT makes a new decision on the merits of the case. This is sometimes called a “de novo” hearing.

This is to

- get evidence and submissions
- ensure the other participating parties can cross-question witnesses and make submissions to reply
- allow a WSIAT Vice-Chair or Panel to ask questions, seek clarification, and get additional information
- be fair with adjudication
- make timely decisions based on the best evidence available

#### 3.0 Hearing Formats

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- 3.1 The WSIAT conducts hearings in these formats
- a. oral hearings in person
  - b. oral hearings by videoconference
  - c. oral hearings by teleconference (telephone)
  - d. oral hearings in a mixed format
  - e. hearings in writing (written appeals)
- 3.2 Appellants must indicate their preference for the format of their hearing on the Notice of Appeal (NOA) Form. The WSIAT will review the NOA Form and the issue(s) on appeal. The WSIAT will make an initial determination of the hearing format. WSIAT staff will identify the hearing format in the Issues on Appeal Letter. WSIAT staff will confirm it in the Hearing Ready Letter.
- 3.3 The Vice-Chair or Panel assigned to adjudicate the appeal will decide the hearing format. They will let WSIAT staff know if the format should be changed.
- 3.4 WSIAT staff will notify the parties if the Vice-Chair or Panel decides that a different hearing format is needed. The WSIAT may request additional information.

#### **4.0 Oral Hearings**

- 4.1 Oral hearings allow parties to
- present their opening statements
  - make submissions
  - present testimony
  - cross-question witnesses
  - make reply submissions
  - present closing statements orally to the Vice-Chair or Panel

They also allow Vice-Chairs and Panels to question the parties and witnesses.

4.2 Everyone who testifies must make an affirmation, which is a solemn promise to tell the truth. It is against the law for a witness to lie during their testimony.

4.2 Oral hearings will be held in one of the following formats

- a. in person
- b. by videoconference
- c. on the telephone
- d. in a mixed format

#### 4.3 **Hearings in Person**

WSIAT in-person hearings take place at the main office in Toronto, the WSIAT office in Hamilton, and in other cities in Ontario. The location closest to the appellant's residence or place of business is usually chosen as the hearing location. For more information visit the Contact Us page on the WSIAT website.

#### 4.4 **Hearings by Videoconference**

The WSIAT may conduct an oral hearing by videoconference. This requires a device with a working webcam (a desktop computer, laptop, tablet, or smartphone) and enough Internet speed to stream video and sound. The WSIAT will give the parties the information they need to connect to the hearing.

#### 4.5 **Hearings by Teleconference**

The WSIAT may conduct an oral hearing on the telephone. The WSIAT will give the parties the information they need to connect to the hearing.

#### 5.0 **Hearings in Writing (Written Appeals)**

5.1 Some appeals will be based on written submissions. They will not have an oral hearing. In these appeals, a Vice-Chair or Panel decides the appeal. They will

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do this by reviewing the case materials, including written submissions from the parties.

5.2 Written appeals are typically not as complicated as those appeals selected for an oral hearing.

5.3 Your appeal may be selected for a written appeal when

- the issue under appeal is one that is listed in the [Appendix](#) to this Practice Direction (Issues that are Usually Suitable to be Decided by a Hearing in Writing)
- the facts are generally not in dispute
- the medical evidence (if required) is complete
- testimony would not add to the information already in the case materials

## 6.0 Objections to the Hearing Format

6.1 If parties disagree with the hearing format chosen, they must

- write to the WSIAT to identify their preferred format
- explain the reasons they believe the format should be changed
- include why they believe oral testimony is or is not required

6.2 The WSIAT will review the objection. This may involve a discussion with other parties. It may also involve submissions from the other parties.

6.3 If the WSIAT cannot come to an agreement with the parties on the hearing format, the objection will be sent to a Vice-Chair for a preliminary decision.

6.4 The Vice-Chair or Panel assigned to adjudicate the appeal will decide on the hearing format. If a party does not agree with the preliminary decision, they can raise it as a preliminary issue for the assigned Vice-Chair or Panel at the hearing.



6.5 If the WSIAT processes the appeal for a hearing in writing, the objecting party should include with their written submissions why they believe the appeal should be determined by an oral hearing. The Vice-Chair assigned to the appeal will consider the request for an oral hearing before considering the merits of the appeal.

6.6 Where the Vice-Chair agrees that an oral hearing is required, they will direct WSIAT staff to prepare the appeal for an oral hearing. Where the Vice-Chair does not agree that an oral hearing is required, they will decide the appeal based on the case materials. For this reason, the parties' submissions should be complete.

## **7.0 References and Resources**

### **7.1 Legislative Authority**

*Workplace Safety and Insurance Act, 1997* sections 123 (WSIAT jurisdiction), 124(3) (types of Hearings at the WSIAT) and 131 (the WSIAT can determine its own practice and procedure)

### **7.2 Related Practice Directions**

#1 – How to Start an Appeal at the WSIAT

#9 – Evidence

#21 – Who May Attend a Hearing

#33 – Role of the Vice-Chair Registrar at the WSIAT

#36 – Delivery and Filing Documents

#39 – Fees and Expenses

## Appendix

### Practice Direction - Issues that are Usually Suitable to be Decided by a Hearing in Writing

- a. time limit appeals under section 120 of the *Workplace Safety and Insurance Act, 1997*
- b. employer requests for Second Injury and Enhancement Fund (SIEF) relief
- c. employer premium rating
- d. loss of earnings or temporary disability under 4 weeks
- e. earnings basis
- f. Canada Pension Plan (CPP) offset – this could be either loss of earnings (LOE) or future economic loss (FEL) benefits
- g. ongoing entitlement to section 147(4) benefits
- h. commutations
- i. hearing loss claims where the issue is the level of impairment
- j. entitlement to health care benefits
- k. quantum (the amount) of a non-economic loss (NEL) award for an organic impairment
- l. quantum of a pension for an organic permanent disability where no claim for loss of earnings is involved.