Dispute resolution and appeals process value-for-money audit consultation

Stakeholder submissions

June 8, 2023 to July 21, 2023

Table of contents – stakeholder submissions

Commentary on recommendations from KPMG about the use of ADR at the WSIB

Brian Cook is an experienced mediator and adjudicator. He has served as a Vice-Chair at the Workplace Safety and Insurance Appeals Tribunal and the Human Rights Tribunal of Ontario. He holds an LLM (ADR) from Osgoode Hall Law School

This is a commentary on some of the recommendations set out in the recent KPMG report (the Report) to the WSIB concerning the use of Alternative Dispute Resolution (ADR) in the Board's appeal system.

One observation about the report in general is that it seems very focused on cases where the issues relate to return to work. As reflected in the current legislation, it is well established that quick resolution of such cases is important to lessen disability, improve workplace relations, and avoid costs. However, the principles of early intervention and quick resolution of disputes do not apply well to other sorts of cases. An occupational disease claim, for example, can require significant investigation and medical review which cannot be accomplished within the timelines that are designed for return-to-work cases.

The Report makes the following recommendation:

ADR training and accreditation should be provided to front line decision makers and AROs with requirements for continuing professional education.
ADR training should be extended to front line decision makers and ARO's to ensure that ADR concepts and processes are understood by all parties. The ADR process should be supported by clear work flows, submission of the ITO and time lines for other supplemental information, and processes and time lines for scheduling ADR sessions with WPP's.

This recommendation is based on information provided by stakeholders:

Based on our discussion with stakeholders, we noted that the current reconsideration process does not support mediation and early resolution. Reconsideration of initial decisions are made based on the ITOs submitted without engaging in communication with the WPP to discuss and facilitate a mediation process.

The report then cites with approval other jurisdictions where the decision-maker talks to the workplace parties before making a final decision.

The Report does not explain how the authors imagine that mediation or "ADR concepts and processes" would be used by the front-line decision makers.

Mediation is usually understood to mean a process where a neutral helps two or more parties resolve their dispute. ADR encompasses mediation but may include a broader range of dispute resolution techniques.

It is difficult to image how mediation would work in the context of a worker's objection to the decision of a front-line decision maker. The parties to this dispute are typically the worker and

the front-line decision maker. If two parties have a dispute it seems rather perverse to suggest that the dispute can be appropriately resolved by having one of the parties change roles and become a mediator. This is not mediation as it is normally understood and use of the term in a process that workers are required to participate in will inevitably cause significant confusion.

There are of course many ADR techniques that can appropriately be used by an adjudicator. For example, active listening, reframing a dispute, empathy, and so on. There is no doubt that training in these techniques would be helpful for front-line decision makers but what these techniques are really about is engaging with the worker and paying attention to what they are saying. The recommendations in the Report about the use of ADR and mediation are grounded in the observation that reconsideration of initial decisions happens with no communication with the workplace parties. It would be much less confusing to simply propose that the decision-makers communicate with the workplace parties, or at least with the party who is objecting to the decision.

Similarly, more appeals are disposed of by Appeals Resolution Officers as written appeals only, with no communication with the workplace parties. In a large proportion of appeals to the Workplace Safety and Insurance Appeals Tribunal (WSIAT), the hearing at WSIAT will be the first time in the entire history of the claim that anyone has spoken to the worker.

Mediation and ADR has a place in the workers' compensation system. The most obvious example is in return-to-work cases, where there is a dispute about the suitability of work offered by the employer to the worker. An ADR intervention can quickly and successfully help the workplace parties to find solutions that will resolve a dispute without the need for an appeals process. If an Appeals Resolution Officer is faced with such a case and if both parties are participating, ADR may help to resolve the matter.

While ADR and mediation can be successfully used when there is a dispute between the workplace parties, but it does not follow that they can be used in other cases where only one of the workplace parties (usually the worker) is engaged with the front-line decision-maker.

ADR is employed at Workplace Safety and Insurance Appeals Tribunal (WSIAT), although the Report does not mention this. At WSIAT there are staff, reporting to a Vice-Chair who use ADR techniques with the worker and the employer if the employer is participating in the appeal. The WSIAT ADR process is explained in Decision 774/04R:

> When a party elects to proceed with its appeal in the "ADR stream", compliance with sections 173 and 174 remains necessary. Where parties proceed through the ADR stream and reach agreement, as was the case in the subject appeal, the staff mediator makes a recommendation consistent with the agreement reached. The agreement must be consistent with the Act (see section 16 of the Act). The appeal is then assigned to a competent decision maker referred to in the sections of the Act noted above. According to the Tribunal's practice, the appeal is usually assigned to a Vice-Chair sitting alone who hears the appeal as a written case. When a matter is assigned to a Vice-Chair or Panel, section 124(1) requires that the decision be made on the merits and justice of the case and section 131(4) requires that reasons be provided.

> After being assigned the appeal, the Vice-Chair considers the appeal on its merits. If the Vice-Chair is satisfied that the disposition reflected by the agreement of the parties is consistent with the parties' rights under the Act, the appeal is allowed on the same terms as the agreement. Where the Vice-Chair is not so satisfied, the parties are advised accordingly, in which case the parties may proceed to a hearing. Alternatively, with the assistance of a Tribunal mediator, the parties may seek to negotiate a modified agreement which could again be recommended to a Vice-Chair for decision.
>
> Where the Vice-Chair, however does not agree that the agreement by the parties was consistent with the Act, it would be inappropriate for the Vice-Chair to dispose of the appeal on terms that were inconsistent in any significant manner from that which the parties agreed. Rather than have their appeal disposed of on terms that are significantly inconsistent with the agreement, the parties should have an opportunity to re-assert their right to a hearing.

This process could be used at the WSIB. It is consistent with ADR principles and respects natural justice. The same cannot be said for a proposal that front-line decision-makers turn themselves into mediators when deciding a request for a changed decision that the decision-maker has made.

Recommendation 1.1: We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals.

Q1. What appealable issues do you think are appropriate for this mediation-arbitration model?

1. **Issues related to return to work including job suitability, re-employment obligation, and RTW co-operation duties and penalties.**

2. Initial entitlement decisions, especially those that relate to disablement cases. While we acknowledge that this consultation has suggested that these are not suitable for mediation, we do not always agree with that view. It is not unusual for there to be evidence that supports either outcome.

3. So long as there is sufficient evidence to support the result of a mediation, we would support the idea of mediation-arbitration on any issue.

Q2. What principles should guide the mediation-arbitration approach? What else should we consider?

1. Fairness.
    a. Mediation-arbitration should only be adopted when both the worker and the employer are participating in an appeal.
    b. Mediation-arbitration may not be appropriate when one party is represented and the other is not.
    c. Language should not be a barrier to mediation, and where a party requires the assistance of interpretation services those should be provided during the mediation.
    d. Where a party suffers from a disability that impairs cognition, judgement, or impairs a party's ability to communicate openly and effective, mediation is not appropriate.

2. Finality.
    a. If an issue is resolved by mediation, that issue should not be subject to further review or appeal at the Board.
    b. It is also important that an agreement reached in mediation should not be subject to appeal to the Appeals Tribunal. This may require an amendment to the Act. At a minimum, co-operation between the Board and the Appeals Tribunal is necessary to ensure that a mediated agreement is not undone by an appeal to the WSIAT.
    c. As a result, we do not recommend that mediation be offered at a level below the Appeals Services Division, however we do think early involvement of mediation as an alternative to an appeal hearing would be of significant value,

particularly on active return-to-work disputes. Where expertise can be developed with front-line decision-makers in the area of return-to-work issues can be established, we suggest that a different decision-maker other than the primary decision-maker should be used as a mediator. If mediation fails at this level, we recommend that the mediator be authorized to issue a final decision of the Board on the issue.

3. If the Board determines that the adoption of a mediation/arbitration option at the front-line decision-making level is preferred, the principle that the mediation agreement or arbitration ruling is final should guide the process and be clear. There should be no further right of appeal on the issue even if the mediation/arbitration is conducted at a level that would ordinarily precede the Appeals Services Division. In this respect, we are concerned that the introduction of mediation-arbitration at the front-line while also preserving a right to appeal an arbitration ruling to ASD would introduce an additional level of adjudication that might delay a final decision of the Board on an issue that otherwise merits more expediency (such as return to work issues).

4. If a decision reconsideration process continues, we recommend that mediation-mediation should only be available after that reconsideration process is complete.

Q3. If mediation does not resolve the issue, what factors should be considered to determine whether an oral hearing or a hearing in writing should be used for the arbitration component by the Appeals Resolution Officer?

In a typical mediation-arbitration process, the mediator continues as the arbitrator. If this is the model that the Board wishes to adopt, and an Appeals Resolution Officer conducts the mediation, we recommend that the ARO be authorized to make the determination as to the appropriate method of hearing.

In some cases, it may be appropriate for an ARO to use the mediation process to find areas of agreement between the parties on facts and other points of evidence. Using that approach, much of the dispute could be resolved prior to the "arbitration" phase. Where oral evidence is necessary to assist the ARO to resolve an issue, that could also be identified with guidance or direction to the parties in terms of the necessary oral evidence that is required.

Even when mediation does not fully resolve the issue, the mediation process may assist in narrowing the issues and evidence for an oral hearing. Where oral evidence is not necessary, the parties could either make oral submissions at the conclusion of an unsuccessful mediation or the ARO could set a timeline for the delivery of written submissions. We encourage the Board to adopt a practice rule that requires each party to deliver its submissions to the other party at the time of filing.

Q4. To ensure expediency, what would be a reasonable timeframe for the mediation component? Is 30 calendar days reasonable?

With agree with this timeline.

That said, there are practical considerations for implementation of this model and optimistic timeline.

- Within what time frame should a party object to an issue *and* request mediation-arbitration?

- How quickly can the parties be provided with access to the claim file?
- How will the worker's right to object to the release of health care information be handled in a mediation case?
- How much time should an unrepresented party be allowed to find a representative?

There may be a need to improve the efficiency of communication with both parties and their representatives to ensure that a mediation process can move forward with expedience, but also ensure fairness in the process, including rights of access to information that is relevant to both mediation and arbitration. In all cases, we encourage the Board to adopt a practice guideline or rule that the parties and their representatives should copy the other party on any communications to the Board.

Q5. How might alternative dispute resolution be used by front-line decision-makers? If there is a dedicated team of front-line operational experts delivering alternative dispute resolution, how much should other front-line decision-makers be trained in the approach?

We have provided some comments on this above. Alternative dispute resolution, separate from the mediation-arbitration model, can be a function and role of every front-line decision maker. For that reason, we believe that all front-line decision makers should be trained in the same approaches to ensure consistency in decision making and aid in the reduction of the volume of cases going to appeals. Front-line decision makers might use ADR to resolve RTW issues and assist the parties in determining what evidence is necessary to adjudicate non-complex initial entitlement cases.

We respect that a primary role of decision-makers is, of course, to make decisions. In adopting an ADR approach to decision making, care should be taken not to erode the core function of the adjudicative staff. Where the evidence supports a decision, then the front-line decision-makers should continue to follow the evidence to that outcome. Where there is ambiguity or uncertainty on an issue, and there is willingness of the parties to co-operate to find a reasonable

solution, ADR can assist the front-line decision-maker to make a decision that is reasonably supported by the evidence *and also* supported by both workplace parties.

Strong ADR skills can also assist front-line decision-makers to diffuse conflict between the workplace parties over disagreement about the circumstances leading to the decision. We do not, however, expect front-line decision makers to act as workplace counsellors or mediators of issues that do not fall within the mandate of the WSIB.

Recommendation 1.1: Our alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

Section 120(2) outlines that the workplace parties must indicate in writing why the decision is incorrect or why it should be changed. Understanding that and what each party wants (i.e., the proposed remedy) is foundational to both formal and informal methods of resolving disputes in a timely and quality manner. We already ask these questions on our intent to object (ITO) and appeal readiness forms (ARF), however, the parties do not always complete the information. In implementing this recommendation, we will make it mandatory to provide *complete information* through the current processes or through alternative dispute resolution.

Q6. What factors should we consider in making the above information mandatory to initiate the dispute resolution and appeals process?

While we are in general agreement that *more* information than is typically provided on an ITO or ARF is necessary to give meaning to the appeal, we wish to address the ability of the parties to provide more comprehensive information at the point of filing the initial objection to the decision.

The Board has adopted a two-stage appeal process for good reason.

- At stage one, the objecting party provides notice of an objection within the statutory time limit to ensure that the objection may evolve into an appeal. On many occasions, a party files an ITO without the benefit of representation and without sophistication to understand the process or the extent of information that is needed to give meaning to the requirement set out in s. 120(2).

- At the stage two, the party states that it is ready to proceed with the appeal by filing the ARF. At this stage, the party should be familiar with the issue in dispute and should be able to describe why they believe the decision is incorrect or why it should be changed. A party should provide any new documentary evidence and identify any necessary witnesses, should the appeal be conducted by oral hearing. The party should also be able to explain the reasons in support of the preferred method of hearing.

- In between these two stages, both parties will receive access to the claim file. Of course, the worker has a right of access to the claim file at any time upon making a request to receive it. The employer, in contrast, only receives the claim file when there is an issue in dispute and it is either objecting to a decision or is participating as respondent to a worker objection. Receipt of the claim file provides substantial information to each party, including a better understanding of the process of adjudication that led to the decision that has been appealed, the supporting evidence (or lack thereof) and (in many cases) the deficiencies of each party to provide sufficient evidence to support its position.

It may be helpful for the Board to develop a guide on how to complete an ITO or an ARF, and what information should be included on each form. These guidelines should also explain what may occur if the ITO or ARF is not properly completed.

To ensure that all participants receive the benefit of these guides, they should be available to the parties in their language of preference.

Intent to Object form

Given our comments above, we recommend that the ITO should identify the decision that is in dispute, the specific issue or issues that are disputed, and the objector's position as to what the correct outcome should be. This may still result in an objection that is not yet well formed. Where a party lacks the sophistication on how to complete the form, the Board could redirect the party to the guidelines (which we recommend in the above paragraph).

We do not recommend that "complete information" be provided on the ITO, particularly in light of the two-stage process that we have described above.

Appeal Readiness Form

We recommend that the ARF should be complete. On the method of hearing, a party should provide meaningful submissions with appropriate reference to the ASD Practices & Procedures.

On the issue appealed, where a hearing in writing is requested, full written submissions should be provided. Too often, as employers' counsel, we are responding to worker appeals (including those where the worker is represented) that provide no submissions on the appeal issues. In the absence of submissions, we recommend that the appeal should not proceed to the Appeals Services Division.

We also request that the parties be required on the ARF to identify any outstanding issues that remain with the front-line decision makers or for which the party anticipates pursuing. For example, if a party is seeking entitlement on an organic basis but also anticipates seeking

entitlement for a psychological injury or chronic pain disability, this should be identified on the ARF.

Fairness

Having set out our view on these issues, we also wish to ensure fairness in the process. It is our recommendation that a representative should be held to a higher standard than an unrepresented party.

Recommendation 1.1: We should adopt set timeframes for the reconsideration process**.**

Q7. What factors should we consider when implementing 30—calendar-day timeframes for each step in the above reconsideration process?

- When does the time begin?

  When the phrase "reconsideration" is used, we presume that this means a reconsideration by a front-line decision of that decision-maker's own decision. In such a process, the ITO would initiate the reconsideration. If the ITO is incomplete, then this should be drawn to the attention of the objector before the 30-calendar day period begins.

- Both parties should be able to participate in a reconsideration process.

  In the current reconsideration process, this is not usually the case. When one party objects and provides new evidence that persuades the original decision-maker, a reconsideration decision is rendered without engagement of the other party. This has been our experience whether the employer or the worker is the objecting party. This is an unfair process when it is made on the evidence and submissions of one party in the absence of engagement of the other party.

- Allow for time to communicate to the non-objecting party that an objection has been filed and time for the responding party to acknowledge an intent to participate in the objection/appeal.

  It would be ideal, of course, if an objecting party was required to provide a copy of that objection to the other party at the time of filing (along with any new evidence or submissions that have been provided with the ITO). This should certainly be the process when both parties are represented and could be supported by proof of service (including by fax or email). Indeed, this is a regular expectation of the Appeals Tribunal (except when the appellant first files the Notice of Appeal).

We admit, however, that this may an unreasonable goal where one or both parties are unrepresented.

Notice to the non objecting party, then, is received from the Board. This may occur weeks after the ITO is filed. For parties who utilize TITAN, the delivery of the notice of objection is more expedient. For others (or when the front-line decision-makers overlook the direction of authorization of a representative), notice is delivered by regular mail. We have identified significant gaps in consistency of delivery of correspondence by mail that has resulted in serious breakdowns in fairness in the process.

In the current process, upon receipt of notice of the objecting party's objection (along with the participant form), the responding party has 30 days to complete and return the participant form.

<u>If a reconsideration process is to be complete within 30 days, the current design would routinely exclude the responding party from participation in that process.</u>

- Improvements in process and use of technology.

  Changes in appeal practice and a <u>more comprehensive use of technology</u> may assist to reduce these delays and to ensure (a) timely delivery of notice of an objection to the responding party, (b) confirmation of receipt of that notice, and (3) means to engage both parties in the reconsideration process.

- <u>Opportunities to extend the time at each stage</u>.

  The appellant's primary time limit is the time to object to a decision. At this stage, the objector has control over the initiation of the process. The current reasons for extending time limits to object are reasonable and should continue.

  Once the respondent receives notice of the objection, it is then held to short time limits at every stage. Time limits during an early stage of reconsideration (before claim file access has been provided, for example), should be reasonably flexible to account for such things as the availability and time demands on a party's representative within any given 30 day-time period, and the availability of the client (and in respect of the employer, the availability of key decision makers within the 30 day time period).

  As an example, we note that the request to provide submissions on this consultation in mid-June seeking a response at the end of the third week of July. The key period for assembly of a response was in the core part of each year's vacation period. That creates an added strain on resources at a time when necessary contributors to a meaningful response are absent from work due to scheduled vacations.

This type of an example might not seem to be a reasonable explanation for an extension of time, but it is a practical consideration for the Board to understand when setting shorter time periods for the completion of each stage of the process. In practical terms, there are times when the time limits cannot be met. This reasoning applies as equally to the decision-makers and Board staff as it does to the participants.

Where the opposing party consents to an extension of time, we submit that this should always be a compelling reason to extend time.

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

- We agree with this proposition.
- We recommend that time to file the ARF should begin following the date of the most recent reconsideration decision that resulted in a change of the decision.
- We also recommend that the appellant should be required by the Board to deliver a copy of the ARF to the respondent's representative (or respondent, if there is no representative) at the time of filing, along with any new evidence, information or submissions that are filed in support of the ARF.

Q8. If we were to implement a new one-year time limit from the decision date to submit an appeals readiness form on January 1, 2024, how should we manage appeals from before this date where an appeal readiness form has not yet been submitted?

- A general notice should be posted on the Board's website, and attached to any new correspondence sent to the parties on any case with an outstanding objection for which no ARF has been filed. The notice should inform the parties that there is an outstanding objection, and that a **time limit to file the ARF** has been set (more on this in our comments below).

Q9. Should appeals from before this date be exempt from the requirement to send an appeal readiness form within one-year? If we were to make appeals from before this date exempt from the requirement to send an appeal readiness form within one year, what would a reasonable time limit be? Would one year from the new effective date be reasonable?

- The time limit to file an ARF should not be set retroactively. That is, if a party filed an objection but has not yet filed an ARF, the opportunity to file that ARF should not be deemed to have expired as though the time limit had been set and had run out in the past.

- Appeals from prior to January 1, 2024 should not be exempt from any time limit, however. It is important that this change should bring finality to outstanding objections that have never been advanced by the appellant. We agree that one year from the adoption of a time limit to file an ARF should commence in 2024. This should apply to all cases for which an ITO has been filed prior to 2024, even if the 12-month period from the date of the appealed decision has not yet expired as of the date of commencement of the time limit.

- It is important to consider the practical implications of adopting a 12-month time limit starting on January 1, 2024 and applying that rule to all outstanding objections where no ARF has been filed before 2024.

    - In cases where there are representatives that have initiated those objections, there could be a sharp increase in the number of ARFs that are filed in 2024. We anticipate that the acute portion of that sharp increase will occur towards the end of 2024 as the time is running out.

      The idea that this could be occurring during the month of December 2024 adds additional strain, given that many of the participants of this system are absent from work for the seasonal holidays.

    - If so, this could place significant additional demands on front-line decision-makers (and in many of these cases, the original decision-makers may have left the WSIB, have been reassigned to a different role, or have no meaningful recollection of these older claims).

    - There could also be significant additional demands on the Board to prepare and deliver claim file access to the respondents, and updated access to the appellants.

    - There could be a very substantial increase in appeals in **2024, 2025 and 2026**. In respect of oral hearings, this could significantly delay scheduling of appeal hearings.

    - The effect of a sharp increase in appeals will continue to impact the system forward to the Appeals Tribunal, and back to the appeal implementation team and front-line decision makers after appeal decisions are rendered.

- The reactivation of dormant appeals will also place significant additional demands on respondents and their representatives (in most cases, that will be employer representatives) to respond to an increase of all appeals, and to respond to otherwise dormant appeals that could involve stale or unavailable evidence.

Recommendations

To plan for these outcomes, we recommend that the Board provide EARLY notice, well before January 2024, that outstanding ARFs must be filed before the end of 2024, and that from January 1, 2024 onward, a party will have only 12 months from the date of decision (or last revised/reconsidered decision) to file the ARF.

We recommend the Board consider the following process changes:

- In respect of any objections initiated in 2023 for which no ARF has yet been filed, appeals will be addressed in the normal course, with the time to file the ARF expiring on December 31, 2024.

- In respect of objections initiated prior to 2023 for which no ARF has yet been filed, the appeal will be resolved by written submissions, except in extraordinary circumstances. The time to file the ARF will also expire on December 31, 2024, and full written submissions in support of the appeal must be provided with the ARF at the time of filing. If no submissions are provided with the ARF, we recommend that the ARF should be rejected as incomplete, with one opportunity to rectify this deficiency on the condition that a new ARF with written submissions is filed by December 31, 2024.

One effect of adopting such a plan for historic objections is that representatives must then plan sufficient time to review their cases and to complete written submissions on these historic cases. That may help to disperse the filing of new ARFs across the entire period from when notice of this change is first provided by the Board and until the end of December 2024.

Q10. Under what extenuating circumstances should we consider extending the one-year time limit for submitting the appeals readiness form?

The current criteria for a time extension as set out in the Appeals Practices & Procedures should be applied. Having said that, for reasons that we explain in our comments about time for the Board to broadcast the changes, we submit that in most cases *actual notice* can be implied if these efforts have been undertaken by the Board.

In addition, we suggest that extension could be granted in the following circumstances:

- The appellant is an unrepresented person who is actively seeking representation or is on a waiting list for support through agencies such as the Office of the Worker Adviser, injured worker advocacy groups, or community and specialty legal clinics.

- Persons who are incapacitated and unable to complete the ARF or to provide instructions to their representatives to do so. In such cases where the person has an active representative, we recommend that the Board adopt a form for a request for an extension due to the capacity of the representative's client. Such a form, in our view, should still be filed *prior to the expiry of the time limit*. Whether and for how long an extension can be granted for that reason is then a matter that the Board could determine on a case-by-case basis and could review at regular intervals.

- There are other concurrent legal proceedings and the submission of the ARF is dependent on the conclusion of those proceedings. In such a case, again, we recommend that the party seeking the extension should request that extension of time *before the expiry of the time limit*.

Q.11 Is January 1, 2024, a reasonable start date for the new one-year appeal readiness form time limit? How much time would you need to make sure you have enough notice for a start date?

While the time limit could, of course, be extended beyond the 12 months (for example, 18 months and gradually reducing to 12 months), that might cause confusion as the time limits are adjusted. It might also only delay the inevitable sharp increase at the end of the 18-month period.

In our view, 12 months is adequate time to review all outstanding ARFs and to make a plan to apportion that workload, *provided* that the Board gives sufficient advance notice of the change before it is adopted. **We recommend that a six-month lead time would be sufficient for that purpose**. That is ample time, in our view, for widespread broadcast of this change through a variety of means:

- a general announcement on the Board's website maintained until and for a period of months after the adoption of the time limit;

- periodic notice of this change through the Board's social media platforms such as twitter and LinkedIn;

- an information circular attached to every new decision on all claims and every new employer statement;

- engagement of representatives through professional associations such as the Law Society of Ontario and the Ontario Bar Association;

- engagement with injured worker advocates, unions, and labour organizations; and,

- engagement with employer associations and the HRPAO.

If, for example, the Board determines by the end of August 2023 that it will implement a time limit for the filing of an ARF, the initial notice of that decision could be released on September 1, 2023, and the 12-month time limit could then commence on March 1, 2024.

For our part, this consultation has already alerted us to the likelihood of this change, and we have initiated a process to review all outstanding objections of our clients for which we have not yet filed an ARF. That will not be the case for many other representatives, and most certainly not for unrepresented persons.

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

Since the start of the pandemic in 2020, we have been very flexible in determining the method of resolution for appeals. We have worked directly with the parties to best accommodate their needs either online, in person, or in a hybrid manner for oral hearings. We conducted a survey in 2022 on online oral hearings and it showed that they were positively received and that we should continue to offer them. Our current oral hearings are online. We make exceptions for in-person oral hearings in unique cases impacted by things like accessibility needs or technological challenges.

Q12. What other factors should we consider in determining whether the oral hearing should be offered in person or online?

- Our experience with online and telephone hearings has been consistently very good. While there are challenges that arise in these hearings from time to time, including technological issues, in our experience these challenges are offset by the challenges that are associated with in-person hearings which includes extensive travel time for participants and, in most cases, added stress for worker participants.

  We therefore recommend that the Board continue to conduct oral hearings by videoconference as the default method of oral hearings.

- In its *Guidelines for the Resumption of In-Person Hearings*, the Appeals Tribunal has set out the following criteria for the consideration of an in-person hearing. We have made slight alterations to this list for application to the Board. We endorse these factors:

    - a party is unable to participate in a videoconference hearing due to technology barriers, that cannot be addressed through other reasonable means;
    - a request for an accommodation for a *Human Rights Code* related need has been made that cannot be met through a videoconference format;
    - a party is unable to participate in a videoconference hearing due to health issues;
    - a self-represented party has unique needs (including the ability to access and use technology, and/or the need for support to use technology);
    - whether there is a suitable hearing room available in the location where the in-person hearing would take place;
    - due to the nature or complexity of the issues or the evidence, an in-person hearing would be more appropriate;
    - whether the in-person hearing will be able to proceed in accordance with the principles of natural justice and in a fair manner; and
    - any other relevant and valid reasons why a remote electronic hearing might not be appropriate, including any personal circumstances of a party or participant.

Recommendation 3.1: We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

We have an expedited appeal process for return-to-work decisions. Currently, the following decision types have a 30-calendar-day time limit to appeal and are considered for an expedited appeal:

- job suitability decisions where functional abilities or level of impairment are not in dispute;
- lack of cooperation on a return-to-work plan from the person with the injury or business or during a training program;
- suitable occupation and/or training plan decisions;
- re-employment decisions.

We do not use the expedited process if there are decisions involving other issues coupled with the above (i.e., those with a six-month time limit). We are considering adhering to the 30-calendar-day time limit and expedited process when there are multiple issues (i.e., both those within the 30-calendar-day and the six-month time limits). This would mean that the return-to-work issue would be expedited through the appeals process independently regardless of whether it is coupled with other issues or not.

Q13. What factors should we consider in expediting return-to-work issues when there are multiple issues in an appeal?

Frankly, we were unaware that there was an expedited appeal process for return-to-work decisions. Indeed, we have never experienced an expedited appeal in such a case despite years of practice in this field. This is likely because as employer representatives, we are routinely involved in return-to-work cases where functional abilities and level of impairment are in dispute. That there is dispute over those factual issues, in our view, escalates the importance of expedited resolution of these disputes.

In many cases where there are multiple issues in dispute, it is typical that the return-to-work issues may turn on the *other* issues. For example, the scope of entitlement in a claim may be in dispute. If the entitlement is expanded, that may be the turning point as to whether a job is suitable or whether a worker has been co-operating in return to work, or whether a worker was ever fit to return to work (a fundamental element of the re-employment obligation). We see this occurring frequently in cases where job suitability or ability to work is in dispute *at the same time* that entitlement for another area of injury is in dispute. This occurs most often in cases where entitlement is disputed respecting psychotraumatic disability, chronic pain disability or a mental stress injury.

Dividing these appeal cases in order to expedite the return-to-work issue is rarely practical.

That said, we do agree that efforts to expedite return to work decisions is important. Triage of incoming appeals could assist to determine whether other appeal issues area reasonably related to the return-to-work issues and should then be included with the processing of an expedited appeal. Where there are disputes over the functional abilities and level of impairment, we submit that these should not be a barrier to an expedited appeal but they may require that an oral hearing be conducted. Scheduling an oral hearing on an expedited basis is, regrettably, more difficult than a written hearing.

In some cases, the related non-return-to-work issues have not been advanced through an ARF and may also not have been fully adjudicated by a front-line decision-maker. In these cases, we recommend co-ordination between Appeals Services and the front-line adjudicative unit to expedite the adjudication of those issues so that they might be advanced to ASD at the same time as the return-to-work appeal.

Where a front-line decision has been made, but the appealing party has not yet filed an ARF, we encourage some expansion of the ARO's jurisdiction to allow the consideration of related appeal issues that have not yet been advanced by the filing of an ARF. In such cases, it is imperative

ARO's jurisdiction to allow all parties to be fully prepared to address additional appeal issues.

Modification of the ARF and the Respondent Form to require the parties to identify related issues and outstanding issues that may impact the ability of an ARO to decide the issue in dispute may assist the Board to identify cases that require pre-hearing review or a pre-hearing conference.

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.

Currently, the Appeals Resolution Officers' decisions sometimes lack instructions and the information required to implement their decision. We will review the way Appeals Resolution Officers' decisions are written to make sure they include directions for their decision to be implemented including any supplementary information needed. The decisions will also address the issue and entitlements requested by the parties as identified on the Appeal Readiness Form or the benefits that flow from the decision as part of the parties' proposed resolution to the appeal.

Q14. What factors should we consider in reinforcing the 30-calendar-day timeline for appeal implementation?

We have noticed a significant improvement in the time for implementation of appeal decisions over the course of the past 6 months or so.

The pre-hearing process could assist the parties to prepare the information that is necessary for the implementation of an appeal *before the hearing has taken place*.

- For example, if a worker has appealed the denial of LOE benefits, the ARF or supplemental attachments to the ARF could be designed in a way that requires the worker to identify the specific period of LOE benefits that are sought. In respect of that period, the worker should then be required to disclose any earnings from employment or self-employment an any CPP disability benefits received. Proof of those earnings could be required to be provided as attachments to the ARF.

- Similarly, the employer as a respondent could be requested to provide attendance records, pay statements and other earnings information sufficient to address both the pre-injury average earnings and long term recalculations of average earnings, as well as any information about advances or actual earnings paid to the worker during the period of LOE that is sought.

- In each such case, the front-line decision maker could pre-determine the likely additional information that will be needed in the event that the appeal is allowed, and thus identify which additional forms or information should be provided by the appeal participants.

If this type of work is done prior to the appeal, when the parties are most engaged in preparation for the appeal, then there are two potential results:

1. The ARO has sufficient evidence to make a ruling on benefits flowing from the decision, and will be in a position to make that ruling as part of the appeal decision; or,

2. An implementation case manager will have sufficient information to make a timely implementation decision without needing to return to the parties to gather more information.

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

We are assessing examples of decisions we make that rely on standardized calculations to determine if we should exclude them from our internal appeals process. This might include certain permanent impairment rating (quantum) decisions, and their non-economic loss monetary award calculations; certain loss-of-earnings benefits calculations and decisions; and certain personal care allowance decisions.

Q15. If we were to exclude decisions that rely on standardized calculations from our internal appeals process, what are some factors we should consider?

We do not agree with this recommendation. The simple fact that this consultation appears to acknowledge that we must first decide what types of decisions are "standardized calculations" illustrates the perils of disposing with fulsome appeal rights that turn on whether a decision is or is not characterized as a "standardized calculation". It also defers the adjudication of such an appeal to the WSIAT, thus delaying a hearing of an appeal that might be more easily addressed by the Board.

- The implementation of the rate of indexation rate for the annual increase in benefits is a "decision" that comes to mind. However, in the two most recent years we have seen a divergence of opinion as to how the Board should determine that indexation rate. Whether that is an appealable issue is one consideration but determining that the calculation is "standardized" is another.

- NEL quantum awards are sometimes routine, but in other cases they are complex and require a careful review of the available health records. Calculation of the quantum of benefits are less complex, but only after the permanent impairment rating has been determined.

- LOE calculations are very complex and sometimes turn on determinations around the change in the employment, mandatory vs voluntary overtime, and how earnings are characterized.

That said, some of these issues can proceed on an expedited basis and by written hearing. They might also benefit from an alternative appeal stream, where they are reviewed by Appeals Resolution Officers who are specialists in the appeal issues. We recommend that this approach be taken rather than to displace an appeal from the Board's internal appeals process and to send it directly to the Appeals Tribunal.

In our experience, these types of issues are complex and, unfortunately, are not well advocated by most representatives. That should not preclude them from being appealed and reviewed internally by the Board.

Q16. Are there other decision types that we should exclude from our internal appeals process?

In rare cases, appeals are vexatious or frivolous. We would endorse the adoption of a pre-hearing review that would allow for a determination that an appellant is a vexatious appellant and to exclude from appeals review any appeal that has been so advanced.

Sometimes in different claims for the same person, an issue in dispute may be active with WSIAT while another issue is active with us.

Q17. Should there be options to request for us to exclude some decisions from our internal appeals process to pursue the holistic resolution of the issues for the person or business at the WSIAT? Under what circumstances would this be best? What else should we consider?

We agree that some issues should be expedited to a final decision of the Board where there is an active and outstanding appeal at the WSIAT, and the principle of whole-person adjudication merits this result.

Where both parties are participating in the appeal at the Appeals Tribunal, we recommend that the Board obtain the consent of both parties to expedite a final decision. Where there is biparty consent, we recommend that the front-line decision be endorsed as a final decision of the Board *irrespective of the issue in dispute*.

Where there is disagreement between the parties as to whether to exclude the decision from the Board's internal appeals process, we recommend that the Board request submissions from both parties on the procedural issue and, where principle of whole-person adjudication outweighs the need for an appeal hearing before the Board, that the Board endorse the front-line decision as the final decision of the Board. Otherwise, we recommend that the Board

request written submissions from the parties on the substantive issue in dispute and render an expedited appeal decision.

The types of cases where this might be most important are those where there are job suitability or return to work issues before the WSIAT, or issues relating to the employability of the worker, and outstanding issues before the Board relate to the scope of entitlement in the claim. We provided similar comments to Q13 when we discussed questions related to expedited appeals for return-to-work issues on cases where there are multiple appeal issues.

Respectfully submitted by
Tara Ross &
Rob Boswell

Boswell Employment Law
July 21, 2023

BUILDING TRADES WORKERS' SERVICES

July 21, 2023

Workplace Safety and Insurance Board
200 Front Street West
Toronto, Ontario
M5V 3J1

Via e-mail: appealsfeedback@wsib.on.ca

To Whom It May Concern:

Re: KPMG's Value for Money Audit (VFMA) of the WSIB's Dispute Resolution and Appeals Process

I am writing to provide feedback on the WSIB's proposed changes to their dispute resolution and appeals process based on recommendations made by KPMG following their 2022 VFMA.

I am writing on behalf of Building Trades Workers' Services, a non-profit organization representing hundreds of injured workers from dozens of unions across Ontario. Collectively, our representatives have over 100 years of experience with the workers' compensation system in Ontario.

This submission will focus on the negative, practical impacts these changes – particularly, the imposition of stricter time limits - will have on injured workers attempting to access legal representation.

With regards to the scope and legality of KPMG's recommendations, we adopt the submissions of our colleagues from the Provincial Building and Construction Trades Council of Ontario, the United Steelworkers District 6, and the Ontario Legal Clinics' Workers' Compensation Network.

Imposing tighter deadlines will exacerbate the access to justice crisis affecting injured workers

There is an access to justice crisis impacting injured workers. It has nothing to do with the expediency of the WSIB's appeals process. Instead, the crisis is that most injured workers do not have access to affordable legal representation to help them navigate that system. For non-unionized workers, the Office of the Worker Advisor (OWA) and legal aid clinics have long waiting lists.

Most unions do not have the staff to litigate WSIB appeals. Unionized workers are not eligible for services from the OWA. There are often no wait lists to go on. Even though they are unionized, in practice, they are unrepresented.

Imposing the stricter time limits recommended by KPMG – for example, the one-year limit to submit an Appeals Readiness Form (ARF) – will only add fuel to this fire.

Preparing for and arguing an appeal takes time. It takes time to get the WSIB file, to spot the relevant issues, to identify and track down missing information. It is common for medical offices to take 3-6 months (or longer) to respond to requests for clinical notes and records. It takes time to perform legal research and draft affidavits and submissions.

The time an appeal takes is outside the control of injured workers. For example, the longest wait is usually the time it takes to get new evidence, such as expert reports, which are often necessary for a successful appeal.

Injured workers will not be able to get the evidence they need to submit their ARFs within one year. Doctors and healthcare specialists have busy private practices and already take months or years to provide reports. They aren't going to cut corners to accommodate the WSIB. If they are told they have less time to provide a report, they won't provide them sooner: they just won't provide one at all.

Similarly, worker representatives have professional and ethical obligations to our clients that we can't compromise. For instance, we have an obligation to provide competent representation. If we miss a deadline or show up to a hearing unprepared, we can be sued. Significantly limiting the time we have to prepare a case will have a corresponding reduction on the amount of files we can competently carry. Our licenses and professional reputations are at risk.

KPMG's recommendations may be well-intentioned, but they are based on a misunderstanding of the practical realities of litigating WSIB appeals, which are time-consuming, document-intensive and complex. Any time limit to submit an ARF is an unnecessary burden to introduce.

The problem is initial decision-making, not the appeals process

KPMG's recommendations are a solution looking for a problem. For the most part, the WSIB's appeals process runs smoothly. It is an effective and accessible dispute resolution process that works for both workers and employers.

BUILDING TRADES WORKERS' SERVICES

The real problem is the quality of decision-making by Eligibility Adjudicators and Case Managers. They simply lack the training, knowledge and experience to make proper, informed decisions.

It has become the default to make surface-level decisions and hand workers off to the Appeals Services Division rather than engage in a robust investigation and review. This has eroded the inquiry-based system that is the foundation of workers' compensation in Ontario.

The emphasis should be on the initial decision-making process and avoiding unnecessary appeals. Giving the Eligibility Adjudicators and Case Managers the tools they need to make sound decisions will have a cascading effect throughout the entire appeals system. It will achieve the goals of the workers, employers, the WSIB, and even KPMG, too.

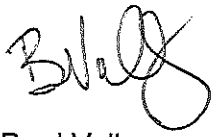
From the perspective of worker representatives, KPMG's recommendations are impractical and inconsistent with how the WSIB's appeals process actually works. They ignore the limited and stretched resources we are all working with and will limit our ability to meaningfully advocate for injured workers.

I urge the WSIB to decline to implement their time limit recommendations.

Sincerely,

Building Trades Workers' Services

Per:



Brad Valley

From: Ken Stuebing
Sent on: Tuesday, July 18, 2023 7:45:09 PM
To: appealsfeedback
Subject: WSIB consultation on the proposed changes to the WSIB Appeals process

---

Hello,

I am a lawyer who has represented injured workers in Ontario in their appeals before the WSIB and WSIAT for over 20 years.

I have grave concerns about the proposed changes to the Appeal system and in particular to the time limits currently prescribed by the *WSIA*.

The proposed changes include: adding 3 new time limits for injured workers within a 90 day period; cutting the time limit to object to decisions from 6 months to 1 month, and; cutting the amount of time for injured workers to find a legal representative.

I am aware of a host of voices in the workers' representatives community that have expressed serious concerns about the proposed changes.

The WSIB's appeal processes are already administratively challenging for vulnerable injured workers, many of whom suffer from disabilities and hardships that impact their ability to participate in formal appeal processes.

The proposed, restrictive changes to WSIB's appeal processes threaten to severely limit these vulnerable workers' participatory rights.

Most recently, I have had the opportunity to read and consider the comprehensive submission prepared by Andy LaDouceur and Sylvia Boyce on behalf of the USW District 6.

I agree entirely with USW District 6's detailed and thoughtful presentation. I adopt their positions, summary and conclusions as my own for the purposes of WSIB's stakeholder consultation.

In the interests of fairness and facilitating participatory rights, I respectfully request that WSIB reject the proposed changes to the WSIB Appeals process.

Thank you for your attention to this brief submission. I am available to speak to these points further as needed.

Sincerely,

Ken Stuebing
CaleyWray
LAWYERS

CANADIAN MANUFACTURERS & EXPORTERS

MANUFACTURIERS & EXPORTATEURS DU CANADA

Sent Via E-mail: appealsfeedback@wsib.on.ca

July 24, 2023

200 Front Street West
Toronto, Ontario M5V 3J1

Dear Consultation Secretariat:

Re: Dispute resolution and appeals process value-for-money audit consultation

Canadian Manufacturers & Exporters (CME) appreciates the opportunity to provide feedback to the Workplace Safety & Insurance Board's (WSIB) "Dispute Resolution and Appeals Process Value-For-Money Audit Consultation".

As a member of the Ontario Business Coalition CME supports its position, which has been submitted in response to this consultation, and provides the following additional comments.

Recommendation 1.1: The WSIB should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals.

CME supports the use of mediation in appropriate cases to resolve issues as early as possible in the process. In the interest of ensuring the principles of Natural Justice are served, it is preferable to have a more timely and efficient resolution of the issue(s), which can be one of the benefits of mediation.

CME supports the use of mediation for those cases where there is a clear opportunity for the parties to compromise. For example, certain return to work issues would be well suited to mediation if the parties are willing to actively engage in the process. Additionally, circumstances where both parties have issues in dispute may also be well suited to mediation if there is the potential that each party may agree to drop their objection (or objections) if the other party does the same.

CME agrees that to be eligible for mediation-arbitration both parties, or at least the appellant, must agree to the process and sign a mediation-arbitration agreement as outlined in the WSIA (**sec 122(3)**). This agreement should include the terms and conditions of the process, including the scope of the mediator's authority and the specific steps that will be taken within specified timelines if the parties are unable to reach an agreement. This is a critical piece for ensuring that all parties understand the rules of engagement.

Another suggestion the WSIB may wish to consider is offering a case conference prior to the hearing. This may be an opportunity to make the appeals process more efficient in situations where mediation is not appropriate for the issue(s) in dispute or where the parties do not wish to participate in mediation.

If mediation does not resolve the issue(s), CME supports that the WSIB decide whether an oral hearing or a hearing in writing should be used based on the type of issue(s); in other words, whichever hearing method (written on oral) would normally be used for that type of issue should generally be the guiding factor to determine the appropriate hearing method if the mediation is not successful.

Recommendation 1.1: The WSIB should adopt set timeframes for the reconsideration process.

With respect to the timeframe for mediation, CME believes that 45 calendar days from the time that both parties receive access to the file would be appropriate. Both parties to an appeal will need to have obtained access to the file and had an opportunity to review the file to participate in mediation, and sometimes there are delays in parties receiving access. Also, given that some files can be large and complex with multiple issues, it is suggested that 45 days from the time that both parties receive access would be a more reasonable timeframe than 30 days to give parties a bit more time to obtain representation if they wish to do so and give those representatives sufficient time to review the file so that both parties can meaningfully participate in the process.

CME strongly believes that if the WSIB is using alternative dispute resolution to resolve disputes, this should be done by a specialized and dedicated team that has received significant training in alternative dispute resolution. This option is preferred over that of training all decision makers in alternative dispute resolution in that it lets a select group of decision makers focus on that approach only rather than requiring all decision-makers, who already have many competing decision-making obligations to address, deal with yet another specialized aspect of decision-making.

Recommendation 1.1: The alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

CME supports the recommendation that the alternative dispute resolution and appeals processes should only start once the objecting party has clearly documented the reasons for their objection (why the decision is incorrect or should be changed) and what outcome they are seeking. We would support the Board consider providing a resource, or point of contact, for parties who have questions about how to fill out the forms correctly and answer any questions about the process.

Recommendation 1.2: The WSIB should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

CME supports the implementation of a one-year time limit after the initial decision date for appeal readiness forms to be submitted**.**

CME would also propose that if the WSIB implements a new one-year time limit from the date of the decision to submit an appeals readiness form (ARF), appeals that were filed prior to the introduction of this new time limit should have one year from the date that the time limit is introduced to submit an ARF.

In addition, CME suggests that this time limit to submit an ARF should be extended by the WSIB in appropriate cases. Parties should be given an opportunity to indicate that they are not ready to proceed, the reason(s) why they are not ready to proceed, and how much additional time they will need to be ready. For example, in addition to the current criteria considered by the WSIB for time extensions, we suggest that the appellant may need more than 1 year from the decision date to be ready to proceed with their appeal if:

- there was a delay in receiving the WSIB decision that is being objected to;
- there was a delay in receiving access to the file;
- there is a reasonable delay in obtaining medical information that is relevant to the appeal;
- the parties are awaiting another decision from the WSIB's operating area regarding the same claim, and it would be beneficial to have both issues heard together on appeal so the claim can be considered more holistically; or
- a party is pursuing issues related to the same claim in another legal proceeding (e.g., at the Human Rights Tribunal of Ontario).

CME believes that a January 2024 implementation date is too soon. We suggest the start date should be at least 6 months from the day on which the WSIB communicates this change to workers, employers, and the broader stakeholder community. An appropriate start date would be one that would give sufficient opportunity for the Board to notify parties of this change in process and give parties sufficient time to obtain the information they will need and retain legal representation if they wish; legal representatives will also need sufficient time to prepare their cases.

We are wondering how the Board intends to notify parties who filed an Intent to Object Form or Objection Form (ITO) in the past but never submitted an ARF that there is a new time limit that will apply? Many appellants would have received advice from representatives in the past that there was no time limit to proceed.

In addition, we would suggest that if the appellant filed their ITO when there was no time limit to submit an ARF, and the appellant did not have notice that this new time limit was being introduced, this should be a relevant factor weighing in favour of extending the time limit to file an ARF in cases where this new time limit was not met.

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

CME supports the establishment of criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility. In addition to situations where accessibility or technological challenges may support the need for an in-person oral hearing, in cases where both parties agree that the oral hearing should be held in person (or in the case of a single-party appeal, if the appellant requests it) CME believes the WSIB should strongly consider providing an in-person hearing when that is the wish of the affected parties.

Recommendation 3.1: The WSIB should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

CME believes that if there are multiple issues in an appeal and the return-to-work issue(s) is/are being expedited, that any other issue(s) that are ready to proceed (i.e., an ARF has been filed for the other issue(s)) should be included in the expedited process as this would likely be more efficient and effective for both the WSIB and the parties.

Recommendation 4.2: The WSIB should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

CME supports the WSIB's proposed approach of excluding decisions based on standardized calculations from its internal appeals process and having these decisions appealed directly to the WSIAT.

CME supports excluding a decision (or decisions) from the WSIB's internal appeals process where both parties (or the appellant in a single-party appeal) wish to have the operating-area decision treated as the final decision of the WSIB so they may pursue an appeal at the WSIAT more quickly.

Please do not hesitate to contact us should you require clarification of any points we have raised.

Regards,

Maria Marchese

Maria Marchese
Director, Workplace Safety & Compensation Policy
CME-Ontario

Canadian Vehicle
Manufacturers' Association
Association canadienne
des constructeurs de véhicules

116 Albert Street
Suite 300
Ottawa, ON K1P 5G3

Tel: 416-364-9333
info@cvma.ca
www.cvma.ca

July 21, 2023

Senior Director, Appeals Services Division
Workplace Safety Insurance Board
200 Front Street West
Toronto, Ontario M5V 3J1

Subject: Dispute resolution and appeals process value-for-money audit consultation – CVMA feedback

Dear Mr. Veltri:

The Canadian Vehicle Manufacturers' Association (CVMA) representing Ford Motor Company of Canada, Limited, General Motors of Canada Company, and Stellantis (FCA Canada Inc.) appreciates the opportunity to provide feedback on WSIB's dispute resolution and appeals process value-for-money audit consultation.

We recognize that WSIB will be implementing updates to its appeals and dispute resolution process which includes recommendations from a recent Value-For-Money (VFM) audit. Our comments on the 6 areas identified by WSIB follow.

Recommendation 1.1: We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals. Our alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy. We should adopt set timeframes for the reconsideration process.

We recognize the potential benefits of voluntary alternative dispute resolution through a mediator or arbitrator in cases such as Return-to-Work or cooperation issues. This process should be voluntary and promoted as a way to potentially expedite decision making. If a resolution is not reached through this process the appeal should continue to proceed to an oral or written hearing as usual, but on a priority basis as the appeal should be considered already in process.

As noted, clear timeframes and timelines should be established to ensure this process does not simply become a delay in the overall process. We also suggest that to ensure an efficient and effective process that there should be dedicated contacts to facilitate each dispute resolution.

We note that while an alternative process may be helpful, it remains important to ensure the original decision is made on concrete evidence and with sufficient explanation, such as the defining the criteria for the lost time/health benefits and reason for the decision, towards reducing the number of appeals.

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

We strongly support the recommendation to limit inactive appeals and to apply a firm one-year time limit from the date of the decision being appealed. Implementing this January 1, 2024 is appropriate and we

note that there may need to be transition provisions for appeals initiated prior to January 1, 2024. This should include correspondence to the objecting and participating parties providing a specific date when the appeal needs to be actioned. For instance, if ARF is not received by a certain date, perhaps a 3-month transition, no further action will be taken and the appeal will be considered "withdrawn."

In general, if an extension is required, it should follow the Appeals Practice and Procedure document. We do note that there are some circumstances, as outlined by the Office of the Employer Advisor, for which it would be appropriate to consider extensions such as:

- if there was a delay in the party (or parties) receiving the WSIB decision that is being objected to;
- if there is a delay in a party receiving access to the file;
- if there is a reasonable delay in obtaining medical information that is relevant to the appeal;
- if the parties are awaiting another decision from the WSIB's operating area regarding the same claim, and it would be beneficial to have both issues heard together on appeal so the claim can be considered more holistically; or
  if a party is pursuing issues related to the same claim in another legal proceeding (e.g., at the Human Rights Tribunal of Ontario).

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

The criteria need to be clearly communicated and transparent.

Some other considerations for determining in-person or online hearings could include the type of claim or presence of physical injuries where exact details need to be heard in person.

Recommendation 3.1: We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

Prioritizing RTW is positive. We note that if there is more than one area of injury, focus should be first on the accepted area of the claim while identifying each potential barrier and identifying potential solutions for the series of events. If stress is part of the claim, we suggest that focus should first be on the objective matters followed by the subjective matters.

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.

We strongly support this recommendation and the 30-day time period should be enforced at all levels and for all types of appeals. We note that it often takes time to gather information to implement the ARO decision and it will be important to ensure that the case manager communicate clearly and regularly with all parties involved, especially for LTI adjudication or recalculations.

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

We note when considering standardized calculations, WSIB needs to consider when the injured worker is assessed as the level of impairment may improve or worsen over time. There may be some standardized calculations that could be appropriately covered under the dispute resolution and appeals process.

We trust that our comments will be considered and we look forward to understanding how they will be addressed by the WSIB. Should you wish to discuss our input, please do not hesitate to contact me directly at 416-560-0167.

Yours sincerely,

Karen Hou
Director, Vehicle and Workplace Safety

cc: appealsfeedback@wsib.on.ca

Carpenters' Regional Council

United Brotherhood of Carpenters & Joiners of America

222 Rowntree Dairy Road, Woodbridge, ON L4L 9T2

t: 905 652-4140 **f:** 289 719-0811

SUBMISSION TO THE WSIB'S DISPUTE RESOLUTION AND APPEALS PROCESS VALUE-FOR-MONEY AUDIT CONSULTATION

Introduction

These submissions have been prepared by Michael Farago and Sally Chiappetta-Scapin who are Workers' Compensation Representatives with the Carpenters' Regional Council.

The Carpenters' Regional Council has 16 local affiliates that include over 30,000 members across the province. The members we represent include carpenters, drywallers, industrial carpentry workers, scaffolders, siding installers, and resilient floor layers, as well as some personal support workers and dietary aides employed in long-term care facilities.

Michael and Sally each have 18 years of experience representing our union members in claims and appeals before the Workplace Safety & Insurance Board (WSIB) and the Workplace Safety and Insurance Appeals Tribunal (WSIAT). We deal with approximately 100 to 120 new claims each year.

Michael has a further 9 years of experience at WSIAT, including 2 years as a Vice-Chair and one as a mediator in an early ADR project at the Tribunal.

Sally has prior experience representing injured workers from a variety of different industries, including in non-unionized workplaces.

Alternative Dispute Resolution

The KPMG report suggested mediation in the context of reconsideration of initial decisions (see page 17 of KPMG report). It was noted that "Reconsideration of initial decisions are made based on the ITOs submitted, without engaging in communication with the WPP to discuss and facilitate a mediation process."

The WSIB is suggesting a mediation-arbitration model of alternative dispute resolution for certain appeal scenarios. The WSIB acknowledges that both parties, or at least the appellant, must agree to the process and to sign a mediation-arbitration agreement.

We are concerned that this proposal puts the focus on the workplace parties' resolving their disputes, without acknowledging the need for better communication and more flexibility on the part of decision makers.

Although the WSIB's written decisions encourage parties to contact decision-makers about the conclusions reached, we find that it is very rare that a decision-maker is willing to change a decision. Most of the time, they provide further explanation as to why they have reached a particular conclusion and are not open to considering additional arguments. Occasionally, we have had success in having a decision changed after we discuss our concerns with a WSIB manager or director that the decision does not follow WSIB policy or practice.

In 1997-1998 Michael Farago worked for the Appeals Tribunal's ADR project to mediate workers' compensation appeals. He found that workers were extremely reluctant to give up any possible rights to benefits, as they viewed that they were entitled to benefits under the workers' compensation scheme. There was rarely an incentive for workers to negotiate. Unlike the civil litigation context, often they were not paying for their own representation and they were not at risk of having to pay the opposing party's costs if they lost an appeal.

Initially, it was hoped that many more appeals might be resolved through mediation at the Appeals Tribunal but, through experience, it was determined that only select cases would be suitable for mediation. One of these involves Return-to-Work.

To some extent, mediation currently takes place in Return-to-Work meetings involving workers and employers. There are many issues discussed in planning a successful Return-to-Work, including job duties, start time, location of work and arranging outside medical appointments.

It is important that any new model of alternative dispute resolution not impose a barrier to accessing the appeals system. If a party wishes to proceed to an appeal, they should be allowed to do so.

Changes in time limits

We have some general comments with respect to any possible changes in time limits.

The entire dispute resolution and appeals system provides a very important legal protection to injured workers as well as to employers. The appeals system helps to ensure that decisions are made fairly and in accordance with law and policy.

Any changes to time limits in the appeals system should not be based solely on administrative expediency, but must also take into account principles of natural justice.

The imposition of time limits in the *Workplace Safety & Insurance Act, 1997* resulted in the creation of a significant additional hurdle for injured workers. Those who miss a time limit now have to go through the burdensome process of requesting a time limit extension. In some cases, workers who may otherwise be deserving of compensation, are left without recourse and this can have a tremendous impact on their lives.

The workers' compensation system was designed to protect workers who were injured in the course of their employment. This is a vulnerable population who face many challenges in dealing with an injury or illness, including the following:

Physical impairment due to the injury or illness
Psychological impacts
Financial insecurity
Impacts on activities outside of work, including leisure activities
I cts on family life and social life

We strongly object to any changes that in time limits that would further erode injured workers' legal rights to claim compensation for their injuries and illnesses.

Timeframes for the reconsideration process

The consultation document refers to a 30-calendar-day time limit for reconsiderations. This would require parties to submit information in support of their objection within a 30 day period. In our experience, this time limit is completely unrealistic.

Recently we have experienced significant delays even in receiving decision letters from the WSIB. They may be received two weeks after the date of the letter.

In most appeals, we then need time to obtain a copy of the file and to thoroughly review it in order to understand what information the WSIB had before it when making a decision.

It could take several weeks for us to receive a file. The timelines for processing access have not been consistent.

After reviewing the file contents, we then need to decide whether to obtain additional information, including medical records or witness statements. In some cases, injured workers need to undergo further medical examination in order to clarify a diagnosis and this could take weeks or months.

In the past, WSIB Case Managers were much more proactive about gathering medical information. They also had assistance from WSIB investigators who could request information from health care practitioners and others. Now, with all the onus placed on workers and their representatives, more time is required to ensure that cases are ready to be reconsidered. The time required may vary greatly depending on where an injured worker lives and whether they have a family physician.

When completing an Appeal Readiness Form, we do make a point of specifying what we are asking the WSIB to do. In some cases, there would have to be ongoing adjudication of entitlement and it is not always possible to indicate all the benefits to which a worker may be entitled. Again, the requirement to provide reasons in support of an objection to a decision and to provide the proposed remedy should not be imposed as a barrier to an appeal.

We are concerned about the recommendation in the KPMG report that "the WSIB should move to an electronic form submission method which only allows forms with complete data fields to be submitted." [Page 20] Many of our union members are not comfortable using computers and there are many injured workers who do not have the benefit of free legal representation. A requirement to have all Appeal Readiness Forms to be submitted electronically would significantly restrict injured workers' access to the appeals system.

One-year time limit for Appeal Readiness Form to be submitted

The KPMG report suggests shorter timelines for decision-making for the purpose of resolving disputes more expeditiously. Alberta and British Columbia were cited as examples of jurisdictions that have time limits on proceeding with appeals.

Sally represented a union member who also had a claim in Alberta. She contacted the WCB in Alberta to request an extension to the appeal as the 1-year mark was approaching and our office had not yet received Access. Sally's request for an extension of the "request for review" was granted and postponed for 6 months. This Member came to our office with 3 claims in Ontario and 1 in Alberta with interconnected issues. We required updated medical information to determine which claim to pursue. Given our caseload, our office would not be able to work within an imposed deadline.

The KPMG report does not address the issue of how to deal with objections that have been filed since 1998. By imposing a new time limit for submitting an Appeal Readiness Form that could apply to all objections filed in the past twenty-five years, the WSIB would be creating an avalanche of appeals that would be very difficult to manage and that would undermine the goal of efficiency in decision-making that is touted by the KPMG report.

It will be difficult enough for the WSIB and for representatives to adapt to new time limits for filing Appeal Readiness Forms without having to deal with all outstanding appeals since 1998.

For example, we currently object to all Return-to-Work Decisions to protect time limits. We do this because a Return-to-Work training plan could last three years and in that time many issues could arise. However, if we do not object to the plan at the outset, the WSIB will refuse any subsequent attempts to challenge the Return-to-Work Plan.

If the WSIB requires us to pursue an appeal within one year, we will try to keep the appeal going as long as possible at the WSIB and then at the Appeals Tribunal to protect our members' interests. In many such cases, there may be no need to pursue the appeal, but we will not know that until the Return-to-Work Plan is complete.

As employees of the Carpenters' Union, we are looked to by members to protect their legal interests when it comes to WSIB.

We are legal professionals licensed by the Law Society of Ontario. As such, we have duty to protect our clients' interests. If we do not pursue an appeal, we could be considered in violation of our professional obligations.

Below are relevant sections of the Rules of Professional Conduct:

Advocacy

5.1-1 When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

> [1] **Role in Adversarial Proceedings** - In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.
>
> [2] This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.
>
> …
>
> [7] The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent.

Criteria for determining in-person online hearings

The WSIB consultation document asks what factors should be considered in determining whether an oral hearing should be offered in person or online. The preference of the injured worker must be considered. In some cases, injured workers are not comfortable with the computer technology required for a videoconference hearing and they would much prefer to appear in person before a decision-maker.

Prioritizing Return-to-Work decisions

The WSIB consultation suggests that return-to-work issues should be expedited through the appeals process independently, regardless of whether they are coupled with other issues. This approach appears to conflict with the KPMG recommendation that the WSIB use more holistic decision-making.

Part of the KPMG report states:

> In line with leading rehabilitation and return to work practices and timelines, the WSIB should consolidate all issues and matters under dispute, including future considerations which may arise from decisions made, and seek to resolve cases through a holistic approach to decision making for all matters under dispute affecting the individual. (Page 24 of report)

There are other issues that will influence Return-to-Work planning, including whether a Non-Economic Loss assessment has taken place. Adhering to a strict 30 calendar-day time limit will be counterproductive in many cases.

Appeal implementation

Following the release of an Appeals Resolution Officer or Tribunal decision, it is common for an Appeals Implementation Case Manager to send out a letter requesting 10 to 14 items in order to implement the decision. It frequently takes us much longer than 30 days to gather all this information and submit it to the WSIB. Although it could help to ensure that appeal decisions clearly set out what information is required, in many cases the WSIB will have to wait longer than 30 days for the additional information that they require.

Excluding decisions based on standardized calculations

The WSIB consultation document asks whether there are other decision types that should be excluded from the internal appeals process. There is also a question as to whether some decisions should be excluded from the internal appeals process so that parties may pursue the holistic resolution of issues at the WSIAT.

Access to the internal appeals process should be preserved for injured workers who wish to avail themselves of this process. However, in some cases where workers would prefer to receive a final decision of the WSIB in order to pursue an appeal at WSIAT, it would be appropriate for the WSIB to render a final decision without the need to go through an appeal.

Conclusions

Through our years of experience, we have seen the WSIB experiment with a number of changes. Some of these were originally thought to improve processes, but they turned out to be unsuccessful.

For example, Vocational Rehabilitation Specialists were privatized and then the WSIB brought them in-house after a few years as this assured better control of the program and consistency of service.

The WSIB also attempted to reduce Non-Economic Loss awards by taking into account evidence of degenerative changes. However, these reductions were made even in the absence of an impairment and the WSIB had to reverse its position after facing legal action.

The KPMG report begins, “Our audit has identified a number of key opportunities and recommendations to improve the economy, efficiency and effectiveness of the dispute resolution and appeals process going forward.” (page 6)

The WSIB consultation selects a few of the KPMG recommendations but does not take sufficient account of how these changes will impact the overall efficiency of the appeals system.

For example, the KPMG report suggests better communication with the parties as a way of resolving issues quickly. The mediation-arbitration model proposed by the WSIB seems to put more of the onus on the workplace parties, without acknowledging the importance of WSIB staff reviewing all the evidence to arrive at a fair decision.

Overall, the proposed changes will likely cause further backlogs and frustration for all parties to the appeal process. Further consultation is required with WSIB stakeholders to arrive at changes that will actually facilitate more timely and effective decision-making.

Dear Ontario MPP, Dear WSIB Executive Officers:

Re: Dispute resolution and appeal process value-for-money audit consultation

We are the Chinese Injured Workers Support Group. Our group was formed in February 1999 with the assistance of the Injured Workers' Community Legal Clinic (IWC) and is composed of injured workers who speak Chinese (Cantonese, Mandarin and other Chinese dialects). We support Chinese injured workers in Ontario in sharing information about workers' compensation issues, fighting for the rights of injured workers in the workplace, and engaging in law reform activities to protect and improve the rights of injured workers. Recently, we learned about KPMG's report from ONIWG (Ontario Network of Injured Workers' Organizations), and we, the Chinese Injured Workers' Support Group (CIWSG), would like to comment on the KPMG's assessment report: our native language is not English, so we need more time to understand the WSIB's decisions.

1. It is not appropriate to reduce the time for an injured worker to appeal because an injured worker needs to prepare the necessary documentation (e.g., doctor's report, etc.) to file an appeal. Due to the different nature of the injuries and the time needed to diagnose them, the injured worker cannot be deprived of their legal rights and interests by compressing the appeal time limit to one month.

2. We are immigrants with limited knowledge of the Canadian legal system, so we need more time to seek legal advice.

3. There should not be a time limit for injured workers to appeal and seek justice.

We call for:

1. the elimination of time limits.

2. the decision on how to proceed with an appeal (i.e., oral hearing, written submission) should be made by the injured worker, not the WSIB.

3. the WSIB should consider a doctor's opinion in its decision-making process.

4. injured workers are not criminals. We deserve to be treated with the dignity and respect we deserve (we need equity and justice).

Additional requirements:

- Treat injured workers with respect, give prompt medical treatment, and value the lives of workers; provide adequate recovery time based on the injured worker's condition/needs.
- Work to ensure a harmonious work environment and a democratic and prosperous social atmosphere in Canada.
- Strengthen legislation to protect the legal rights and interests of injured workers.

Chinese Injured Workers Support Group:

Representative: Zheng Changjian and each one signed.

Signed: Yigong Pang

Community Advocacy & Legal Centre

Bancroft Belleville Madoc Napanee Picton Trenton

July 10, 2023

Grant Walsh, Chair
Workplace Safety and Insurance Board
200 Front Street West
Toronto, Ontario
M5V 3J1

By email: Corporate_SecretarysOffice@wsib.on.ca

Dear Grant Walsh:-

Re: Dispute resolution and appeals process value-for-money audit consultation

We are a community legal clinic that provides legal services to low-income and vulnerable members of our community, including injured workers with WSIB claims.

We have serious concerns about the findings and recommendations of the value-for-money audit conducted by KPMG (final report dated November 30, 2022) and the proposed changes in the WSIB appeal process. In particular, we are concerned about the proposals to drastically reduce the time for workers to file objections and appeals and to submit medical or other evidence.

In our experience, injured workers often face difficulties understanding and navigating the WSIB claims and appeals process, as well as barriers to obtaining medical evidence such as specialist assessments and reports. Tighter deadlines will only create additional obstacles for workers in the WSIB claims and appeals process. Changes to administrative procedures cannot come at the expense of the fair and just adjudication of workers' claims.

The proposed changes, if implemented, would have a sweeping impact on the WSIB appeal process and should be the subject of a robust public consultation process. However the consultation period is very short, announced on June 9 and ending on July 21, 2023; the consultation is by written submission only and will be available on the website only ***after*** the consultation is completed.

We are concerned that those most affected by the proposed changes, i.e. injured workers, do not know about the audit, the proposed changes or how it will affect them and/or will not be able to participate meaningfully in a consultation that is being conducted online by written submissions only.

We are writing to seek the following:-

1. **Time**: Extend the public consultation period by at least 6 months
2. **Public** meetings: Hold in-person public meetings across the province with workers
3. **Notice**: Notify all Injured Workers of the proposed changes and consultation opportunities

In view of the very short timeline for public consultation, we request your response well before the deadline of July 21, 2023. In particular, please confirm in writing whether the public consultation period will be extended by no later than **July 14, 2023**.

Yours truly,

Acting Director

Community Advocacy & Legal Centre

Cc:

- WSIB Appeal Process Consultation (by email: appealsfeedback@wsib.on.ca)
- Hon. Monte McNaughton, Minister of Labour, Immigration, Training and Skills Development (by email: monte.mcnaughton@pc.ola.org)
- Ryan Williams, MP – Bay of Quinte (by email: ryan.williams@parl.gc.ca)
- Shelby Kramp-Neuman, MP - Hastings-Lennox & Addington (by email: shelby.kramp-neuman@parl.gc.ca)
- Todd Smith, MPP – Bay of Quinte (by email: Todd.Smithco@pc.ola.org)
- Ric Bresee, MPP – Hastings-Lennox & Addington (by email: Ric.bresee@pc.ola.org)

Construction Employers Coalition
(for WSIB and Health & Safety and Prevention)

Via email: appealsfeedback@wsib.on.ca

July 21, 2023

Frank Veltri, Senior Director, Appeals
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

&

Tiffany Turnbull, Vice President Policy and Consultation Services
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Mr. Veltri and Ms. Turnbull:

Re: Dispute resolution and appeals process
value-for-money audit consultation Chief Actuary

Please accept this correspondence as our response to the Dispute resolution and appeals process value-for-money audit consultation.

On March 20, 2023 we wrote to the Board with respect to the KPMG WSIB Value for Money Audit (VFMA) and the Board's announcement that it would be implementing changes based on the VFMA recommendations (see **Appendix A**). Among other things, we recommended that the Board engage in an in-depth consultation. We are therefore pleased that the Board initiated a consultation process commencing June 6, 2023 and concluding July 21, 2023.

With that noted, we have since become aware of serious concerns expressed, particularly within the injured worker advocacy community, that a broader consultation process would be preferrable. These concerns were canvassed in the July 20, 2023 submission of Mr. L.A. Liversidge, LL.B., with which we are in agreement. In particular, we support Mr. Liversidge's suggestion **at p. 9, para. E-3**:

> Once the deadline has expired (July 21, 2023), the WSIB should secure the services of an independent and acceptable (to stakeholders) third-party reviewer on par with a Jim Thomas or Harry Arthurs, to review the submissions and offer process recommendations to the Board.

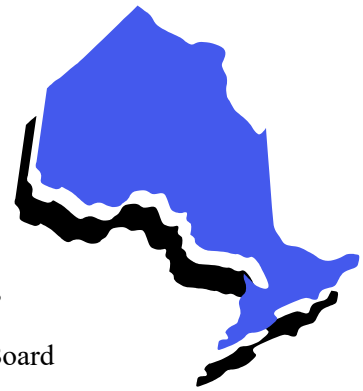
We believe that acceptance of this suggestion will greatly assist in reinforcing stakeholder confidence in this important exercise.

Yours truly,

Andrew Pariser, CEC Chair

Appendix A

Construction Employers Coalition
(for WSIB and Health & Safety and Prevention)



March 20, 2023

Tiffany Turnbull, Vice President Policy and Consultation Services (A)
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

and

Frank Veltri, Executive Director, Appeals
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Turnbull & Mr. Veltri:

Re: November 30, 2022, Dispute resolution, appeals and appeals implementation processes value-for-money audit

We have reviewed the KPMG WSIB Value for Money Audit (VFMA) of November 30, 2022, publicly released on the Board's website on February 21, 2023. We have noticed that in your web announcement (at **Appendix A**) the Board advises:

> We are eager to use the information learned as part of this audit to reassess our current operational design, including practices and policies. We always want to ensure fairness is upheld and dispute resolution and appeals are carried out in an efficient and effective manner and in accordance with the principles of natural justice.
>
> We will act on recommendations in the audit to strengthen our dispute resolution, appeals and appeals implementation processes.

While it seems that the Board will be initiating change as a result of the VFMA, the specific changes are quite unclear. We note that no outreach or consultation approach has been outlined. Prior to implementation, we respectfully suggest that a public consultation is warranted.

As you are aware, in 2012 when the Board was engaged in a similar process, the WSIB released a comprehensive document, "***Consultation Paper: Modernization of the WSIB's Appeals Program***." This document set out many specific recommendations. It was only after considering the viewpoints of the Board's stakeholder public that changes were announced and implemented.

The impact of these changes were later summarized in the May 2014 document "***Modernizing the Workplace Safety and Insurance Board's Appeals Program***." This report described the changes with the Board commenting that they were already achieving, by May 2014, satisfactory results.

Since then, as reported in the Board's annual reports and as noted most recently in the 2021 WSIB Annual Report (at page 4), the Board lauded the continued success and progress with its appeal program.

As we compare the essence of the KPMG suggestions set out in the November 2022 VFMA to the 2012 "Modernization" improvements (excerpted at **Appendix B)**, the recommendations appear to be thematically similar. We are most struck however by the conclusion reached by KPMG (at page 5 of the November 30, 2022 VFMA):

> Through our review of the WSIB's Dispute Resolution and Appeals Process, we have concluded that the process currently demonstrates "low" value for money.

The conclusion of "low value for money" is perplexing. We observe that in the 2008 Appeals VFMA, released March 10, 2009 and also facilitated by KPMG, that it was found at that time (page 7) that the WSIB Appeals program is "*is delivering value for money for WSIB*."

In 2010 the appeals program was delivering value for money. Enhancements were developed and implemented in 2012. These enhancements were lauded by the Board right up to the most recent report of 2022. Now, the same auditing firm has concluded there is now only "low" value for money. In our respectful view, what has not been made clear is the primary contributing reasons for this change in opinion.

Respectfully, before change is initiated, we suggest that is necessary the Board clearly outline the reasons for a change in opinion of KPMG, particularity in light of the enhancements introduced after the 2008 VFMA.

More specifically we would strongly recommend the Board engage in an in-depth consultation effort consistent with past practices before any specific adjustments are introduced. We raise this point as the recent past has shown that unilateral service delivery design changes have resulted in subsequent stakeholder push-back. As an example, in 2018 the Board did not consult before implementing a new **WSIB Operating Model**. This resulted in significant stakeholder blowback.

Please reach out to me directly at pariser@rescon.com.

Your truly,

Andrew Pariser, CEC Chair

Appendix A

wsib ONTARIO

Menu

Dispute resolution, appeals and appeals implementation processes value-for-money audit

Each year, we are required under the Workplace Safety and Insurance Act to conduct a value-for-money audit. The latest audit focused on the dispute resolution, appeals and appeals implementation processes and was conducted by KPMG.

Findings

The audit Dispute resolution and appeals process value-for-money audit (PDF) identified many strengths in our dispute resolution and appeals processes including strong performance metrics, consistent service and current initiatives recommended for continued expansion.

We have an opportunity to improve on these parts of our program and to better align dispute resolution with leading return-to-work and recovery principles so that we can better meet the needs of the people we are here to help.

The audit included a jurisdictional scan and research on leading return-to-work and recovery practices in Canada and internationally. The report outlined recommendations in three key areas: the dispute resolution process, appeals process, and appeals implementation processes, that will, when implemented, deliver added value. Some of the recommendations for implementation include adopting alternative dispute resolution methodology, enforcing timelines, creating stronger links to policy, training and quality assurance, and to better align with leading return-to-work and recovery principles and best practices. You can find the details in the report.

We are eager to use the information learned as part of this audit to reassess our current operational design, including practices and policies. We always want to ensure fairness is upheld and dispute resolution and appeals are carried out in an efficient and effective manner and in accordance with the principles of natural justice.

We will act on recommendations in the audit to strengthen our dispute resolution, appeals and appeals implementation processes.

Appendix B

Workplace Safety and Insurance Board

The New Appeals Program Model

Highlights

The benefits of the modernized appeals program include:

- ✓ A simple and easy-to-complete Intent to Object Form that benchmarks the right to object within six months; invites objecting parties to provide new information that will allow fast-tracking of reconsiderations; and allows for greater coordination and tracking.
- ✓ A more robust reconsideration process by front-line decision makers.
- ✓ Immediate access to file information for objecting parties where reconsideration of decisions is not warranted,
- ✓ Advancement of cases to the Appeals Services Division **only** when the workplace parties submit a "declaration of appeal readiness" through completion of an enhanced Objection Form.
- ✓ No time limit for workplace parties to come forward with their "declaration of appeal readiness" on the enhanced Objection Form.
- ✓ Oral hearings retained for complex entitlement objections.
- ✓ Improvement of the resolution timelines of appeal-ready cases.

The proposed changes below describe the process from the time of a decision by a front-line decision maker to the completion of a final decision by the WSIB Appeals Services Division. See Appendix 1 for a process map of the proposed appeals program, which references the numbered sections below.

Scope

Employer account objections are currently out-of-scope for the proposed program change. Once the new program model has been implemented, work will begin to develop a consistent approach for these objections.

Friday July 21, 2023

via Email: Natasha Luckhardt nluckhardt@ofl.ca
WSIB appealsfeedback@wsib.on.ca

We are CUPE (Canadian Union of Public Employees). The largest trade union in Canada. We have approximately 715,000 members across the country with over 280,000 in Ontario. We have dedicated staff focused on workers compensation, representing our members through the appeals process at WSIB and WSIAT. This is our response to the KPMG Value for Money Audit (VFMA) and the recommendations contained therein.

Recommendation 1.1: We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals.

When establishing an internal Alternative Dispute Resolution (ADR) process, the Workplace Safety and Insurance Board (WSIB) should consider several key principles to guide their approach. To help ensure a fair and effective system, the ADR model should consider:

1. Accessibility: This process should be accessible to all parties involved. The WSIB must make clear the nature of the process, what are the eligibility criteria, and how parties can participate. The WSIB must place measures that ensure individuals with disabilities or language barriers can fully participate.
2. Impartiality and Neutrality: We have concern over mediators' ability to be impartial and neutral during this process since they are WSIB employees. Mediators must have sufficient training and expertise to act as unbiased and neutral actors, provide a forum for parties to present their case, and ensure that the resolution is fair and objective.
3. Voluntary Participation: Participation in the ADR process must be voluntary for the injured worker and they should retain the right to a hearing should they wish to have a hearing at any point during the ADR process.
4. Procedural Fairness: The ADR process should adhere to principles of procedural fairness, This includes providing parties with adequate notice, an opportunity to present their case, and the right to be heard. It also involves ensuring that parties have access to relevant information and an opportunity to respond to any evidence presented. The injured worker should have the same rights and opportunities as they would if they went to hearing.
5. Compliance with WSIA and any other Applicable Laws and Regulations: The ADR process should operate within the framework of relevant laws and regulations. It should not undermine or bypass legal requirements or deny parties their rights under the law.

These principles can provide a solid foundation for the WSIB to establish an internal ADR process that promotes fairness, efficiency, and positive outcomes.
In terms of timelines or time limits for participation in ADR, our recommendation is that there should not be time limits to access this process. Like other tribunal settings in Ontario, the ADR process should be available to parties any time up until the hearing date. If the intent is efficiency, any barrier that limits when an ADR option is available (such as time limits) why would a lime frame be placed on participation which would only limit the ability to participate.

Recommendation 1.1: Our alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

This recommendation is patently unreasonable and unfair. It interferes with the injured workers right to access to justice. Requiring an injured worker to clearly document all the reasons for their appeal and the desired remedy in writing before being allowed to proceed with their appeal is unfair for several reasons:

1. Information and Resource Disparity: Injured workers may not have access to the necessary legal knowledge or resources to effectively articulate their appeal in writing, nor would they be aware of the possible remedies available and suitable to their circumstances. This requirement places an additional burden on workers, especially those who may not have the means to seek legal assistance or lack familiarity with the appeals process.
2. Communication Barriers: Some injured workers may face challenges in expressing themselves in writing due to language barriers, literacy issues, or disabilities. Requiring written documentation could impede their ability to effectively communicate their concerns and needs, potentially leading to misunderstandings or a failure to adequately present their case.
3. Procedural Complexity: The appeals process can be complex and intimidating for injured workers who are already dealing with the physical, emotional, and financial impact of their injuries. Requiring detailed written documentation of all reasons and remedies at the initial stage may place an unfair burden on workers who are still gathering evidence or exploring the full extent of their injuries and the associated consequences.
4. Limited Time and Resources: Injured workers may face time constraints due to the appeals process's strict deadlines. Requiring comprehensive written documentation upfront will not allow sufficient time for workers to gather all relevant information and build a robust case. This time pressure can undermine their ability to present a thorough and compelling appeal.
5. Power Imbalance: Injured workers often face a power imbalance when dealing with their employers and WSIB. Requiring extensive written documentation may further exacerbate this power imbalance by placing a heavier burden on workers compared to employers or insurance companies.

It is important to ensure that the appeals process is accessible, transparent, and equitable. This recommendation by KPMG and endorsed by WSIB, puts excess stress and work on the injured worker unnecessarily which could cause them to abandon their appeal out of frustration. Whether or not it is the intent of this recommendation, implementing this change will serve to repress claims and deny injured workers their rightful entitlements.

Another negative consequence of this recommendation is the amount of extra time it will take worker representatives to prepare for the case, essentially doing the work twice, which will add further representation costs for the injured worker.

Recommendation 1.1: We should adopt set timeframes for the reconsideration process

A 30-day time limit for appeals is unfair and puts the injured worker at a disadvantage. Some concerns are:

1. Accessibility and Procedural Barriers: A short time limit, such as 30 days, can create accessibility barriers for individuals who may require additional time to gather relevant information, access medical, find and consult legal representation, or understand the complex appeal process. It does not provide sufficient time for individuals who have limited resources or face language barriers to navigate the process effectively.
2. Lack of Adequate Notice: Individuals may not receive timely notice or may not be aware of their rights and the deadline for filing an appeal. Individuals do not receive a negative decision on the date it is issued, meaning that they have even fewer days to object. This lack of notice can prevent individuals from exercising their right to appeal within the given time limit and impacts their right to access to justice.
3. Impact on Vulnerable Individuals: A rigid time limit disproportionately affects vulnerable individuals, such as those with disabilities or individuals dealing with physical or mental health issues. These individuals may face challenges in understanding and complying with the time limit due to their circumstances, most of which are focusing on healing from a workplace injury or returning to work.
4. Administrative Errors: In some cases, administrative errors or delays within the WSIB system may result in individuals receiving late or inaccurate information about their right to appeal. Injured workers should not be penalized due to errors or delays outside of their control.
5. Access to Justice: A short time limit can restrict access to justice by limiting individuals' ability to exercise their right to appeal and present their case effectively. It may undermine the principles of fairness and due process by imposing strict restrictions that hinder an individual's ability to seek a fair resolution. It serves to repress claims through procedural rules, rather than assure the correct decision is made on the substantive issues.
6. Medical: Accessing the necessary medical documentation to show that the criteria needed for many claims means injured workers often need to see specialists or other health care professionals and require certain diagnoses to be eligible for benefits. A worker will not know whether to object and the reasons for objecting until these specialists and health care professionals are seen. Accessing these appointments takes Significantly more time than 30 days.

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

This recommendation is counter intuitive and serves to prejudice the rights of injured workers. Once an Intent to Object form has been submitted on time, there is no need for additional time limits, especially ones that would retract the workers right to continue with their appeal. This is a further procedural barrier that undermines injured workers rights to natural justice.

It is our position that this recommendation be abandoned. In the alternative, WSIB could consider placing the file in “inactive” status after a period of 3 years. When the worker is prepared to continue on with their appeal, they can reactivate it by submitting the appeal readiness form.

There is no reason to have more details on the forms such as proposed resolutions. All decision makers should be trained and educated on the resolutions available to injured workers and capable of dealing with this through the appeal process.

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

Having the option for injured workers to have an oral hearing (in person or virtually) versus a hearing in writing is important for several reasons:

1. Direct Communication: An oral hearing allows injured workers to directly communicate their symptoms, experiences, and perspectives to decision-makers. It provides an opportunity for workers to express themselves in their own words, conveying the emotional and personal impact of their injuries more effectively than written documentation alone.
2. Clarification and Follow-up Questions: During an oral hearing, decision-makers have the opportunity to ask clarifying questions and seek further information from the injured worker. This helps ensure a comprehensive understanding of the worker's situation, the nature of their injuries, and the impact on their life and work. It enables decision-makers to make a more informed and fair judgment.
3. Procedural Fairness: Oral hearings contribute to the principle of procedural fairness by providing an open and transparent forum for all parties involved. Injured workers have the chance to present their case, respond to questions or concerns raised by the decision-maker, and address any misunderstandings or discrepancies. This helps ensure that decisions are based on a complete and accurate understanding of the worker's circumstances.
4. Equalizing Power Imbalances: Injured workers often face power imbalances when dealing with employers, insurance companies, or government agencies. Oral hearings can help level the playing field by giving workers a voice. It empowers workers to actively participate in the decision-making process and helps ensure a fairer and more balanced resolution.
5. Written Submissions Require Expertise: while seasoned representatives can articulate the issues and the relevant policies that impact a claim, unrepresented workers may not have the experience or skill set to identify and articulate the issues and terminology that effective written submission require. An oral hearing places less emphasis on the “special language” of workers compensation law and focuses on the experiences of workers. Denying unrepresented workers access to an oral hearing exacerbates the power imbalances noted before, privileging well-resourced employers and their expert representatives.
6. Human Connection and Empathy: Oral hearings provide a human connection between decision-makers and injured workers. This personal interaction can foster empathy and understanding, enabling decision-makers to better appreciate the challenges and hardships faced by the worker. It humanizes the process and can contribute to more compassionate and just outcomes.
7. Building Trust and Confidence: Allowing injured workers to have an oral hearing demonstrates respect for their rights and promotes trust in the WSIB. It shows that their voices matter and that their concerns will be heard and considered. This, in turn, enhances confidence in the fairness and integrity of the decision-making process.

While oral hearings may not be necessary or appropriate in every case, providing the option can significantly enhance the fairness, transparency, and effectiveness of the appeals process for injured workers. It ensures that their experiences and perspectives are fully taken into account, leading to more just and informed decisions.

Oral hearings can be in person or virtually. Each have their own set of pros and cons. Here are some key points to consider for both formats:

In-Person Hearings:

Pros

- Face-to-Face Interaction: In-person hearings allow for direct, face-to-face interaction between all parties involved. This can contribute to a more personal and engaging experience, fostering better communication and understanding.
- Non-Verbal Cues: Being physically present enables participants to observe non-verbal cues such as body language and facial expressions, which can provide additional context and help in assessing credibility or emotions.

Cons:

- Travel and Logistics: In-person hearings may require travel, potentially leading to additional time and cost burdens for participants. This can be especially challenging for individuals who are geographically distant or have limited mobility.
- Scheduling Constraints: Coordinating schedules and finding mutually convenient dates and locations for all parties involved can be a logistical challenge, potentially causing delays in the resolution process.

Online/Virtual Hearings:

Pros:

- Accessibility and Convenience: Virtual hearings eliminate the need for travel, making them more accessible and convenient for participants, particularly those who may face geographical or mobility limitations.
- Cost Savings: Virtual hearings can reduce costs associated with travel, accommodations, and venue rentals, making the process more cost-effective for all parties involved.
- Flexibility: Online hearings provide greater flexibility in scheduling, as participants can join from any location with an internet connection. This can help expedite the resolution process by minimizing scheduling conflicts.

Cons:

- Technical Challenges: Virtual hearings depend on stable internet connections and reliable technology platforms. Technical issues or connectivity problems can disrupt proceedings and impede effective communication.
- Document Sharing and Examination: While digital documents can be shared during virtual hearings, the ability to examine physical evidence or documents may be limited.

It is important to note that the suitability of in-person or virtual hearings may vary depending on the nature of the case, the preferences of the participants, and the availability of appropriate technology and resources. Hybrid models, combining elements of both formats, can also be considered to maximize the advantages of each. Ultimately, the goal is to ensure a fair and effective hearing process that allows for meaningful participation and equitable outcomes.

Recommendation 3.1: We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

We disagree with this recommendation and do not believe this should be a factor for prioritizing and expediting decisions. It undermines efficiency in the appeal process requiring a separate hearing for the return-to-work issues and any other appeals. A decision maker would essentially hear the same or overlapping evidence twice. It would also require the injured worker and/or representative to have to prepare for multiple hearings on the same claim.

This recommendation should be abandoned.

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.

Implementation decisions are often complex and difficult to interpret. To confirm accuracy of loss of earnings payouts, for example, workers will have to find old pay stubs or schedules to make sure that the loss times provided by an employer are accurate. There is no legitimate reason to shorten the time a worker has to confirm the findings of an implementation decision and object to a decision. While finality is important, it is not as important as accuracy. For this reason, we continue to insist that the normal 6 month time limit apply to all implementation decisions.

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

WSIB does not have the legislative authority to exclude certain kinds of decisions from its appeals process. This recommendation appears to be passing the buck to the Tribunal to handle appeals that the WSIB may be able to resolve through its own appeals process. It serves to delay decision making and clog up the Tribunal's own appeal processes. It is an inappropriate and unnecessary recommendation and we ask that the Board reject it.

In solidarity,

WSIB Specialists

CC: N. Sheppard
A. Kerner: jb/COPE491

From: Andrew Bomé
Sent on: Monday, July 17, 2023 3:32:08 PM
To: Corporate Secretary's Office
Subject: WSIB Dispute resolution and appeals process value-for-money audit consultation

---

Hamilton Community Legal Clinic is the largest legal clinic in the legal clinic system and serves the Hamilton area. A significant part of our practice is the representation of injured workers in all aspects of the Workers' Compensation appeal before the Workplace Safety & Insurance Board and the Workplace Safety & Insurance Appeals Tribunal. The four staff at our office that represent injured workers have, collectively, more than 100 years experience representing injured workers. We also engage in systemic advocacy on behalf of injured workers. We primarily do this in our role as general counsel for the Ontario Network of Injured Workers' Groups and with our work with the Hamilton and District Injured Workers' Group.

We have serious concerns about the findings and recommendations of the value-for-money audit and the proposed changes in the WSIB appeal process. In particular, we are concerned about the proposals to drastically reduce the time for workers to file objections and appeals and to submit medical or other evidence.

In our experience, injured workers often face difficulties understanding and navigating the WSIB claims and appeals process, as well as barriers to obtaining medical evidence such as specialist assessments and reports. Tighter deadlines will only create additional obstacles for workers in the WSIB claims and appeals process. Changes to administrative procedures cannot come at the expense of the fair and just adjudication of workers' claims.

The proposed changes, if implemented, would have a sweeping impact on the WSIB appeal process and should be the subject of a robust public consultation process. However the consultation period is very short, announced on June 9 and ending on July 21, 2023; the consultation is by written submission only and will be available on the website only ***after*** the consultation is completed.
We are concerned that those most affected by the proposed changes, i.e. injured workers, do not know about the audit, the proposed changes or how it will affect them and/or will not be able to participate meaningfully in a consultation that is being conducted online by written submissions only.

We are writing to seek the following:

1. **Time**: Extend the public consultation period by at least 6 months
2. **Public** meetings: Hold in-person public meetings across the province with workers
3. **Notice**: Notify all Injured Workers of the proposed changes and consultation opportunities

In view of the very short timeline for public consultation, we request your response well before the deadline of July 21, 2023.

Yours truly

Andrew C. Bomé, J.D., M.B.A.

July 21, 2023

Workplace Safety and Insurance Board
appealsfeedback@wsib.on.ca

Dear Workplace Safety and Insurance Board,

Re: Dispute resolution and appeals process value-for-money audit consultation

In this expedited "consultation", with no efforts to reach workers directly, the Board is contemplating the most significant changes facing injured workers since the introduction of the current dual award system and time limits in 1998.

The catalyst for these far-reaching changes? Surprisingly, recommendations from a team of KPMG auditors, individuals with scant understanding of workers' compensation law and policy or how workers experience the appeals system.

The Board should reject the KPMG report in whole because it is unreliable and uninformed. The consequences of KPMG's uninformed recommendations would fall hardest on precariously employed, migrant and racialized injured workers, who already struggle to challenge decisions that deny them the support they need to recover and return to work.

If the Board and Government adopt the KPMG changes, these workers won't be able to challenge decisions. So they won't get the healthcare they need. They won't return to work. They will be forced into poverty.

The KPMG changes would introduce unintended adverse consequences for the WSIB system. As worker representatives with obligations under the *Law Society Act*, we will have to reduce our services significantly so that we don't miss time limits. And the appeals system will have to handle many appeals that aren't ready to be heard – resulting in huge backlogs and inactive inventories at the Board and at the Workplace Safety and Insurance Appeals Tribunal.

The proposed changes are concerning from a *Charter* perspective. While neutral on their face, their impact will disproportionately target and exclude racialized and precarious injured workers who face barriers to access to justice based on intersecting enumerated and analogous grounds of discrimination.

Workers are panicking about the KMPG changes because appeals are their main path for getting healthcare and other supports they need. In the past 13 years, the Board has transformed itself into an insurance company concerned primarily with keeping employers' premiums low. Workers can't rely on the Board to make the right call, so their appeal rights are critical.

This "consultation" demonstrates a lack of accountability to stakeholders

This "consultation" reveals a distinct lack of accountability to stakeholders. The Board has taken a closed-door approach. The Board didn't directly notify the stakeholders most affected. The consultation is not even linked directly from the WSIB homepage. Furthermore, submissions are limited to written communication via email, with no contact provided for further engagement.

IWA4J & Justicia Injured Workers' Day of Action at WSIB in Toronto, June 1, 2022

Day of Mourning Action at WSIB in Toronto, April 28, 2023

Indeed, on an institutional basis, the Board has abandoned any real public consultation process. Workers now must stand outside the WSIB or wait in its lobby hoping to talk to anyone in charge of the Board's policy decisions, to no avail. See above how the Board turned workers away at the door of the WSIB last June 1st, Injured Workers' Day, and again this year, on April 28, 2023, the Day of Mourning.

This exclusionary approach silences the very voices that the Board most needs to hear. This consultation's design fails to acknowledge that nearly half of Canadians have limited literacy, and many injured workers lack proficiency in English, along with reliable access to computers and the internet.[1] Many injured workers, as persons with disabilities, also need accommodations to participate fully, none of which the Board provides.

"This consultation's design fails to acknowledge that nearly half of Canadians have limited literacy, and many injured workers lack proficiency in English, along with reliable access to computers and the internet"

In its current form, the Board's approach falls well short of meeting benchmarks for meaningful public consultation. The International Association for Public Participation (IAP2) Core Values emphasize actively involving potentially affected parties in the decision-making process, seeking their input in shaping the consultation, and providing them with essential information to engage effectively. [2]

As noted, the Board should reject the KPMG report in whole. But if it believes significant reforms are needed in its appeals processes, it should start with a comprehensive and inclusive public review and consultation, led by an independent adviser in workers' compensation law and policy. This process should encompass in-person or virtual hearings, allowing workers to directly address the decision-makers. Additionally, the

Board must proactively inform all injured workers about the opportunity to contribute their thoughts.

However, even a revamped consultation process isn't sufficient. An alarming oversight emerges in KPMG's report and the Board's response to it—no thought is given to how the most vulnerable workers experience claims and appeals processes. Indeed, the Board takes few efforts to understand how its claims and appeals processes affect the most vulnerable injured workers. A foundation of evidence-based research must underpin any significant reforms to the Board's appeals processes.

Therefore, as part of its independent review, the Board should engage academic researchers to study how vulnerable workers are, or are not, able to access its appeals processes, and how barriers can be removed.

IAVGO is willing to participate in a further, real, consultation that involves workers, and in the research the WSIB needs to understand the impact of the appeals reforms on injured workers. The proposed changes will devastate the most vulnerable injured workers – those who can't find lawyers, can't understand and write English, can't understand legalese, and can't tolerate the pressure of injury along with the need to navigate complex appeal processes. They must have a say.

About IAVGO

The Industrial Accident Victims' Group of Ontario is a community legal aid clinic. IAVGO has been funded for almost 50 years by Legal Aid Ontario.

IAVGO provides direct services to disabled workers injured on the job, and to the families of those who have been killed on the job. IAVGO's clients live throughout the province.

Our clients include some of the most vulnerable workers in Ontario. Every one of our clients, except for survivors of workers who have died, is a person with a disability or multiple disabilities. All are low-income, often living in poverty because of their inability to continue working.

Most of our clients also have at least one of the following characteristics:

- Racialized

- Live in rural and remote areas of the province
- Limited ability to read or write
- Little or no English language skills
- Low levels of education: usually high-school or below
- Mental health conditions including depression, post-traumatic stress disorder, or addiction
- No or limited Canadian immigration or citizenship
- Little or no job security
- Precarious housing or homelessness

For many years, we have worked alongside precarious and migrant workers to help them access compensation following workplace injuries.

In addition to our caseworkers, IAVGO has a satellite clinic, Advocates for Injured Workers. AIW is staffed by law students from the University of Toronto, Faculty of Law. The AIW program allows us to regularly represent many low-income injured workers who would likely otherwise go unrepresented.

Together with AIW, IAVGO represents and advises hundreds of injured workers and their families. We also advise many clients who we do not represent. This advice can range from a 40-minute meeting to opening what we call “merit review” or “self-help” files to

provide injured workers with more hands-on help. For these workers, we ghost-write letters to the Board, gather medical information, evaluate cases for merit, and make sure time limits are met.

IAVGO prioritizes cases and issues relevant to precarious work and marginalized workers, especially migrant workers. We define "Precarious work" as work that is low pay, part-time, irregularly scheduled, temporary, insecure, without benefits, or otherwise non-standard. "Marginalized workers" include workers who are female, single parents, racialized, new immigrants, temporary foreign workers, non-status workers, Indigenous, disabled, older adults, and youth.

IAVGO became involved with the migrant agricultural worker community in November 2005. Travelling to different locations, IAVGO has given educational workshops to migrant agricultural workers regarding workers' compensation, human rights and occupational health and safety. IAVGO has done many outreach trips to rural Ontario alongside Justicia for Migrant Workers. We have also represented or provided other direct legal services for migrant workers who were hurt at work in Ontario, as well as for the surviving family members of those killed at work.

The purposes of the Act must guide the Board's approach to time limits

Like any other Ontario statute, the *Workplace Safety and Insurance Act* is remedial "and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."[3]

The Board's benefits, services, programs and policies must be consistent with the *Act*.[4] Where the Board has discretion to make changes in its policies and practices, it must use that discretion to further the purposes of the *Act*.[5] Indeed, the Board has a legislative obligation to evaluate the consequences of any proposed policy changes to ensure that they are consistent with the purposes of the *Act*.[6] This purpose is to accomplish the following objectives in a "financially responsible and accountable manner":

1. To promote health and safety in workplaces.

2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.

3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.

4. To provide compensation and other benefits to workers and to the survivors of deceased workers.[7]

Although the Board must consider the financial implications of its policy and practice decisions, and the efficiency of the scheme, these considerations matter because they allow the Board to accomplish its statutory purposes. They are not purposes in themselves.[8]

> ***"Although the Board must consider the financial implications of its policy and practice decisions, and the efficiency of the scheme, these considerations … are not purposes in themselves"***

Appeal rights are critical because WSIB makes decisions that ignore evidence

Every day, we see the Board make decisions that ignore medical and other evidence – especially evidence from workers themselves and evidence from workers' own doctors.

The Board's troubling decision-making is well-documented and reflected in the ongoing high allowance rate of worker appeals before the Workplace Safety and Insurance Appeals Tribunal – over 80% in 2022, according to Freedom of Information data collected by the Ontario Network of Injured Workers Groups.

IAVGO published a report, ***No Evidence***, that Ron Ellis, the first Chair of the Workers' Compensation Appeals Tribunal, called a "clarion call for a public inquiry." In Ellis' words:

> The report is a game-changer. It is a game-changer because it proves, on the basis of unimpeachable evidence, that, under its post-2009 management regime, Ontario's Workplace Safety and Insurance Board's adjudicative factual findings are routinely not "evidence-based".
>
> With this report on the table, a public inquiry into the Board's post-2009 conversion of its adjudicative culture to a culture of pro-active denial has become a necessity.
>
> […]
>
> The Tribunal's independence, expertise, and competence, and its reputation for impartial judgments are widely acknowledged. So when, after a full hearing, the Tribunal concludes, for instance, that a Board adjudicator in a particular case has denied a worker's entitlement to benefits on the basis of no evidence, or on the basis of arbitrarily disregarding relevant evidence, that is a decision one can take to the bank. If the Tribunal has found that that happened, then that happened.
>
> NO EVIDENCE reports that, in the appeals the Appeals Tribunal decided and published in 2016, the Tribunal found 629 occasions when, in fact, that, or something like that, happened; 629 instances of Board entitlement decisions that were not evidence-based.
>
> Thus, there is now unchallengeable evidence that the Board's relentless push for cost reductions – its creation of an adjudicative culture of pro-active denial – has at the very least corrupted its fact-finding function on over six hundred occasions.

Before releasing ***No Evidence***, IAVGO met directly with the then-Chief Corporate Services Officer of the WSIB to discuss our findings. The WSIB indicated it was going to start doing regular reviews of Tribunal decisions. As far as we know, the WSIB has not done so.

We have included a copy of ***No Evidence*** for the Board's review.

The Board should decline to ask the Ministry to consider a 30-day time limit because it would undermine the Act's purposes

The Board should decline to ask the Ministry to consider a 30-day time limit for appealing all decisions because it would undermine the Act's purposes to do so. It also should not impose a further 30-day time limit to submit any supplemental information.

The Government and WSIB should not make these changes because they would effectively strip many workers of their appeal rights. As legal clinics, we would struggle to meet 30-day time limits. We regularly don't get letters for 10-15 days after they are dated. This means there would be no wiggle room for us, as legal professionals, to get appeals in on time.

The suggestion that injured workers and survivors, often in the early stages of recovery from devastating workplace injuries or deaths, are able to find legal advice and file an appeal within 30 days is outrageous.

Many of the workers we help will be forced into poverty because they can't appeal unfair decisions in time. They won't be able to get health care for their work injuries. They won't get the help they need to survive, recover and return to work if possible.

Even if workers can figure out how to appeal within 30 days, most will have to do so alone. 30 days isn't enough time to find a representative. Legal representation is crucial in navigating the complex legal processes involved in WSIB claims.

And, shorter time limits adds unnecessary pressure and stress for a worker in the early stages of recovery from devastating injuries. Workplace injuries can have a significant psychological and emotional impact on injured workers, and shorter time limits can exacerbate the stress and anxiety associated with the appeals process, making it harder for vulnerable injured workers to gather their thoughts, make informed decisions, and effectively advocate for their rights.

Even if workers can appeal within 30 days, they can't complete submissions and gather evidence in a total of 60 days. It regularly takes several months or much longer to gather the evidence needed for an appeal. Workers are regularly required to gather their own

medical reports or assessments, and they also need to gather employment documents, information about previous years' income, details about non-work-related conditions, witness statements, information about previous work injuries, and other documents.

The KPMG changes would undermine the purposes of the Act and target the most vulnerable

The auditors pay no attention – don't even mention – the reality facing injured workers who are precarious, don't speak English, are disabled and don't have access to technology.

As a result of their failure to confront these realities, the auditors recommend that the WSIB and Government impose new burdens on workers and new access to justice barriers (the shortest time limits in Canada, new time limits to submit evidence and advance appeals, the burden to complete forms to WSIB satisfaction just to meet time limits). KPMG suggests that workers are to blame for appeal delays. It suggests that workers are failing to properly navigate the appeals process. It places the onus on workers to be the solution.

When the Board, and the Government, decide to require workers to file legal documents and marshal evidence under short time lines, and decide to rigidly enforce procedural barriers, they are undermining the purposes of the Act. The most vulnerable workers won't be able to defend their rights to support to recover and return to work. The most vulnerable workers face multiple intersecting barriers that make it harder for them to understand and defend their rights, harder to gather evidence, harder to find help.

Below are among the many barriers we regularly see frustrating injured workers' rights:

Table 1. Barriers to access to justice

Barriers to Access	**Consequences**
Limited English language skills	- Difficulty understanding WSIB letters and information

Barriers to Access	Consequences
	- Reliance on low-quality translation by family members, even children
	- Miscommunications with health care providers
Precarious housing	- Missed letters and time limits due to changing addresses
	- Lost documents and limited privacy in shelters or rooming houses
Limited reliable phone access	- Missed calls and the inability to return calls
Limited literacy and low education levels	- Difficulty understanding WSIB letters and the appeals process
	- Uncertainty about the necessity of filing an appeal
Financial crisis	- Unable to afford representation
	- Unable to take time off to work for medical care
Inability to find regular health care providers	- Difficulty accessing timely medical care
	- Delays in medical documentation for claims
Precarious employment	- Missing info and records, proof of earnings
	- Don't pursue due to fear of retaliation or job loss
Lack of social supports	- Missed appeals and difficulty gathering necessary records

Barriers to Access	Consequences
	- Challenges in managing appointments and communication
Multiple legal stressors	- Added strain while dealing with WSIB and other legal matters
	- Difficulties gathering required documents for claims
Limited transportation	- Difficulty attending medical, work, legal appointments
	- Disadvantage for migrant workers and those in remote locations
Rural or remote locations	- Inability to access necessary care and services
Limited access to ID and documents	- Late or no filing of claims due to missing documentation
	- Delays in claim processing and potential denial
Limited access to technology	- Inability to send documents to WSIB or access WSIB files
	- Challenges in utilizing technology for WSIB communication
Experience of racialization	- Difficulty in effective communication and cooperation with WSIB staff, employers, and representatives
Higher rate of mental health challenges	- Inability to pursue WSIB claims promptly
	- Difficulty navigating complex systems to find legal and medical help

Barriers to Access	Consequences
Precarious immigration status	- Risks associated with filing or pursuing WSIB claims
	- Inability to access health care and social supports

The WSIB has not conducted meaningful investigations to determine why vulnerable workers aren't able to get equitable access to support – and what changes can be made to allow them to benefit from the WSIB's services. It should do so.

Researchers *have* been able to study the barriers facing precarious and vulnerable workers in the context of access to *Employment Standards Act* protections. Researchers interviewed front-line Ontario employment standards officers [ESOs] about their experience of the issues facing workers. In a 2022 article, researchers explained:

> ESOs identified several other worker 'vulnerability characteristics' as making investigation and resolution challenging, including unstable living conditions, multiple job holdings, lack of phones and computers, and no employment related records. As one ESO said,
>
> > [T]hey don't answer their phones, their addresses change, the phone numbers change, they are living at home, or one woman was living in a shelter where they can't get a hold of them. You can't get their side of the story because you need to get a hold of them . . . I had to make all kinds of attempts to get in contact with them and sometimes they don't have any information or any documents and all they can say is I am owed $2000. They had nothing to support it which is difficult. That is really it.[9]

KPMG also fails to address research showing how vulnerable persons with disabilities struggle to resolve legal problems, and that vulnerable Canadians often face multiple areas of legal crisis at the same time. For example, research published by Statistics Canada in 2022 shows that:

- The high cost of legal representation, the time required to resolve a case, the complexity of navigating the justice system, a lack of knowledge about available services, and a lack of available services are key barriers to accessing justice.

- Some populations face additional barriers to accessing justice and resolving legal problems, such as literacy and language barriers, and perceived discrimination or bias.

- People who did not take any action to resolve their most serious legal problem were asked a series of questions about the reasons why. Of the 12% of people who took no action, slightly more than half (53%) said that they did not think anything could be done about the problem. Other commonly reported reasons were that they thought it would make the problem worse (19%), they did not know what to do or where to get help (18%), and they thought the process would be too stressful (18%).

- Overall, people with disabilities were twice more likely than people without disabilities to report experiencing one or more serious problems in the past three years (33% versus 16%). The most significant differences in the types of serious problems experienced by people with disabilities compared to people without disabilities were a problem relating to poor or incorrect medical treatment (29% versus 13%), a problem with receiving disability assistance (17% versus 2%), with government assistance payments (12% versus 4%), harassment (20% versus 15%), and discrimination (19% versus 15%).[10]

The KPMG changes would devastate access to justice for injured migrant workers

The KPMG changes would devastate access to justice for Ontario's injured migrant workers, who are among the most vulnerable workers in Ontario.

Take a single relatively simple case involving a precarious migrant worker, Mateo, who is illiterate and living in employer housing with limited access to mail, no computer, little to no privacy, and no access to transportation unless his employer drives him.

Mateo may have to appeal all of the following decisions made in the first few months of his claim:

- Allowing a low back strain, but denying a diagnosis of disc herniation based on an alleged pre-existing condition.

- Denying a specific medication because it isn’t on the Board’s formulary.
- Allowing 3 days of loss of earnings payments, but denying subsequent loss of earnings payments because the Board states the employer offered modified work.
- Allowing loss of earnings during recovery from surgery, but denying loss of earnings after the 2-week recovery.
- Denying accommodation to live in a safer space than the bunkhouse during recovery from surgery.
- Denying Mateo's verbal request for psychotherapy, on the basis that the worker’s psychological problems are not likely related to the work injury.

- Deciding that Mateo was fully recovered from the low back strain, and that any remaining symptoms relate to the non-compensable disc herniation.

> ***"A 30-day time limit might as well be one day. He doesn't stand a chance."***

There is no possibility that Mateo will be able to protect his appeal rights – and consequently his rights to recovery and return to work support – if the KPMG changes are introduced. He already would struggle to do so under the current regime. He won't be able to gather evidence himself, without access to transportation (except provided by his

employer), mail, fax, or computer. A 30-day time limit might as well be one day. He doesn't stand a chance.

Once repatriated back to his home country, Mateo would have to meet any additional time limits with a new set of barriers. Most international mail to Caribbean countries and Mexico takes weeks or longer to arrive. Workers are unable to contact the WSIB because they often don't have minutes on their phones to call out of country. Many also have language barriers and are illiterate. They don't have any ability to understand WSIB letters, even if they get them.

The WSIB is not ignorant to the access to justice barriers facing precarious workers, though KPMG may well be. Some years ago in 2012, the WSIB's Research Advisory Council (subsequently disbanded) funded researchers to conduct research about migrant workers and workers' compensation. While the results of that research were never made public by the WSIB, IAVGO obtained them through a freedom of information request. The researchers spoke to a group of 100 injured migrant workers and reported:

> Of the 100 workers surveyed, only 22% stated that they understood the WSIB process … Even among the workers who had applied for compensation, just 35% said they had received information about the WSIB process and, of these, only 28% said that they actually understood the process, indicating a lack of accessible information. … These data indicate that workers' understanding of WSIB is both inconsistent and insufficient, with most migrant workers not having a good understanding of the WSIB and its claims process.[11]

The researchers also found that, of the 100 workers,

> Of the 59% who met the criteria [to apply to WSIB], **about half of these did not apply for compensation**. Their principal reasons are summarized below, though many workers reported multiple barriers (e.g. did not know about right and fear of loss of employment). [Emphasis added]

Contrary to KPMG's misrepresentation, the KPMG changes don't align with time limits across Canadian jurisdictions

The auditors' claim that 30-day timelines "align with timelines observed in our jurisdictional scan" is inaccurate and misleading. Only three jurisdictions have 30-day time limits, with all other Canadian jurisdictions having longer or much longer time limits (up to three years). Two jurisdictions, like Ontario until 1998, have **no time limits at all**.

Table 2. Jurisdictional Comparison

Province/Territory	**Time Limit for Appeal/Review**
Manitoba WCB	No time limit
Saskatchewan WCB	No time limit
Alberta WCB	1 year
BC WorkSafe	75 days for reconsideration, 90 days for review
PEI WCB	90 days
New Brunswick WorkSafe	90 days
Yukon Workers' Safety and Compensation Board	1 year
Northwest Territories/Nunavut Workers' Safety & Compensation Commission	3 years
Nova Scotia	30 days
Newfoundland and Labrador	30 days
Quebec	30 days

The KPMG changes would force our clinic to reduce services because of our professional obligations

The KPMG changes would force IAVGO to reduce our services. Otherwise, we will risk being professionally negligent.

As lawyers and paralegals, we are obligated to our clients to maintain a standard of competence in any work we agree to undertake:

> 3.1-1 "competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client including […]
>
> (e) performing all functions conscientiously, diligently, and in a timely and cost-effective manner;
>
> 3.1-2 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer. […]
>
> [5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.[12]

"[W]e will have to redirect significant resources towards fighting new time limits issues in our existing caseload, and away from our other casework"

If the WSIB and Government choose to adopt the KPMG changes, we will have to reduce our services because we won't be competently able to assist workers within their deadlines. We are only able to represent workers once we have reviewed their cases,

because otherwise we would be acting incompetently. It takes us from 4-8 weeks just to get a copy of a worker's WSIB file to be able to review it, and often months more to gather missing medical and other evidence. We won't be able to represent many workers – **at all** – if they are required to submit all new evidence within 60 days of the decision, and to submit the Appeals Readiness Form within 1 year. We will have to turn workers away.

We also anticipate we will have to redirect significant resources towards fighting new time limits issues in our existing caseload, and away from our other casework. As KPMG likely does not know, arguing time limit appeals before the WSIB and WSIAT is factually and legally complex. Since a denied time limit denies the worker the substantive underlying right, we are professionally required to submit comprehensive legal submissions as well as affidavit evidence in time limit extension appeals.

We also will be forced to conduct our work in less efficient and effective ways because of the one-year deadline to file the Appeal Readiness Form, discussed below.

A one-year (or any) time limit to pursue an appeal with a protected time limit would have massive unintended consequences

KPMG suggests that the WSIB can and should choose to enforce a one-year time limit to submit the Appeal Readiness Form. It should not. Such a radical change would upend the appeals system and push it towards further delays.

It is questionable that the WSIB has the legal authority to create a one-year time limit to pursue an appeal. The WSIB management team states in its response to the KPMG auditors that it does not, subject to legislative changes.[13] We agree. There does not appear to be a legislative basis for the WSIB to create such a time limit where the worker has filed an appeal as required under the Act. Even if the WSIB has jurisdiction to create a one-year “administrative” time limit to submit the ARF, it should not.

The repercussions of enforcing a one-year time limit would ripple through the appeals system, exacerbating existing delays with massive unintended consequences on a system wide level:

- Injured workers would be forced to pursue issues that are premature and can't yet be properly adjudicated.
    - For example, occupational disease claims where medical or occupational hygiene evidence is not yet available, or claims where other interrelated issues aren't yet decided.
- This would cause incredible delays in the appeals system.
- The Appeals Branch of the WSIB would have to start maintaining a complex system of inactive appeals.
- The WSIB would also create a cascade of ping-ponged or "on hold" appeals at the Workplace Safety and Insurance Appeals Tribunal.

KPMG are auditors and don't have expertise in workers' compensation law. As a result, it is little surprise that they approach the system as if each case engages one central issue that – once resolved – will resolve the controversies in the case. But this understanding is wrong. Most workers' compensation injuries that don't quickly heal result in many decisions, many of which interact and all of which workers are required to individually appeal. A more complex claim could easily have 15 or 20 individual decisions, many of which are interrelated and can't properly be heard separately. Often, an issue is denied at the Board level, but it doesn't make sense to pursue it until a related issue can also be addressed in the appeal.

A common example:

- A worker is engaged in a return to work process with their employer, dealing with an accepted low back strain.
- During the return to work, the worker's supervisor and co-workers are upset the worker gets light duties and make hurtful comments that affect the worker's emotional well-being. The worker also struggles with the loss of their normal role as a thriving and valuable worker.
- As a consequence, the worker begins to experience symptoms of depression and anxiety, which ultimately force them to stop working.
- The Board renders a decision, deeming the work suitable for the worker's compensable low back strain and denying loss of earnings.

- The worker asks the Board to adjudicate entitlement for the psychological injury, only to face a waiting period of 6-9 months to determine temporary psycho-traumatic entitlement.

- If temporary psycho-traumatic entitlement is granted, the worker must undergo a series of psychotherapy sessions over several months to a year before the Board arrives at a decision about a permanent psychological injury.

- As the Board takes its time to deliberate on the psycho-traumatic disability, initiating an appeal regarding the suitability of the work is illogical. The Appeals Branch can't properly consider if the work was suitable without considering the psychological injury.

In this circumstance, we would generally advise the worker not to proceed, because the Appeals Branch lacks all relevant information necessary to make a well-informed decision on job suitability. With the proposed KPMG changes, instead of pursuing the suitability appeal when it makes sense, we would have to advise the worker to pursue the suitability appeal within one year despite the incomplete information.

This unfortunate turn of events will require arguing the case at least twice (and quite possibly more, since we might have to ask for a reconsideration of the first ARO decision so that a second ARO can address all the compensable injuries to look at job suitability again) resulting in an inefficient and stressful waste of time and resources for everyone involved.

It is unclear how KPMG imagines the one-year ARF time limit could co-exist with its recommendation that appeals not be fragmented. If the recommendation means merely that workers must file the Appeal Readiness Form – but that their appeals won't move forward where there are related issues still at the claims level – then KPMG appears to be recommending an unnecessary procedural time limit for the sole reason of putting barriers in the way of appeals.

Case example.

Ali is told he will be retrained as a mechanical engineering technician. Ali doesn't have any reason to question this training when it starts, but based on legal advice he files an appeal in case something goes wrong. Nine months into a 3-year training, he realizes some job tasks might be challenging for his workplace back injury. Some accommodations are made during training, but he is concerned the job may end up being unsuitable after his training ends. He would prefer to wait to do an appeal only if needed. But, instead, he is forced to file the ARF within a year of the RTW decision.

When he gets to the Tribunal, the Tribunal realizes the issue under appeal hasn't crystallized and won't for another year or more. It is forced to place the appeal into its inactive inventory, causing a huge waste of resources.

The KPMG recommendation to enforce a 30-day time is illegal and unfair

KPMG advises the Board to start an illegal practice of enforcing a 30-day time limit to appeal decisions that relate to benefits or other matters, if the decision also touches on return to work. There is **no legislative authority** to enforce a 30-day time limit on decisions unless they are concerning RTW or LMR. The statute does not allow the WSIB to enforce a 30-day time limit about non-RTW issues where a RTW decision is combined with another decision, as the auditors suggest. The law says:

> 120 (1) A worker, survivor, employer, parent or other person acting in the role of a parent under subsection 48 (20) or beneficiary designated by the worker under subsection 45 (9) who objects to a decision of the Board shall file a notice of objection with the Board,
>
> > (a) in the case of a decision concerning return to work or a labour market re-entry plan, within 30 days after the decision is made or within such longer period as the Board may permit; and
> >
> > (b) **in any other case**, within six months after the decision is made or within such longer period as the Board may permit.

If the Board implements the KPMG recommendation to enforce a 30-day time limit on non-return to work decisions, it should expect immediate and significant legal challenges.

Further, as the Board must know, many of the most significant benefit decisions – like those denying loss of earnings because an offered job is allegedly suitable or ending loss of earnings once re-training is over – intersect with RTW and LMR. As a result, implementing the KPMG recommendations would illegally strip workers of their rights to appeal the most critical decisions. The proposal to enforce a 30-day time limit on decisions combined with RTW decisions will mean that the most vulnerable injured workers will be effectively robbed of their appeal rights.

We also have to remind the Board that, in 2017, it made a policy decision – based on fairness – to apply the six-month time limit to return to work decisions where they intersect with other issues like loss of earnings. The auditors are asking the WSIB to renege on its commitments. I am attaching correspondence between the worker community and the WSIB on this issue. It is not clear if the KPMG auditors were even told about the stakeholder community discussions with WSIB on this issue.

Concerns about the impact of ADR initiatives are well-founded

The worker community has expressed serious concerns about KPMG's recommendations that the Board move to a model including ADR, mediation and mediation-arbitration in the appeals system. We share these concerns.

In principle, mediation and mediation-arbitration could make sense for injured workers, but only in circumstances where workers are well-represented and properly informed, and are under no pressure or undue influence. That is not what KPMG recommends. KPMG goes so far as to suggest using disincentives on parties to resolve appeals. No precise definition of “disincentives” is provided but given the statutory mandate of the WSIB, the only disincentive the WSIB has is to take away benefits. Workers don't act freely if they are obligated to comply with mediation, or face the loss of their benefits.

The auditors' lack of expertise discredits their findings

The auditors make basic errors that reflect their lack of legal or subject matter expertise in workers' compensation law and policy. As a result of these errors, the WSIB should not rely on any element of this report. It is untrustworthy. These are some of the most egregious mistakes:

- KPMG suggests that the WSIB "establish a roster of qualified representatives" and examine payment to the representative community. Further, it suggests that the WSIB should tie payment to representatives "level of effort throughout the decision process".[14]
    - As any competent reviewer would know, WSIB doesn't fund representation. It can't control representation. It can't determine payment for representatives. It can't interfere with workers' or employers' representation.
    - WSIB's suggestion that it may engage with the Law Society of Ontario on this recommendation is troubling. While the WSIB, like other administrative bodies, can establish codes of conduct for representatives, it would be entirely inappropriate for either the WSIB or the LSO 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.
    - The WSIB has no ability under the statute to refuse to hear certain appeals.
- It suggests that some decisions like NEL decisions are based on "standardized calculations" and so appeals are "effectively redundant".
    - Any person who works in workers' compensation knows that NEL decisions are complicated, often incorrect, and often changed on appeal. Indeed, data provided to the Ontario Network of Injured Workers Groups shows that the Appeals Branch allowed (in full or part) 23% of worker NEL appeals in 2021, a percentage close to its allow rate on issues like initial entitlement (27%).

- As noted above, 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. Only decisions concerning return to work have a 30-day time limit.

To understand barriers and inefficiencies in its appeal system, the Board should instead retain subject-matter experts to examine its appeals performance.

Recommendations for more red tape undermine the purposes of the Act

The auditors recommend several measures to make appeals harder for vulnerable injured workers. In addition to the time limit changes, they suggest that workers be burdened with new procedural barriers to access to justice:

- An obligation to "clearly outline" the issue 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.[15]
    - This obligation is contrary to the Act, which requires at s. 120(2) only that:
        - 120 (2) The notice of objection must be in writing and must indicate why the decision is incorrect or why it should be changed.
- A requirement to complete an electronic Appeals Readiness Form “which only allows forms with complete data fields to be submitted.”[16]
    - Workers who have low literacy, limited English, little access to technology, or limited ability to use technology, won’t even be able to complete their appeal forms to meet their time limits.

The auditors’ recommendations fall afoul of the now widespread recognition across the justice sector that courts and tribunals need to remove barriers to access to justice, including enforcement of technicalities against self-represented persons, not add more red tape. See these sources:

- Canadian Judicial Counsel, “Statement of Principles on Self-represented Litigants and Accused Persons”, Online: https://cjc-ccm.ca/en/news/canadian-judicial-council-issues-statement-principles-self-represented-litigants-and-accused

- "Forms, rules and procedures should be developed which are understandable to and easily accessed by self-represented persons."

- "Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case."

- "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."

- Association of Canadian Court Administrators, "Addressing the needs of self-represented litigants in the Canadian justice system" (2013), online: http://www.cfcj-fcjc.org/sites/default/files/docs/2012/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf

    - "The justice system and its stakeholders must recommit to the core dispute resolution purpose for which the system was designed: to provide a meaningful, fair, just and accessible venue for citizens – represented or not – to resolve their disputes."

    - "The legal information/advice distinction upon which court staff have traditionally relied when dealing with [self-represented litigants] should be rejected in favour of a more service-oriented approach based on a notion of "meaningful legal assistance". Principles and guidelines should be developed and provided to court staff in order to empower the provision of legal assistance to [self-represented litigants]."

- Council of Canadian Administrative Tribunals (CCAT), "A National Survey of Tribunal Responsiveness to Self-Represented Parties – Measuring Access to Justice for Canadian Administrative Tribunals", Online: https://www.ccat-ctac.org/access-to-justice-tools-for-tribunal-leaders/

- Julie Macfarlane, "The National Self-Represented Litigants Project: Final Report" (2013), Online: http://www.lsuc.on.ca/uploadedfiles/for_the_public/about_the_law_society/convocation_decisions/2014/self-represented_project.pdf

    - "While on-line court forms appear to offer the prospect of enhanced access to justice, many forms are complex and difficult to complete, and [self-represented litigants] often find they have made mistakes and omissions.

The most common complaints include difficulty knowing which form(s) to use; apparently inconsistent information from court staff/judges; difficulty with the language used on forms; and the consequences of mistakes including adjournments and more wasted time and stress."

The KPMG changes may violate workers' *Charter* rights

The current test for discrimination contrary to s. 15 of the *Canadian Charter of Rights and Freedoms* focusses on the impact of the impugned distinction on the disadvantaged group. The Supreme Court explained the test in *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (CanLII). The claimant must demonstrate that an impugned law or state action:

(1) on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
(2) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

> ***"While neutral on their face, their impact will disproportionately target and exclude racialized and precarious injured workers who face barriers to access to justice based on intersecting enumerated and analogous grounds of discrimination"***

The proposed changes are concerning from a *Charter* perspective. While neutral on their face, their impact will disproportionately target and exclude racialized and precarious injured workers who face barriers to access to justice based on intersecting enumerated and analogous grounds of discrimination (race, national or ethnic origin, colour, sex, age, mental or physical disability).

Yours truly,

IAVGO Community Legal Clinic

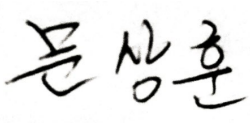
Maryth Yachnin

Jessica Ponting

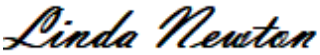
Belia Berrocal

David Arruda

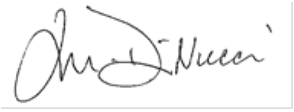
Dora Chan



Sang-Hun Mun



Linda Newton



Mary DiNucci

Aleksandar Ivovic

cc. Minister of Labour Monte McNaughton

[1] CBC Radio, “Nearly half of adult Canadians struggle with literacy — and that's bad for the economy” (January 17, 2021), online: https://www.cbc.ca/radio/costofliving/let-s-get-digital-from-bitcoin-to-stocktok-plus-what-low-literacy-means-for-canada-s-economy-1.5873703/nearly-half-of-adult-canadians-struggle-with-literacy-and-that-s-bad-for-the-economy-1.5873757

[2] International Association for Public Participation, "IAP2 Core Values for Public Participation" Online: https://www.iap2.org/page/corevalues

[3] *Legislation Act, 2006*, SO 2006, c 21, Sch F, s. 64(1).

[4] Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A, s. 126.

[5] Decision No. 1059/09I2, 2012 ONWSIAT 1554 (CanLII), at para. 104.

[6] Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A., s. 161(2).
[7] Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A, s. 1.
[8] Decision No. 1059/09I2, 2012 ONWSIAT 1554 (CanLII) at para. 110.
[9] Hall, A., Hall, R., & Bernhardt, N. (2022). Dealing with 'vulnerable workers' in precarious employment: Front-line constraints and strategies in employment standards enforcement. Economic and Industrial Democracy, 43(1), 469–494. https://doi.org/10.1177/0143831X20909143
[10] Laura Savage, Canadian Centre for Justice and Community Safety Statistics and Susan McDonald, Department of Justice Canada, "Experiences of serious problems or disputes in the Canadian provinces, 2021", Published by authority of the Minister responsible for Statistics Canada. © His Majesty the King in Right of Canada as represented by the Minister of Industry, 2022, Catalogue no. 85-002-X, available online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00001-eng.htm
[11] Janet McLaughlin & Jenna L. Hennebry, Addressing Barriers in Access to Health and Workers' Compensation Services for Migrant Farm Workers (July 31, 2013) [unpublished]
[12] Law Society of Ontario, Rules of Professional Conduct, online: https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct.
[13] KPMG audit, p. 21.
[14] KPMG audit, p. 37
[15] KPMG audit, p. 18.
[16] KPMG audit, p. 20.

no evidence.

The decisions of the
Workplace Safety and
Insurance Board

IAVGO
Community Legal
Clinic

IAVGO Community Legal Clinic
1500-55 University Avenue
Toronto, ON M5J 2H7
Tel: 416-924-6477
Fax: 416-924-2472
w w w . i a v g o . o r g

Author: Maryth Yachnin
Staff Lawyer
IAVGO Community Legal Clinic

Acknowledgments:

Legal Aid Ontario

Pro Bono Students Canada

Mathew Elder, Brendan Goldenberg, Lilya Hassall, Rebecca Lockert, Luke Maynard, Mike McDonough, Alexandra Hergaarden Robertson, Emily Young

2017

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The 2016 decisions of the Workplace Safety and Insurance Appeals Tribunal tell a stark and troubling story. In hundreds of appeals, Tribunal decision makers comment that the decisions of the Workplace Safety and Insurance Board are "unreasonable" and "arbitrary," ignore the "unanimous opinions" of doctors, are based on "not a single word of medical or other reliable evidence," and could place the worker at "medical risk."

The Tribunal's decisions confirm what workers and health care professionals have been saying since 2010: in order to get its financial house in order, the Board is disregarding the safety, health and dignity of workers who are injured on the job. It is abdicating its statutory duty to compensate workers and help them recover and return to work.

In *No Evidence*, we expose the decision making of the WSIB through an in-depth analysis of the Tribunal's 2016 decisions. Our four primary findings:

1. The Board regularly fails to listen to treating health care professionals about whether return to work is safe.
2. The Board has reversed benefits it had promised to the most vulnerable workers.
3. The Board wrongly denies compensation based on "pre-existing conditions."
4. The Board targets workers with mental health conditions for denial of benefits and treatment, increased scrutiny and surveillance.

The WSIB regularly fails to listen to treating health care professionals about whether return to work is safe.

In 110 cases, the Board failed to listen to workers' treating health care professionals about the safety and appropriateness of return to work.

The Tribunal concluded that the Board disregarded medical advice that the worker should rest and recover before returning to work, even though it had "no evidence" and "no medical documentation to counter" this advice.

The Board's approach appears to stem from its "Better at Work" principle, which strongly discourages rest away from work. This has led the Board to act with disregard for workers' doctors' advice and workers' safety.

In one case, the Board told a welder whose eye and face were burned by hot oil to return to work, even though the trip to work would have exposed him to fumes and particles, increasing his risk of infection or permanent loss of vision. The Tribunal observed that "the journey to and from work was potentially dangerous during this vulnerable period in the worker's recovery." The worker's condition at that time was "precarious." It is troubling that the Board was willing to endanger this worker's health and safety by pushing him back to work too soon.

The WSIB reversed benefits it had promised to the most vulnerable workers.

In 2009, the Auditor General identified "locked-in" claims as a financial problem for the Board because of their long duration and high cost. If a worker is "locked-in" with full benefits, the WSIB is usually obligated to pay full benefits until the worker turns 65.

In 2010, the WSIB started reducing the cost of locked-in benefit claims by reversing the benefits of the most vulnerable workers. The Board had previously promised many of these workers full benefits until the age of 65, often in writing. Then, seemingly out of the blue, the Board changed its mind, just as these workers approached lock-in. Without any apparent justification, the Board told these workers they needed to retrain and somehow return to work. Most or all were not able to find work. But their benefits – their only source of income – were often significantly reduced or ended completely.

These workers continue to be forced to pursue costly, stressful appeals to the Tribunal. In 2016, 28 of these workers had to ask the Tribunal to step in and restore the financial security the Board should never have taken from them in the first place.

The WSIB wrongly denies compensation based on "pre-existing conditions."

The Tribunal decisions confirm that the WSIB is wrongly denying workers' fair compensation based on "pre-existing conditions."

Workers have expressed alarm about how the Board uses so-called "pre-existing conditions" to deny compensation, even when the evidence shows they were able to function perfectly well until the workplace injury derailed their lives.

The typical case is a worker who never had any real back pain before a fall at work, after which she immediately developed debilitating back pain. When an MRI shows the presence of degenerative changes in her back, the Board decides that she "should" have recovered from the fall by a certain expected healing time. The Board attributes any remaining disability to these degenerative findings, rather than the workplace accident.

In 75 cases in 2016, the Tribunal said that the Board's decision to deny benefits based on pre-existing conditions was based on "little, if any, evidence," "no evidence" or "no medical opinion" suggesting that any pre-existing factor was the cause of their ongoing disability. The Board's decisions were contrary to the "inescapable conclusion" that the work accident caused the worker's injuries.

The Tribunal also noted, in 38 appeals, that the Board cut workers' permanent impairment benefits based on pre-existing conditions that did not impair them before the injury. The Tribunal emphasized that this WSIB practice is contrary to the Board's own binding policy.

Finally, in other cases, the Board attributed psychological injuries to workers' past experiences – like a divorce or their status as a refugee – rather than their workplace injury. The Tribunal found that this ran contrary to the medical evidence: it was unfounded speculation.

The WSIB targets workers with mental health conditions for denials, scrutiny and surveillance.

The Board's adjudication of psychological injuries stands out as particularly alarming. The Tribunal found that the Board rejected, time and again, the "unanimous" and "overwhelming" opinions of treating doctors and psychiatric specialists that the workplace injury and its fallout caused workers' psychological injuries. In denying entitlement for their psychological disabilities, the Board also denied these workers the treatment they needed to recover and return to work.

Several of the Tribunal's 2016 cases also demonstrate that the Board approaches workers with mental health conditions with undue suspicion. In one case, the Board disregarded a finding of its own Appeals Services Division that a worker had a psychological injury and needed treatment.

Instead of providing him treatment, the Board put him through two independent medical assessments and placed him under covert surveillance, only to then end his benefits by finding him non-cooperative. The Tribunal restored his benefits, observing that the worker had no reason to expect "that the genuine nature of his psychiatric condition was in question."

Conclusion

While the WSIB is fixing its finances, workers are falling into poverty and poor health. Workers have long reported that the Board denies benefits without any evidence or justification. These decisions from the Appeals Tribunal provide hard evidence for workers' claims. They show that in order to fulfill its statutory obligations, the Board must radically transform its current practices.

I. Overview

The 2016 decisions of the Workplace Safety and Insurance Appeals Tribunal tell a stark and troubling story. These decisions lay bare the reality that the Workplace Safety and Insurance Board is abdicating its statutory obligations to many injured workers.[1] The Board isn't compensating workers for the losses they suffer from workplace injury. It isn't helping them recover. It isn't helping them return to work.

In hundreds of worker appeals, the Tribunal echoes what workers have been saying about the WSIB's conduct since 2010. Tribunal decision makers comment that the WSIB's decisions are "unreasonable" and "arbitrary," disregard the "unanimous opinions" of doctors, are based on "not a single word of medical or other reliable evidence," and would place the worker at "medical risk."

Since 2010, following concerns from the Auditor General about its finances, the Board has "transformed" its financial position.[2] The WSIB claims this financial success is the result of improved "return to work and recovery" programs. It denies reducing costs through benefits cuts.[3]

But those who are forced to deal with the WSIB explain the significant cost injured workers have paid for the Board's improved financial position. They say that the WSIB:

- Routinely disregards medical evidence;

[1] *Workplace Safety and Insurance Act, 1997,* SO 1997, c 16, Sch A, s 1 [*WSIA*].
[2] Ontario, Workplace Safety and Insurance Board, *The Transformation of the Workplace Safety and Insurance Board,* online: <http://www.wsib.on.ca/cs/groups/public/documents/staticfile/c2li/mdyw/~edisp/wsib060404.pdf>,
[3] *Ibid.* at 4.

- Forces workers back to work before they are fit to do so, sometimes causing re-injury;
- Disregards the psychological health of injured workers;
- Cuts compensation benefits even though workers are still injured; and
- Reduces compensation against established law and policy.[4]

In our recent report, *Bad Medicine*, we analyzed the WSIB's health care statistics and found that the Board has been cutting benefits without improving health care outcomes for workers.

[4] Ontario Federation of Labour and The Ontario Network of Injured Workers Groups, *Prescription Over-Ruled: Report on How Ontario's Workplace Safety and Insurance Board Systematically Ignores the Advice of Medical Professionals* (05 November 2015), online: <http://ofl.ca/wp-content/uploads/2015.11.05-Report-WSIB.pdf> [*Prescription Over-Ruled*]; Ontario Federation of Labour and The Ontario Network of Injured Workers Group, *Submission to the Ontario Ombuds Office* (29 January 2016) [*Submission to the Ontario Ombuds Office*]; Sara Mojtehedzadeh, "WSIB policy pushed hurt workers into 'humiliating' jobs and unemployment, critics say" *Toronto Star* (12 September 2016), online: <https://www.thestar.com/news/canada/2016 /09/12/wsib-policy-pushes-hurt-workers-into-humiliating-jobs-and-unemployment-critics-say.html>; Sara Mojtehedzadeh, "WSIB critics say spending cuts are 'devastating' injured workers" *Toronto Star* (10 June 2016), online: <https://www.thestar.com/news/gta/2016/06/10/inadequate-health-care-devastating-injured-workers-critics-say.html>; "Ontario psychologists claim WSIB unfairly denying patient claims" *CBC News* (04 November 2015), online: <http://www.cbc.ca/news/canada/toronto/programs /metromorning/ontario-psychologists-claim-wsib-unfairly-denying-patient-claims-1.3302778>; "Sudbury WSIB claimant's doctor pushes to change 'unresponsive' system" *CBC News* (09 November 2015), online: <http://www.cbc.ca/news/canada/sudbury/keith-klassen-wsib-paul-chartrand-1.3310497>; Sara Mojtehedzadeh, "Fair appeals for injured workers under threat, experts warn" *Toronto Star* (06 April 2016), online: <https://www.thestar.com/news/gta/2016/04/06/fair-appeals-for-injured-workers-under-threat-experts-warn.html>; Ashley Burke, "WSIB's 'devastating' compensation policy all about board's bottom line, lawyers charge" *CBC News* (27 Oct 2016), online: <http://www.cbc.ca/news/ canada/ottawa/wsib-injured-worker-benefits-1.3803300; Sara Mojtehedzadeh, "Class action against WSIB claiming unfair benefit cuts given go-ahead" *The Toronto Star* (14 Feb 2017), online: <https:// www.thestar.com/news/gta/2017/02/14/class-action-against-wsib-claiming-unfair-benefit-cuts-given-go-ahead.html>; Lisa Xing, "Why a family of 6 in Oakville is living on $36k a year" *CBC News* (22 Mar 20), online: <http://www.cbc.ca/news/canada/toronto/ family-of-six-lives-on-36000-a-year-1.4035415>;2012-2013 IAVGO, "Benefits Policy Review Submissions of IAVGO" (28 Nov 2012), online: <http://iavgo.org/research-and-resources/>, at 11-21.

In the present report, we study another source of information about Board decision making since 2010: the 2016 decisions of the Workplace Safety and Insurance Appeals Tribunal. The Tribunal is the final decision maker in the workers' compensation system, and it is independent of the WSIB. Each year, the Tribunal finally decides about 3,000 appeals by workers and employers.[5]

By analyzing the Tribunal's decisions, we were able to identify systemic problems with the Board's adjudicative practices. We reviewed a full year of the decisions of the Tribunal. We found ***425*** cases where the Tribunal addresses unfair decision making practices that have also been consistently identified by workers, doctors, and representatives.[6]

Our most consistent and stark findings:

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

- 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.

[5] The Tribunal was legislated into existence by on October 1st 1985 by the Ontario Government. The newly created Tribunal was distinguished by its independence from the board, a tripartite adjudicative model, and expertise in decision-making; "Workplace Safety and Insurance Appeals Tribunal: Celebrating 25 Years of Excellence" *Workplace Safety and Insurance Appeals Tribunal* (Jan 2010), online: <http://wsiat.on.ca/english/about/history.htm>.
[6] For a detailed breakdown of these 425 cases see www.iavgo.org/researchandresources.

- In ***28 appeals***, the Tribunal found that the Board wrongly reversed a worker's entitlement to full loss of earnings payments.

- In ***38 appeals***, the Tribunal decided that the Board had wrongly reduced the worker's permanent impairment award based on "pre-existing" issues.

In each of these 425 appeals, the worker had to navigate a complex bureaucracy for several years to resolve their claim. Before they could ask the Tribunal to fix the Board's error, each of these workers had to:

- Meet strict time limits to appeal the Board's decision or, often, multiple decisions denying them benefits;

- Find a representative to help them navigate the appeal system, often at significant cost;

- Bring their case to the internal Appeals Services Division of the WSIB;

- Endure years of delay. For most workers, it takes at least three years, and often closer to five years or more, to reach the stage of a Tribunal hearing;

- Often, live without support to recover and return to work; and

- Often, suffer a fall into poverty.

II. The WSIB disregards medical advice about return to work

A. Background

Workers injured on the job often report being pressured to return to work immediately after injury. The Board instructs them to return well before they or their treating physicians believe they are ready.

This trend began in 2011, when the Board instituted the "Better at Work" principle – that "staying at work or returning to work is part of the recovery process." According to the WSIB, research shows that "return to work is critical to the recovery process" and "should be used as rehabilitation to enhance recovery, increase activity and function, and optimize successful and sustained employment."[7]

Medical professionals who care for injured workers have expressed serious concerns about the Board's rigid application of "Better at Work." These health care providers say that the Board ignores their recommendations about the safe timing of return to work.[8]

Further, the "Better at Work" approach derives from the American College of Occupational and Environmental Medicine, which critics describe as a body designed to legitimize the interests of corporate doctors and their funders.[9]

[7] Ontario, Workplace Safety and Insurance Board, *Better at Work*, online: <www.wsib.on.ca > Employers > Return to Work > Better at work; Ontario, Workplace Safety and Insurance Board,
[8] *Prescription Over-ruled*, *supra* note 4 at 6. See also the media reports listed in note 3.
[9] The American College of Occupational and Environmental Medicine has been described in the *International Journal of Occupational and Environmental Health* as "a professional association that represents the interests of its company-employed physician members…. [it] provides a legitimizing professional association for company doctors, and continues to provide a vehicle to advance the agendas of their corporate sponsors": J Ladou *et al*, "American College of Occupational and

For a detailed discussion of the impact of "Better at Work", see the submissions of the Ontario Network of Injured Workers' Groups to the WSIB.[10]

B. Ignoring medical advice about safe return to work

In ***110*** cases, the Tribunal found that the Board wrongly refused to compensate workers for time they took off work on their doctors' advice. Often, this advice was to rest for a short period of time after injury. The Board refused these workers loss of earnings payments for the missed time.

The Tribunal concluded that the Board:

- disregarded medical opinion about return to work;
- wrongly required workers to disregard medical advice;
- endangered workers by placing them at a risk of re-injury;
- disregarded psychological safety in return to work;
- failed to provide workers with necessary supports during return to work;
- failed to ensure the employer was complying with its obligations;

Environmental Medicine (ACOEM): A professional association in service to industry" (2007) 13:1 International Journal of Occupational and Environmental Health 404 at para 1; See also M. Lax, "Not Quite a Win-Win: The Corporate Agenda of the Stay at Work/Return to Work Project" (2015) 25:1 New Solutions: A Journal of Environmental and Occupational Medicine 4-24.

[10] Ontario Network of Injured Workers Groups, "Submissions to the WSIB" (7 Nov 2016), online: <http://injuredworkersonline.org/wp-content/uploads/2017/02/Ltr_ONIWG_20161107_Better-at-Work-response.pdf>.

- ignored the Board's own adjudicative advice document about timely return to work; and

- made decisions that were illogical or unreasonable.

i. The WSIB disregarded medical opinion about return to work

In a number of decisions, the Tribunal determined that the Board had unreasonably disregarded medical opinion. It found that the Board rejected medical evidence without any valid reason or justification.

> **Personal support worker**
> **Suffered head, back, knee injuries**
>
> [I]t is unreasonable to expect an injured worker to ignore the advice of her treating physician. In my view, it is further ***unreasonable for the Board to ignore the professional opinion*** provided by a worker's treating physician as noted on an FAF requested by the accident employer and the Board.[11]- *63/16*

In *Decision No. 63/16*, for example, the Board refused a personal support worker loss of earnings benefits because it found that the employer's job offer was suitable. But, the worker's doctor and physiotherapist had told her and the Board that she should not work for several weeks post-injury. The doctor noted that the worker, who was in her seventies, was suffering severe knee pain, urinary incontinence, back pain and headaches. She followed her doctor's advice to rest and recover.

[11] *Workplace Safety and Insurance Appeals Tribunal Decision No. 63 /16* (11 January 2016) at para 30.

When her doctor and physiotherapist cleared her to return to work a few weeks later, she did. The Board denied her compensation for her time off work. The Tribunal stated it was "unreasonable for the Board to ignore the professional opinion provided by a worker's treating physician as noted on an FAF [Functional Abilities Form]."[12]

Other decisions similarly criticized the Board for disregarding medical evidence about return to work. In these cases, the Tribunal stated that the Board had:

- **"no basis" to disregard** the medical evidence;[13]
- "**essentially no evidence**" to support their position contrary the opinion of the worker's doctor;[14]
- "not a **single word of medical or other reliable evidence**" that the worker was able to return to work;[15] and
- "**no medical documentation to counter**" the opinion of the worker's treating health care professionals.[16]

In *Decision No. 1479/16*, the Tribunal opined that the treating health professional's role is to provide functional abilities information to the employer and Board. Quoting from a 2014 decision, the Tribunal

[12] *Workplace Safety and Insurance Appeals Tribunal Decision No. 63/16* (11 January 2016) at para 30.
[13] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1364/16* (19 August 2016) at para 32.
[14] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1069/16* (28 April 2016) at para 18.
[15] *Workplace Safety and Insurance Appeals Tribunal Decision No. 989/16* (27 June 2016) at para 45.
[16] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2932/16* (14 November 2016) at para 29.

emphasized that "this information should not be treated lightly and easily disregarded."[17]

In *Decision No. 2524/16*, the Tribunal stated that there was "no basis" to doubt either the objectivity or appropriateness of the doctor's opinion that the worker needed several days off work to rest. The Tribunal noted that if the Board wanted to question the doctor's "clear recommendation" to remain off work, it should and could have requested additional medical information.[18]

Car factory worker
Suffered low back and leg injury

If the Board had reason to question the worker's decision to accept the clear recommendation of his attending physician to remain off work during the period in question in the appeal, the CM could have requested further information."[19] – *2524/16*

In *Decision No. 2525/16*, the Tribunal adopted the reasoning of a previous decision that the "ESRTW process [now known as WR] established under the WSIA is not just about early return to work, it is equally about safe return to work."[20] In light of an objective medical opinion that the worker should have remained off work for a short period

[17] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1479/16* (7 June 2016) at para 32.
[18] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2524/16* (23 September 2016) at para 56 [2524/16].
[19] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2524/16* (23 September 2016) at para 56 [2524/16].
[20] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2525/16* (27 September 2016) at para 28.

of time after injury, the worker should have entitlement to full loss of earnings.[21]

ii. The WSIB required workers to disregard medical advice about return to work contrary to the Act

In some 2016 decisions, the Tribunal also held that the Board had wrongly suggested that the worker should have disregarded medical advice about return to work. The Tribunal found that it was "unreasonable to expect an injured worker to ignore the advice of her treating physician."[22]

> **Personal support worker**
> **Suffered knee injury**
>
> Her denial of the offered modified duties in these meetings was based on the ***advice of her health care providers, which she was required to follow***. – *1886/16*

The Tribunal has stated that workers are in fact required by law to follow medical advice regarding their return to work. In *Decision No. 1886/16*, the Tribunal held that the worker was required by the health care co-operation provision of the *Workplace Safety and Insurance Act* to comply with the advice of her health care providers. The Tribunal noted that the Board was wrong to have suggested she should have returned to work against that advice.[23]

[21] *Ibid* at para 37.
[22] *Workplace Safety and Insurance Appeals Tribunal Decision No. 63/16* (11 January 2016) at para 30.
[23] *WSIA*, *supra* note 1, s 34 states that

> 34. (1) A worker who claims or is receiving benefits under the insurance plan shall co-operate in such health care measures as the Board considers appropriate.

In *Decision No. 2949/16*, the Tribunal held that the worker was also required to comply with her surgeon's advice to remain off work because of her statutory obligation to cooperate in early and safe return to work. The Tribunal stated that in complying with her doctor's advice and keeping the employer abreast of her progress, the worker was cooperating in her ESRTW "as is required by section 40(2) of the WSIA."[24]

iii. The WSIB endangered workers by requiring them to disregard medical advice

Tribunal decision makers have found that workers either were re-injured during their return to work or would have been at risk of harm or re-injury if they had complied with the Board's direction to disregard medical advice about return to work.

Machine operator
Suffered finger amputation

These types of activities require bilateral hand manipulation to some degree, thus posing a ***medical risk*** to the worker if he were attempting to perform such activities. *-1133/16*

(2) If the worker fails to comply with subsection (1), the Board may reduce or suspend payments to the worker under the insurance plan while the non-compliance continues.

[24] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2949/16* (25 November 2016) at para 23; *Ibid* at s 40.

The Tribunal variously observed that the Board's recommended course of return to work:

- posed a "**medical risk**,"[25]
- would "likely have **resulted in re-injury**,"[26]
- was "**potentially dangerous**,"[27]
- failed to give "due consideration" to the **worker's safety**,[28]
- ignored that the worker had attempted the duties "to her detriment," **exacerbating pain** and symptoms,[29]
- disregarded the fact that the worker had been prescribed painkillers that rendered her **unable to "safely operate** a motor vehicle to attend work."[30]

In *Decision No. 1437/16*, the worker was a welder. In 2011, a hydraulic hose struck the left side of his face and splashed hot oil in his eye. He was taken to hospital by ambulance. He had a left eye trauma and face laceration and burns. The hospital doctors told him to stay off work for two weeks. The next day, "a few hours after the worker was discharged" from the hospital, the employer offered him modified work. The Board told him he must return to work. It only paid him two days of benefits. The worker explained that his doctor said he should stay at home

[25] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1133/16* (3 May 2016) at para 26.
[26] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1889/15* (29 April 2016) at para 33.
[27] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1437/16* (16 June 2016) at para 35.
[28] *Workplace Safety and Insurance Appeals Tribunal Decision No. 989/16* (6 April 2016) at para 48.
[29] *Workplace Safety and Insurance Appeals Tribunal Decision No. 674/16* (5 April 2016) at paras 53, 54.
[30] *Workplace Safety and Insurance Appeals Tribunal Decision No. 3068/16* (22 November 2016) at para 26.

in a cool clean environment. There was a risk of infection and possible permanent vision loss. The modified job was in the office, but getting through the work site to the office would expose him to fumes and particles. In the summer, it was also difficult to make sure sweat didn't run into his eye, endangering his recovery. The worker eventually returned to work five weeks after the accident.

The Panel determined that the worker was entitled to benefits for his lost time. They observed that "the journey to and from work was potentially dangerous during this vulnerable period in the worker's recovery." The worker's condition at that time was "precarious". Since the job posed a health and safety risk to the worker, it wasn't suitable.[31]

Welder
Suffered eye injury

Although the office to which the worker was assigned was cool and free of fumes and smoke, the journey to and from work was ***potentially dangerous during this vulnerable period in the worker's recovery***. *-1437/16*

In *Decision No. 1503/15*, the Vice Chair found that the worker's return to unsuitable work against medical advice caused her shoulder injury to worsen and caused her to develop depression.[32] The worker worked in a poultry processing plant. Her modified work was located in the cold room, and the cold aggravated her injury. Her doctors repeatedly and "without condition" said she should not work in a cold environment,

[31] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1886/16* (21 July 2016) at para 32.
[32] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1503/15* (2 February 2016) at para 62.

but the Board disregarded this advice and found the work suitable.[33] The Vice Chair noted that the worker had "experienced far more than an 'unpleasant experience with the cold'" because of the Board's failure to listen to the consistent advice of her treating doctors. She in fact suffered "the deterioration of her right shoulder condition" and the development of a psychological impairment.[34]

iv. The WSIB disregarded psychological safety in return to work

a. Disregarded unanimous evidence that the worker cannot work

In a significant number of cases, the Tribunal found that the Board had ignored medical evidence showing that a return to work was unsafe or inappropriate because of a worker's psychological injury.

In *Decision No. 2814/16*, the Vice Chair noted that the Board had "no basis" to question the medical evidence that the worker was not able to return to work due to her compensable psychological state. The Board ignored the opinion of treating medical professionals that the worker "remained unable to return to work at all . . . due to her fragile psychological condition resulting from the work accident."[35]

[33] *Ibid* at para 66.
[34] *Ibid* at para 62.
[35] *Workplace Safety and Insurance Appeals Tribunal Decision No.* 2814/16 at paras 32, 42, 43.

In *Decision No. 1036/16*, the Panel noted each of the many doctors who examined the worker, including specialists at the Centre for Addiction and Mental Health, had concluded that he was unable to work because of his psychological injury. The worker was a machine operator who suffered a crush injury and amputation and developed Post Traumatic Stress Disorder. Despite the "unanimous opinions" of his doctors that he was unable to work, the Board decided to refer the worker for retraining in 2012 and subsequently decided he was capable of earning minimum wage. The Panel overturned this decision and found that, as established by the chorus of medical opinions, the worker was unemployable. The Panel observed that there was "no reason to question the unanimous opinions of the worker's treating and assessing health care providers" that he was unable to work. [36]

The Panel finds no reason to question the unanimous opinions of the worker's treating and assessing health care providers … all of whom opined that the worker was unable to work. –*1036/16*

In *Decision No. 1430/16*, the Vice Chair found that, contrary to the Board's decision, the "nature and seriousness of the worker's compensable injuries prevented him from safely engaging in any type of work" during the period of time his doctors said he needed to be off work. The Vice Chair noted that "[t]he worker did not have medical clearance to re-integrate into any type of work over this period." The Vice Chair noted particularly that "his compensable psychological/ emotional state was unstable" and

[36] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1036*/16 (26 April 2016) at para 44; See also, *Workplace Safety and Insurance Appeals Tribunal Decision No. 919/16* (22 June 2016).

that therefore the Board's advice that he return to work was inappropriate.[37]

In *Decision No. 2935/16*, the Panel once again addressed a WSIB decision that a worker, a sewing machine operator, was employable contrary to "unanimous" medical evidence. The Panel noted that psychiatric assessments had all found that the worker was "incapable of performing any type of work," since at least 2010.[38] Further, the medical evidence was unanimous that the worker's permanent psychiatric impairment was not "mild," as decided by the WSIB.[39]

Sewing machine operator
Suffered finger amputation, depression, PTSD

Thus, the ***medical evidence appears unanimous*** in the opinion that the worker is incapable of performing any type of work, and has been since at least 2010 and continuing. – *2935/16*

The Panel in this decision also made some observations about the troubling way in which the Board investigated the worker's psychological condition. The worker appealed to the Board's Appeals Services Division in 2013. The ARO decision found that the worker was unemployable and entitled to full loss of earnings, subject to any future material changes.

The Board subsequently asked the ARO if a possible improvement in her condition would be a "material change" warranting a reassessment

[37] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1430/16* (10 June 2016) at para 47.
[38] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2935 16* (28 November 2016) at para 68.
[39] *Ibid* at para 59.

of her benefits. The ARO replied it would be. The Board's operating level then decided to conduct covert surveillance of the worker. The Board's stated rationale for surveillance, provided by the Director of the Industrial Sector, was that the Board was unable to reach the worker without leaving a message. This "lack of availability," the Director stated, conflicted "with information [the worker] had provided to her psychologists and to the case manager" that she rarely left the house.[40]

The Panel noted that it was "improbable" that the Board's decision to conduct surveillance was actually spurred by the worker's failure to answer phone calls: the Board had only tried to contact the worker *after* it started the surveillance. The Panel observed that the Board started surveillance within two weeks of the ARO clarification that it could revisit benefits if the worker experienced a possible improvement in her condition. The Tribunal concluded that the worker was entitled to full benefits, that the surveillance was not inconsistent with her limitations, and that any failure to contact the Board was explainable given her psychological impairment.[41]

[W]e do not that the Director's letter suggests that surveillance was ordered due to incongruities between the worker's claim she was totally impaired and the information she provided to her doctors and the WSIB staff … it seems improbable that this was the basis for surveillance. – 2935 16

[40] *Ibid* at paras 4, 35.
[41] *Ibid* at paras 72-74.

b. Disregarding psychological restrictions in selecting suitable job

In several cases, the Tribunal found that the Board failed to consider the worker's psychological health when selecting a post-injury suitable occupation.

In *Decision No. 1703/16*, the Panel observed that the Board completely ignored the worker's long-standing disabling depression, anxiety and chronic pain in deciding she could work in a stressful fast-paced job.

> **Banquet Server**
> **Suffered neck, upper back, shoulder and psychological injuries**
>
> ***For reasons that are not clear to the Panel, the non-organic aspects of the worker's condition were not taken into account*** by the Board in the 2011 WT process. … The occupational therapist cautioned that the worker's depression, her problems with memory and concentration required further attention. This was not addressed. - *1703/16*

The worker was a banquet server. After an injury in 2007, she had to appeal all the way to the Tribunal to get her benefits restored, her chronic pain accepted and right to retraining support recognized in 2011. In implementing the Tribunal's 2011 decision, the 2016 Panel noted that "[f]or reasons that [were] not clear to the Panel, the non-organic aspects of the worker's condition were not taken into account by the Board." The Board failed to adjust the worker's restrictions to account for the new

entitlement for chronic pain disability.[42] The Board also failed to consider the "significant evidence" of disabling depression and anxiety and the specific advice by an occupational therapist that her depression and memory problems "required further attention."

As a result, the Board wrongly decided that the worker could be a service express agent, which would have required her to process and log a large number of calls, and assist guests who were angry or upset about service issues. This decision ignored her psychological limitations including depression, memory and concentration issues. It wasn't safe.[43]

In *Decision No. 892/16*, the Vice Chair expressed similar puzzlement about the Board's decision that a worker with a sensitive psychological condition could be a telemarketer. The Board did not explain how the worker would cope with the "potentially confrontational interactions" that telemarketing involves.[44]

In *Decision No. 584/16*, the Panel again decided that the Board did not consider the worker's psychological disability in selecting the suitable occupation, this time Retail Sales Clerk. The Panel noted that each of the practitioners treating the worker for his psychological disability believed that his condition likely rendered him unemployable. These same doctors explained that the worker's impatience and frustration with other people was a characteristic of the worker's psychological disability. The Panel found that this "would be a significant barrier to many types of employment, again including Retail Sales Clerk."[45]

[42] Para 20.
[43] Para 41, 38, 37.
[44] *Workplace Safety and Insurance Appeals Tribunal Decision No.* 892/16 (8 April 2016) at para 14.
[45] Decision No 584/16

v. The WSIB failed to provide workers with necessary support during return to work

As well as ignoring restrictions, the Board also often failed to provide the supports that workers required in order to succeed in return to work.

The psychological supports that were identified as required by even the most optimistic of the psychological consultants … have not been implemented. – *589/16*

In *Decision No. 589/16*, the Panel found that the Board failed to provide the psychological supports the worker would have needed to have any chance to return to work.

The worker was a police officer who was assaulted on the job and developed Post Traumatic Stress Disorder and Depression. He was involved in a return to work and then had a long period of unemployment while he underwent treatment for his psychological injury.

In 2008, the WSIB decided the worker could be retrained and in 2010 the Board cut his benefits, finding he could be a night watchman or junior office clerk.[46] These jobs were unsuitable for a variety of reasons. But even if they were potentially suitable, expert assessors at CAMH had only said that the worker *might* be able to return to work if the Board provided him with an extensive treatment program. The Board did not provide him with any such treatment program. In this context, there was no prospect of him ever being able to return to work.[47]

[46] *Workplace Safety and Insurance Appeals Tribunal Decision No. 589/16* at para 39.
[47] *Ibid* at para 46-47.

In *Decision No. 2475/15*, the Tribunal determined that the Board had similarly failed to provide medical support the expert assessors said the worker needed. The Board also disregarded the impact of the worker's headaches and dizziness, which the Tribunal had previously ruled were work-related.[48]

Machine operator
Suffered ear amputation, headaches, dizziness and chronic pain

The worker was **not provided with any such support during his work-hardening period and, not surprisingly, was unable to continue despite his efforts.** -*2475/15*

In considering his ability to work, the Board had sent the worker, a machine operator, for various medical assessments. The Functional Restoration Program said that, while he was very motivated, the worker's headaches and dizziness were aggravated by many activities. The FRP recommended that any return to work attempts be coupled with a customized treatment program in order to increase his chances of success.

The Board did not provide the worker with the recommended treatment program, but still decided that the worker could return to work in light assembly after a brief job placement program. The worker tried two job placements but his headaches and dizziness prevented him from doing them. The Board decided he was not cooperating in his return to work and cut his benefits. Consequently, the Board penalized him by

[48] *Workplace Safety and Insurance Appeals Tribunal Decision No.* 2475/15 (5 May 2016) at para 37.

deeming him able to earn the maximum earnings for his suitable occupation, thus eliminating his benefits.

The Tribunal decided that the Board's decision that the worker could return to work in light assembly "disregarded the worker's longstanding and ongoing symptoms of dizziness or headache." The Panel found that the worker was not provided with the recommended medical support. In that context, "not surprisingly," he was unable to continue.[49]

vi. The WSIB failed to ensure the employer was complying with its obligations

In several cases, the Tribunal also noted that the Board had completely failed to ensure the employer was complying with its obligations to provide modified work before it terminated the worker's benefits.

In *Decision No. 810/14*, the Board decided that the worker had failed to cooperate in suitable work and was not entitled to benefits after the employer fired her. The Tribunal found that, in making this decision, the Board relied on obviously false and "scurrilous documentation" from the employer.[50]

The Vice Chair noted that the ARO completely failed to address the employer's hostile and false communications.[51] The Vice Chair found that these documents:

- were likely "falsely dated" to before the worker's termination to retroactively justify the termination;

[49] *Ibid* at para 37.

[50] *Workplace Safety and Insurance Appeals Tribunal Decision No. 810/14* (16 June 2016) *at para 54.*
[51] Ibid at para 51.

- included "general character attacks" against the worker, even through she was a 10-year employee; and

- "clearly demonstrate[d] hostility to the worker during the return to work process."[52]

Deli worker
Suffered a low back injury

The presentation of ***such anonymous, disparaging, irrelevant and quite possibly false information*** to the WSIB by the employer in support of its position speaks volumes about the workplace environment that the worker was employed in. There was no established return to work program, there was no formal description of the work that the worker was to perform and there was ***clear hostility directly expressed towards the worker.*** *-810/14*

The Tribunal also found that the Board had decided the work was suitable before anybody from the Board either visited the worksite or obtained a job description. In fact, there was no such description. The employer said the worker was to do "whatever."[53]

In *Decision No. 251/15*, the Vice Chair once again held that the Board had terminated the worker's benefits without confirming that the employer was actually offering modified work. As such, the Vice Chair found, it had no "legislative basis for terminating entitlement." In fact, the Vice Chair observed, the employer never did offer the worker modified work and subsequently fired him.

[52] *Ibid* at paras 53, 55.
[53] *Ibid* at para 60.

Transport truck driver
Suffered concussion, neck injury and headaches

The reduction and eventual termination of benefits was based on **an assumption by the Case Manager that the graduated return to work stipulated by Dr. Waseem would be put into place by the accident employer.** […] the Case Manager did not, in fact, have any information confirming that fact. *-2514/15*

The worker informed the Board that the employer had not offered modified work. The Board's call to the employer for more information went unanswered, but nonetheless, the Board denied the worker benefits.[54]

vii. The WSIB ignored its own adjudicative advice document about safe return to work

In 2016, the Tribunal found that some of the Board's decisions were contrary to its own Adjudicative Advice Document, "Recognizing Time to Heal – Assessing Timely and Safe Return to Work." The Tribunal found that the Board's decisions did not comply with the common sense best practices set out in the Time to Heal document.[55]

The WSIB created the Time to Heal document in 2005 after consultation with stakeholders. The document states that sometimes "'rest' is an appropriate form of treatment and required in order to speed recovery and facilitate a successful return to work." It also cautions that

[54] 2514 15

[55] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1889/15* (29 April 2016) at para 28; See also *2524/16*, *supra* note 18 at para 45.

neither the WSIB nor the employer "should insist on a return to work too early." "Too early a return to work," the document explains, "could cause damage, result in further injury for the worker, and more time away from work."[56]

In 2015, the Board retracted the Time to Heal document and implemented a new Adjudicative Practice Document more in line with "Better at Work." This new document states that "evidence-based best practices do not support 'rest' and inactivity for promoting recovery and supporting successful return to work."[57]

viii. The WSIB's decision about return to work was illogical or unreasonable

The Tribunal found that a number of WSIB decisions regarding return to work were just plainly illogical or unreasonable in light of the medical evidence and facts.

In *Decision No. 2122/16*, for example, the Tribunal noted that, given the medical restriction to limit driving to 15 minutes at a time, the worker would have had to stop and rest for one to two hours each way just to drive to and from work. As a result, "in order to drive to work and drive home on any given day, the worker would have required between four to eight hours of rest" just to recover from the effects of the vibration incurred during the commute.[58]

[56] WSIB, Adjudicative Advice Document, "Recognizing Time to Heal – Assessing Timely and Safe Return to Work."
[57] WSIB, Administrative Practice Document, "Return to Work Considerations" (May 2015).
[58] *Workplace Safety and Insurance Appeals Tribunal Decision No.* 2122/16 (22 August 2016) at para 23.

Factory worker
Suffered left arm laceration

While is it true that the worker injured his left forearm, that does not mean the [worker's] whole person needs are irrelevant nor does it mean that ***modified duties that cause pain to a noncompensable body part*** are suitable. -*1062/16*

In *Decision No. 1062/16*, the worker lacerated his left arm while skinning a cow in a meat packaging facility. The employer offered him modified work, but it was located in a freezer and caused him nerve pain because of a prior right shoulder injury. The Board denied the worker benefits because the offered work was suitable for his work injury. The Tribunal rejected the Board's findings, noting that "[w]hile is it true that the worker injured his left forearm, that does not mean the [worker's] whole person needs are irrelevant nor does it mean that modified duties that cause pain to a noncompensable body part are suitable."[59]

In *Decision No. 70/16*, the Tribunal stated that the Board's decision that the worker could find work as a janitor in the wider labour market was "both unrealistic and illogical." It ignored that the worker's own employer, a large institution, had been unable to accommodate his restrictions following his shoulder injury.[60]

[59] *Workplace Safety and Insurance Appeals Tribunal Decision No.* 1062/16 (16 June 2016) at para 29.

[60] *Workplace Safety and Insurance Appeals Tribunal Decision No.* 70/16 (27 April 2016) at para 31.

III. The WSIB reversed vulnerable workers' promised benefits

A. Background to the issue

i. The WSIB becomes concerned about locked-in claims

In 2009, the Auditor General reported that the WSIB was in serious financial trouble. Among the culprits, the report stated, were the Board's "locked-in" claims, which had doubled in number between 1997 and 2001.[61]

The Auditor General identified "locked-in" claims because of their long duration and high cost: they involve benefits that, by law, the Board is no longer able to adjust, except in limited circumstances. Most benefits are "locked-in" by statute six years post-injury. If the worker is "locked-in" with full benefits, the WSIB is usually obligated to pay full benefits until the worker turns 65.

In 2011, the Board hired Deloitte & Touche LLP to analyze the WSIB's finances and to specifically address the role of "locked-in" claims in its 12 billion dollar deficit. The Board asked Deloitte to provide advice on "Right Sizing Costs," and outlined the following goals in their contract:

- "Understand[ing] … key drivers of high duration claims";

[61] Office of the Auditor General of Ontario, *2009 Annual Report*, at 331.

- "Understanding lock-in percentages – Making better lock-in percentage decisions"[62]; and

- Gaining "greater insight into the key drivers of high impact claims (including locked-in), high duration claims" in order to allow the WSIB to make "strategic decisions around claim management and risk mitigation."[63]

Deloitte's report, dated October 26, 2011, advised the Board to "standardize" and "control" its claims adjudication in order to achieve "significant cost savings."[64] The Board maintains that it "did not commission any reports which were aimed at reducing benefits."[65]

The Board followed Deloitte's advice and took significant steps to "standardize" its decision making, especially as it affects full benefits claims and lock-in. The Board now requires management or even director-level approval before allowing full loss of earnings claims. Further, the Vice President of Service Delivery, an extremely senior Board official, is required to *personally review* any "lock-in" of benefits granted to workers under the age of 55.[66]

The intention of these changes is transparently to cut benefits in expensive claims. This process directly introduces senior WSIB

[62] Ontario, Workplace Safety and Insurance Board, "Deloitte – Executed Contract" (2011) at 1.
[63] *Ibid* at 2.
[64] Deloitte noted that certain of WSIB's field offices had "significant variances" in total claims costs. The report further found that two offices in particular had "a disproportionate number of claims to survive until lock-in"; See Ontario, Workplace Safety and Insurance Board, "Deloitte – Analytic Review of Claims Data – 26 October 2011" at 50 in *WSIB Disclosure to Standing Committee on Government Agencies* (31 July 31) at 1679.
[65] Ontario, Workplace Safety and Insurance Board, *WSIB Disclosure to Standing Committee on Government Agencies* (31 July 31) at 17.
[66] Ontario, Workplace Safety and Insurance Board, "Oversight and Approval Framework – Service Delivery Manager Review and Touch Points – 29 May 2012" at 9 in *WSIB Disclosure to Standing Committee on Government Agencies* (31 July 31) at 4076

management into the adjudication of individual claims.[67] It also discourages front-line adjudicators from recommending full benefits. They can avoid conflict with management by denying full benefits at lock-in. Further, by targeting claims for full loss of earnings, these requirements have the largest impact on the most disadvantaged workers.

ii. The WSIB reverses full benefits because of concerns over its finances

In 2010 the Board appears to have implemented another "control" measure to reduce locked-in benefits: reversing full benefits claims before they could be locked in.

In 2010, the Fair Practices Commission, the organizational ombudsman for the WSIB, received a number of complaints after the Board started reassessing the claims of workers to whom it had previously promised full benefits. The Board had promised many of these workers full benefits until the age of 65, often in writing. The Board had decided these workers were unable to ever go back to work. But then, out of nowhere, as the worker was approaching the statutory "lock in", the Board changed its mind. As a result, workers' benefits – their only source of income – were often significantly reduced or ended completely. [68]

[67] IAVGO saw one such review in a worker's case record. The document revealed that the Vice President reviews a substantive summary of the facts of the case before deciding whether to approve or deny the lock-in of such claims.
[68] Ontario, Fair Practices Commission, *Fair Practices Commission 2010 Annual Report* (2010) at 3. According to the *WSIA,* workers who are not able to work in suitable and available employment because of their injury are entitled to loss of earnings support; *WSIA, supra* note 1, s 43.

iii. The WSIB drastically cuts the number of workers receiving full benefits

The Board has repeatedly said that it cannot provide information on how many times it reversed workers' promised full benefits. The Standing Committee on Government Agencies requested the Board provide this information, and IAVGO filed Freedom of Information requests, but the Board's response has been the same. [69]

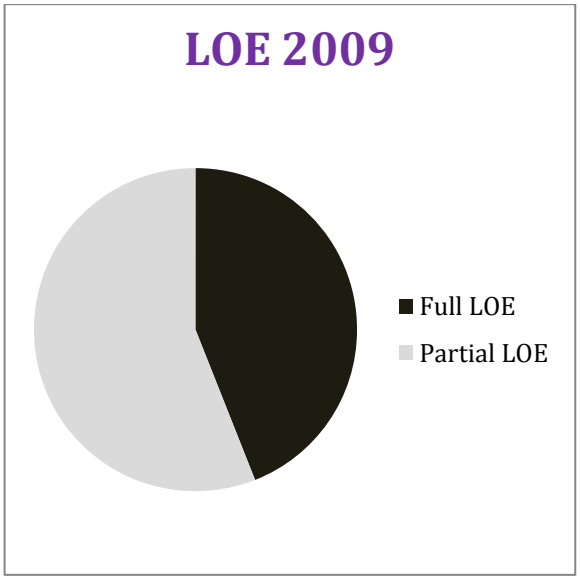
While it's therefore impossible to know how many times the Board reversed a worker's promised full benefits, there is evidence to suggest that the numbers are significant.

One crucial piece of evidence: the total number of workers receiving full loss of earnings at lock-in fell drastically in the years between 2009 and 2013. In 2009, the Board decided that 1,960 permanently injured workers needed long-term full benefits in recognition of the fact that they were unable to work following workplace injury. In 2013, the Board decided that only 693 permanently injured workers needed long-term full benefits.

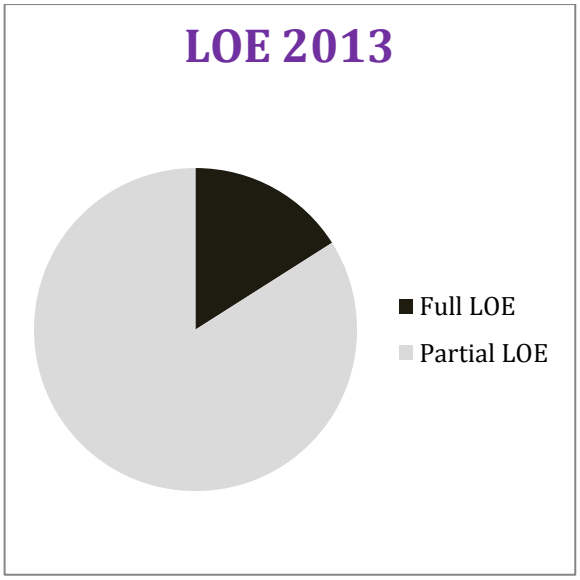
This is a ***65%*** reduction in full benefit cases at lock-in. Another way to look at the numbers: the percentage of workers receiving full benefits, as opposed to partial benefits, at lock-in dropped precipitously during this period. In 2009, 44% of workers receiving any loss of earnings payments at lock-in were receiving full loss of earnings (which means the Board accepted they were unable to find suitable work). In 2013, only 16% of

[69] Ontario, Workplace Safety and Insurance Board, "To IAVGO RE: FIPPA Access Request #14-036" (19 August 2014) at 1, 2; Legislative Assembly of Ontario, Standing Committee on Government Agencies, "Report on Agencies, Boards, and Commissions: Workplace Safety and Insurance Board" (November 2013) at 14.

workers receiving any loss of earnings payments at lock-in received full loss of earnings.



Total number of workers on LOE at lock-in: 4380



Total number of workers on LOE at lock-in: 4140

The Board maintains that this drastic drop in the number of workers on full benefits at lock-in is the result of "better return to work and recovery" outcomes. In providing IAVGO with these statistics, the Board stated that "[c]hanging trends in lock-in awards are directly related to improved outcomes from the New Work Transition Program, which was phased in between 2010 and 2011." Further, they contended that, "[r]eturn to work rates improved from 34.4% in 2009 to 81.3% in 2014."[70]

This contention – that the radical cut in full locked-in benefits between 2009 and 2013 can be explained by more "successful return to work," and not the Board's own adjudicative practices – is suspect for a number of reasons:

1. The Board has no idea if workers are actually working when they are locked in. At best, it only knows if workers are actually working one year post-injury. It does not do any systemic longer-term tracking of whether injured workers are actually working.[71] So, the Board *does not know* whether workers are actually working at lock-in. It has no reliable information about the rate of return to work "success" at lock-in.

2. The Board's contention that it improved return to work from 34.4% in 2009 to 81.3% in 2014 is entirely misleading. This alleged improvement is merely a function of changing how return to work

[70] Ontario, Workplace Safety and Insurance Board, "To IAVGO Re: FIPPA Access Request # 14-011, IPC Appeal #PA14-214 (28 Nov 2014) at 1.
[71] Sara Mojtehedzadeh, "WSIB policy pushes hurt workers into 'humiliating' jobs and unemployment, critics say" *The Toronto Star* (12 September 2016) online: https://www.thestar.com/news/canada/2016 /09/12/wsib-policy-pushes-hurt-workers-into-humiliating-jobs-and-unemployment-critics-say.html. It is still unclear whether the Board actually tracks return to work at all versus whether it merely codes the case "RTW" in its computer system; see Letter from IAVGO, IWC and Gary Newhouse to Tom Teahan, December 21, 2016 re: RTW Tracking, http://iavgo.org/research-and-resources/.

is characterized and measured. The former Labour Market Re-Entry program (pre-2010) only included workers who were unable to return to their employers and so had to retrain for a new career. These permanently injured workers represent the minority of all WSIB claims, and often face enormous barriers to entering an entirely new career. The current Work Reintegration program (Post-2010), on the other hand, expanded to include workers who are able to return their employers. These workers make up the majority of WSIB claims – most workers hurt on the job recover and return to work, regardless of any support the WSIB does or does not provide. By combining these two types of workers, the WSIB is able to claim a huge "success" for merely moving numbers from one column to another. Comparing statistics from the two different programs is meaningless.

3. The Board's new return to work program, phased in between 2010 and 2011, likely had no or little effect on the workers who were locked in from 2011-2013. The new system is largely aimed helping workers return to work with their accident employer.[72] Workers who were locked-in from 2011-2013, as the rate of full benefit awards plummeted, had likely attempted to return to work with their accident employer in the years after their injuries in 2005, 2006 and 2007, not after 2011. Their unsuccessful return to work attempts therefore happened under the previous WSIB "self-reliance" approach to return to work. While there might be some exceptional cases of return to work with the accident employer

[72] *Operational Policy Manual* Document 19-02-01, Work Reintegration Principles, Concepts, and Definitions, at 1.

many years post-injury, in most cases, the Board's new system had no effect on workers locked in from 2011-2013.

In sum, while it's clear that the number of workers who were locked in with full benefits has fallen precipitously, the Board's explanation for this drop is fundamentally unsatisfying. The real explanation is much more disturbing. The Board has imposed a number of cost-control measures that target workers, especially the most vulnerable workers who are unable to return to work.

B. WSIAT 2016 cases demonstrate a regular WSIB practice of reversing full benefit entitlements

If the WSIB is correct that workers no longer locked-in on full benefits are actually back to work, we would expect that there would be few or no appeals from workers who had been cut off full benefits. If workers were actually working, they would have no reason to appeal.

We found the opposite.

Is it just for the Board, after providing assurances to the worker that his benefits will not change except if his condition improves, to then unilaterally change that approach? – *Decision No. 166/14*

By 2016, there was already "considerable case law" at the Tribunal addressing "the issue of the Board first determining a worker to be unemployable and then later reversing that decision as of the final lock-in date."[73] To the best of our knowledge, all of these decisions have restored the workers' full benefits. As the Panel observed in *Decision No. 1997/15*, there is a "consensus of case law on the matter" of the appropriateness of the Board reversing a determination that the worker is entitled to full benefits.[74]

In one of the earlier cases dealing with these benefit reversals, *Decision No. 166/14,* the Vice Chair questioned whether the Board's decision to reverse full benefits was just and complied with the Board's

[73] See e.g., *Workplace Safety and Insurance Appeals Tribunal Decision Nos. 1997/15, 2143/14, 2350/14, 2385/15, 2189/14, 1997/15, 166/14.*
[74] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1997/15* (19 October 2015) at para 17.

obligation to make decisions based on the merits and justice of each case.[75]

IAVGO is also aware from our own work that some of these cases were reversed at the WSIB's Appeals Services Division. In one such case, the Appeals Resolution Officer noted that the only thing that changed between 2008 and 2012 was that the worker got four years older. The ARO noted that there is "no evidence to support that advanced age increases employment opportunities or enhances employability." She concluded that the Board's original decision was sound and there was no indication why the Board decided differently in 2012.

> **Labourer**
> **Suffered back injury**
>
> [T]here was sufficient sound basis to support the decision of the adjudicator in 2008 that the worker was not a candidate for LMR services and was unemployable. ***It is not clear why the adjudicator in 2012 decided differently*** as there was no new information provided to conclude that the earlier decision was flawed. - *ARO decision*

In 2016, the Tribunal issued an additional ***28*** decisions in which it found that the Board wrongly reversed a previous determination that the worker was entitled to full benefits.

[75] *Workplace Safety and Insurance Appeals Tribunal Decision No. 166 14* (14 February 2014) at para 26. Emphasis added.

i. *Decision No. 1192/16*

In *Decision No. 1192/16*, the worker was a farmer who, in his mid-fifties, injured his back while working as a truck driver and labourer.[76] He was unable to return to his job. In 2007, the WSIB sent him for a detailed psycho-vocational assessment of his ability to retrain and work. The worker had a learning disability and the psychologist said he was not a candidate for academic retraining. After receiving this assessment, the Board decided that the worker would neither benefit from retraining nor be able to find other work. The Board told him he would receive ongoing full loss of earning support.

It can be argued that it is not appropriate to keep a worker in limbo for over four years regarding LMR services, once there has been a decision, that such would not be appropriate and employment was not feasible. – *1192/16*

Four years later, out of nowhere, the Board decided to reassess his ability to work. The Board determined that he could in fact retrain to be a Retail Sales Clerk. However, the Board neither sent the worker for a new assessment nor asked his opinion. His doctor expressed concern to the Board, stating, "I am unclear as to why a vocational reassessment is planned for [the worker]. He has not improved since he was deemed to have a permanent work-related low back injury."

During the retraining program, the worker was told not to mention his back disability to prospective employers. The worker sent out resumes, but couldn't even find a placement, let alone a job. At the end of

[76] *Workplace Safety and Insurance Appeals Tribunal Decision No.* 1192/16 (18 May 2016).

the retraining program in 2012, the Board decided that he could work as Retail Sales Clerk. His benefits were reduced by the amount of money the Board believed he could make in this job.

The Vice Chair found that it was "not appropriate" for the Board to keep the worker "in limbo" for four years before sending him for retraining that it had already decided would not succeed. In restoring the worker's benefits, the Vice Chair made the following observations:

- In 2007, the Board told the worker he was to receive full benefits to age 65.
- There was "no evidence" that there had been any change in the worker's condition or circumstance since he was deemed incapable of performing the same suitable occupation in 2007.[77]
- In 2011, the worker had been unemployed for close to five years. He was older, and job availability in his community was much worse.

ii. *Decision No. 2385/15*

In another 2016 case, the worker was injured in 2006 in her job of 32 years as a packer.[78] Her attempts to return to work had failed. The Board sent her for a psycho-vocational assessment which determined that she was not a good candidate for retraining. The assessors explained that the worker, who scored at kindergarten level for literacy and numeracy, would need three years of retraining in order for her English language skills to be adequate for the job of telemarketer. In January 2008, when the

[77] Ibid at 5-8.
[78] *Workplace Safety and Insurance Appeals Tribunal Decision No.* 2385/15 (21 August 2013).

worker was in her fifties, the Board wrote to her and explained that she would receive full loss of earnings support until she turned 65.

Packer
Suffered back and shoulder injuries

The Panel finds ***no evidence*** to support a conclusion that the worker's condition had improved in the intervening period between Board's decision in 2007 which found the worker was not suitable for LMR services, and its subsequent decision on October 18, 2011, referring the worker for WT services.[79] – *2385/15*

In between 2008 and 2011, the Board rarely contacted the worker. There was no change in her medical condition. Yet, in October 2011, as her case approached lock-in, the Board decided the worker could retrain for the job of Retail Sales Clerk. The worker was 62 years old. Contrary to the assessors, who believed the worker required three years of retraining, the Board decided she could retrain in about eight months.

When the worker declined to participate in the retraining plan because of ongoing pain, the Board eliminated her benefits, saying that she failed to cooperate in her return to work. The Board determined she was capable of earning $21/hour as a Retail Sales Clerk and reduced her benefits by that amount.

The Panel restored the worker's full benefits, and made the following observations:

[79] Ibid at para 23.

- There was "no evidence . . . to suggest the worker no longer required extensive ESL upgrading, or academic upgrading, prior to attempting a return to the labour market."[80]

- There was "no evidence to support a conclusion that the worker's condition had improved in the intervening period" between 2007 and 2011.[81]

- The worker was almost 63 years old when the Board demanded that she participate in retraining, and would have been nearly 64 at the end of retraining.[82]

iii. *Decision No. 120/16*

In *Decision No. 120/16,* the Board reversed its finding that the worker couldn't work in the spring of 2010, only six months after it had made it. The Board had no reason for the reversal. In fact, an expert assessment in March 2010 confirmed again that the worker would be unable to do any formal academic training or upgrading. The Vice Chair observed that, while the Board has the power to reconsider a LOE entitlement decision, "it seems reasonable to expect that taking action of this nature should be based on a rationale that

It seems reasonable to expect that taking action of this nature should be based on a rationale that is understandable and communicated to a worker. That was not the case here – *120/16*

[80] Ibid at para 23.
[81] Ibid at para 23.
[82] Ibid at para 23.

is understandable and communicated to a worker." This was "not the case here."[83]

iv. *Decision No. 920/16*

The Board often failed to consider barriers to retraining and even risks inherent in retraining when reversing entitlement. In *Decision No. 920/16*, the Board had decided in 2009 that the worker should not be retrained. The Board noted expert advice that showed that all the proposed post-injury jobs were physically unsuitable or otherwise not viable. The Board also observed that the stress from a retraining plan could aggravate the worker's non-compensable epilepsy. In 2011, however, the Board changed its tune. The Board sent her to retraining and then cut her benefits in 2012. The Board appeared to ignore its own concerns about worsening the worker's health.[84]

[83] *Workplace Safety and Insurance Appeals Tribunal Decision No. 120/16* (18 January 2016) at para 53.
[84] *Workplace Safety and Insurance Appeals Tribunal Decision No. 920/16* (19 April 2016) at 9-12.

IV. The WSIB wrongly cuts benefits based on "pre-existing conditions"

A. Background

In or around 2010, the WSIB began using "pre-existing conditions" to deny or limit workers' benefits. Now, the Board frequently ends entitlement by deciding that workers have recovered from their workplace injury. Any ongoing symptoms, the Board reasons, must be caused by a pre-existing condition rather than the workplace accident.

This new approach began with the following changes:

- The WSIB started relying more heavily on "expected recovery times". It often uses these expected recovery guidelines to decide that a worker had recovered from the workplace injury, even if the medical evidence shows the worker is not recovered.[85]

- The Board began to increasingly decide that pre-existing conditions were the predominant or only source of a worker's ongoing disability. The most frequent "pre-existing conditions" the WSIB cites are degenerative changes, like degenerative disc disease. Often, these degenerative conditions are asymptomatic

[85] As part of its disclosures to the Standing Committee, the Board provided a document entitled "Expected RTW and Recovery Timeframes Tool (April 2012)"; included in the WSIB's disclosure to the Standing Committee on Government Agencies July 31, 2012 at 2377.

prior to the workplace injury and are only discovered through post-injury medical tests. [86]

- In or around 2012, the WSIB began reducing (or "apportioning") the permanent impairment (NEL) ratings of workers with pre-existing conditions, even if the worker had no pre-accident symptoms or diagnosed impairment.[87] This practice was contrary to the plain language of the Board's policy.[88] In November 2014, the Board revised its policies to try to legitimize this practice.[89]

- In November 2014, the Board implemented its first policy specifically addressing pre-existing conditions. This policy explains

[86] Maryth Yachnin and Rob Boswell, "Assessing Pre-Existing Conditions and Determining Permanent Impairments" in *Current Issues in Workplace Safety and Insurance Law – 2014* (Ontario Bar Association: Ontario, 2014) at 4.
[87] In early 2012, the WSIB hired a consultant to conduct a review of the NEL system and devise recommendations for a different way to rate these awards (despite the legal requirement that the Board use the third edition of the *AMA Guides*). The consultants recommended, among other things, that the WSIB should not include any permanent impairment assessment for "degenerative processes associated with aging and genetics". The WSIB immediately implemented the consultants' recommendation and, without any change in official policy, started apportioning the NEL benefits of workers with pre-existing conditions, even where those conditions were asymptomatic. Particular attention was paid to injuries of the back and neck. In May 2012, the WSIB's Permanent Impairment Branch issued an internal document directing NEL assessors (who by this point were almost exclusively the WSIB's own employees) to reduce awards whenever diagnostic or other medical reports show the presence of underlying or pre-existing conditions.
For the consultant's review, see: Brigham & Associates, *Permanent Impairment Advisory Service: Executive Summary,* (4 April 2012) at 7 (included in the WSIB's disclosure to the Standing Committee on Government Agencies July 31, 2012 at 1065).
For the internal document on NEL awards, see: Ontario, Workplace Safety and Insurance Board, *Spine and Pelvis: Permanent Impairment Branch,* May 7, 2012 (included in the WSIB's disclosure to the Standing Committee on Government Agencies, July 31, 2012, at 3549-3581). The document includes a table advising assessors how to apportion where there is evidence of DDD.
[88] Ontario, Workplace Safety and Insurance Board, "18-05-05, "Effect of a Pre-existing Impairment" in *Operational Policy Manual Document*.
[89] Ontario, Workplace Safety and Insurance Board, "18-05-03, "Determining the Degree of Permanent Impairment" in *Operational Policy Manual Document* (03 November 2014).

how entitlement may be limited due to the existence of pre-existing conditions.[90]

The Board's internal training documents further illuminate the Board's current adjudicative approach to pre-existing conditions.[91] These documents instruct decision-makers that if a worker's recovery time is longer than originally expected, they should look for a pre-existing condition as the likely cause:

- In one training document, for example, the Board informs its adjudicators that a worker's diagnosis is usually "compatible with the work related injury." If recovery is prolonged beyond the expected date, the document continues, and "further testing such as x-rays and CT scans are done, the underlying condition becomes apparent." This suggests that the reason for an extended recovery time is usually related to a non-compensable "underlying condition," rather than the workplace injury. The Board concludes the note by reminding adjudicators that "entitlement is not granted for the pre-existing condition."[92]

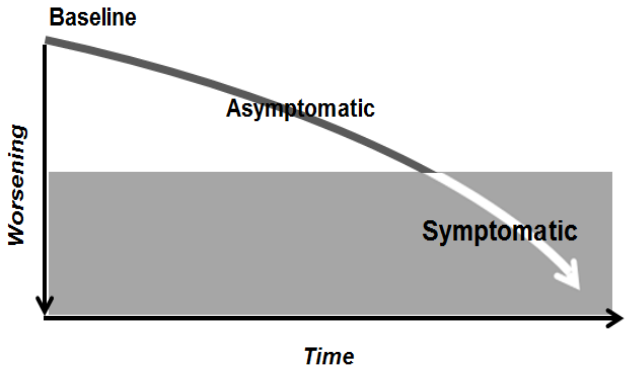
- The Board's characterization of degenerative changes further encourages adjudicators to attribute an extended recovery period to pre-existing conditions. The Board asserts that the key characteristics of degenerative conditions are a "***Slow and***

[90] Ontario, Workplace Safety and Insurance Board, "15-02-03 Pre-Existing Conditions" in *Operational Policy Manual Document* (03 November 2014).
[91] These documents were disclosed to Injured Workers' Consultants legal clinic upon a Freedom of Information request.
[92] Ontario, Workplace Safety and Insurance Board, "Training Resource - Delivery Guide: Principles of Adjudication" (28 April 2015) at 5 (disclosed to the Injured Workers' Consultants legal clinic upon a Freedom of Information request, 2016).

gradual progression, over years and decades" and an "***Asymptomatic phase*** before symptoms appear." The Board further specifies that "a ***single incident*** rarely changes the overall course or outcome" and that the major risk factors are "age, family history, prior cartilage damages."[93] This characterization suggests that any degenerative change would inevitably become symptomatic, regardless of the workplace injury.

- Below is a chart that the Board provides its adjudicators to guide their approach to pre-existing conditions. This chart teaches adjudicators that degenerative conditions follow a course of deterioration over time, regardless of workplace injury.

Degenerative Conditions



[93] Ontario, Workplace Safety and Insurance Board, "Training Resource – Degenerative Conditions: Key Characteristics" (2015) (disclosed to the Injured Workers' Consultants legal clinic upon a Freedom of Information request, 2016). Emphasis in original.

The Board's use of pre-existing conditions to cut benefits has been widely noted and challenged. One law firm has launched a class action about the Board's practice of cutting NEL awards. The plaintiffs allege that by cutting NEL awards in a manner that violates its own policy, the Board engaged in misfeasance in public office, bad faith and negligence.[94]

B. The WSIB wrongly denies entitlement based on pre-existing conditions

i. The WSIB wrongly attributes compensable physical injury to pre-existing changes

There are some cases where the evidence really does show that an injury is caused by a pre-existing impairment. However, the case law from the Tribunal reveals that the Board identifies pre-existing conditions to justify cutting benefits in spite of the evidence, not because of it. In 2016, there were **75** cases where the Tribunal found that the Board used a pre-existing condition to deny entitlement without adequate, or any, evidence or reason. The following are some examples:

- In *Decision No. 2625/15*, the Panel found that there was "**little, if any, evidence**" to support the Board's finding that the worker, a roofer, had recovered from her compensable back injury. The Panel further held the decision to attribute the worker's impairment to a pre-existing condition had been "**arbitrary**."[95]

- In *Decision No. 1968/16*, the Panel found that there was "**no evidence**" that any pre-existing condition was sufficiently severe

[94] While the class action was at first dismissed on a preliminary motion, the Ontario Court of Appeal recently restored it; *Castrillo v Workplace Safety and Insurance Board*, 2017 ONCA 121.
[95] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2625/15* (8 June 2016) at para 72.

to cause the worker's symptoms. The Panel held that, contrary to the Board's findings, there was "no medical evidence of substance" linking the worker's low back condition to a pre-existing condition.[96]

- In *Decision No. 2396/16*, the Panel found that there were "**no medical opinions suggesting an alternate cause**" for the worker's left shoulder injury "other than work duties." The Panel further observed that the Board had no evidence to suggest age-related degeneration was the sole cause of the worker's ongoing condition.[97]

- In *Decision No. 2705/15*, the Panel once again addressed a Board decision that a worker's injury was pre-existing. The Panel noted that the worker, a migrant farm labourer, had been performing **physically demanding work for 10 to 14 hours per day for 12 years prior to the accident without issue**. The worker only experienced acute symptoms immediately following the accident, and there was "no evidence" of any symptoms prior to the accident.[98]

- In *Decision No. 1980/16*, the Board had attributed the worker's back injury to a non-compensable condition. The Panel stated there was "no indication in the evidence . . . that the worker had a symptomatic low back condition, previous back injuries, or a

[96] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1968/16* (5 December 2016) at para 63 [*Dec. No. 1968/16*].
[97] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2396/16* (20 October 2016) at para 32.
[98] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2705/15* (4 April 2016) at para 31.

history of back symptoms" before the workplace injury. The Panel further observed that the neurosurgeon and family doctor both opined that the worker's back injury was work-related, and there was "no contrary medical opinion" in the case record.[99]

Salesperson
Suffered back injury

The Panel notes the opinion of the neurosurgeon with respect to causation reflects that of the worker's long time family doctor. We also find it is consistent with the evidence before us. There is ***no contrary medical opinion*** contained in the material before us. – *1980/16*

- In *Decision No. 1007/16*, the Vice Chair found that the evidence pointed to the "**inescapable conclusion**" that the work accident, not a pre-existing condition, caused the worker's chronic back injury. There was "no evidence" of any other event or factor.[100]

Paving stone installer
Suffered back injury

Finally, to the extent that the adjudicator may have been implying that the worker's back pain is due to a degenerative condition of any kind, there is ***no medical opinion*** to that effect. – *1442/16*

[99] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1980/16* (15 August 2016) at para 14.
[100] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1007/16* (27 April 2016) at para 35.

- In *Decision No. 1442/16*, the Panel determined that "to the extent that the adjudicator may have been implying that the worker's back pain [was] due to a degenerative condition of any kind, there [was] no medical opinion to that effect." The Panel further noted that the Board provided **"no medical support"** for its finding that the worker's condition was non-compensable.[101]

- In *Decision No. 2461/15*, the Panel found that the Board's decision that the worker's ongoing symptoms were attributable to underlying degenerative changes was "unsupported by any medical evidence." It was also **contrary to its own previous decision** that the worker, a welder, *did not* have a pre-existing bilateral shoulder condition at the time of his accident.[102]

ii. The WSIB wrongly attributes compensable mental health conditions to pre-existing conditions

The Board's tendency to erroneously blame pre-existing conditions extends to cases of psychological entitlement. In a significant number of Tribunal decisions, the Panel or Vice Chair found that the Board had wrongly attributed a mental health condition to a non-compensable factor. The following are some striking examples of this pattern:

- In *Decision No. 694/16*, the Tribunal addressed the appeal of a worker who developed a serious chronic pain condition requiring amputation of his finger. The Board denied the worker entitlement

[101] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1442/16* (17 June 2016) at para 23,
[102] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2461/15* (15 January 2016) at para 40.

for his psychological injuries diagnosed as social phobia, anxiety and PTSD, stating that he had a non-compensable history of mental health issues dating back to when the worker was a young child. The Panel found that this conclusion was "not supported by the evidence." In fact, there was **"no medical reporting" the worker had ever sought psychological treatment before the accident**.[103]

- In *Decision No. 2457/16*, the Board denied entitlement for the worker's psychological injuries because it found they were pre-existing. The Vice Chair found that there was "a lack of medical evidence" to show the worker had any symptomatic psychological condition until the injury.[104] The Board decision's that the worker had a pre-existing condition was **"not supported" by the evidence**.

- In *Decision No. 2824/16*, the Board had attributed the worker's condition to a number of non-compensable factors, including high blood pressure, a divorce many years before the injury, and the fact that the worker originally came to Canada as a refugee. The Vice Chair found that there was **"no evidence of substance"** to suggest that these non-compensable factors were in any way connected to the worker's mental health condition. The worker's specialist had not opined that any of these factors had caused any component of the worker's psychological condition.

[103] *Workplace Safety and Insurance Appeals Tribunal Decision No. 694/16* (2 May 2016) at para 54.
[104] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2457/16* (3 November 2016) at para 55

The Vice Chair firmly resolved that "**there [was] no substantial basis for concluding that these factors, which caused no psychological condition prior to the injury, somehow overwhelmed the causal contribution of her traumatic workplace injury** in perpetuating her ongoing psychological condition."[105]

The ARO also suggested that the worker's presentation was not genuine because she was tearful during the ARO hearing but was observed leaving the building "walking, holding, and swinging her large purse in her right hand". - *Decision No. 2824/16*

In this case, the Vice Chair also raised concerns about the ARO's suggestion that the worker's presentation was not genuine because she was tearful during the hearing but was observed leaving the building "walking, holding, and swinging her large purse". The Vice Chair noted that the worker was not "expected to cry constantly" and that her ability to carry a purse was entirely consistent with her demonstrated abilities. Further, the suggestion that the worker wasn't genuine ran counter to the weight of evidence on file.[106]

- In *Decision No. 1723/16*, the Board initially decided that the worker's psychological condition was work-related, but later wrongly rescinded this entitlement. The Vice Chair found that the

[105] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2824/16* (9 November 2016) at para 32, 33.
[106] *Ibid* at para 34.

Board's initial reasoning in allowing was the claim was correct. The Board originally found that "[t]he worker was capable of getting up and going to work every day for 21 years" before the injury. "While she may have some persisting psychological issues," the original decision maker observed, "there is nothing on file to support that the worker was depressed, having chronic nightmares or suicidal prior [sic] to this injury." The Vice Chair found that those conclusions were still "supported by the evidence" and found **"no reason" to reject the opinions of the three doctors who "unanimously" believed** that the worker's depression was work-related.[107]

The Board's tendency to wrongly attribute workers' mental health conditions to pre-existing facts of their lives like their family or immigration status disproportionately targets workers who are already marginalized.

[107] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1723/16* (August 16 2016) at para 23, 24. See also, *Workplace Safety and Insurance Appeals Tribunal Decision No. 2037/16* (19 August 2016) at para 10. The Vice Chair noted,

> *"On May 21, 2013, Dr. Omoruyi concluded in a letter to the Board that the worker remained compliant with all medications and treatment, but that she was significantly impaired mentally and physically. He opined in his report that her mental state was directly related to the loss of her function and her job. While the ARO concluded that the worker had prior depression, I see no evidence that she was unable to work and maintain the normal activities of daily living."*

C. The WSIB decides that workers have recovered contrary to the evidence

As well as erroneously attributing injuries to non-compensable conditions, the Board routinely decides that workers have recovered from workplace accidents despite evidence to the contrary. In ***56*** cases, the Tribunal found that the Board had ignored medical evidence that showed that the worker had not recovered. For example:

- In *Decision No. 1398/16 I*, the Vice Chair stated there was "no evidence" and "no medical evidence" to support the conclusion that the worker's left knee impairment had resolved, nor that the condition was pre-existing. The Vice Chair observed that it was "**not clear how the Case Manager and ARO came to the conclusions that they did about this matter**."[108]

> **Labourer**
> **Suffered leg and knee injury**
>
> There is ***no medical evidence stating that this condition was a pre-existing condition***. It is not clear how the Case Manager and ARO came to the conclusions that they did about this matter.[109] - *1398/16 I*

[108] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1398/16 I* (1 June 2016) at para 37 [*Dec. No. 1398/16 I*],
[109] *Ibid* at para 37.

- In *Decision No. 43/16*, the Panel found that "**all available medical evidence**" showed that the worker's compensable psychological injury had not resolved.[110]

- In *Decision No. 942/16*, a medical centre had predicted that a worker would fully recover in six weeks. The Board had relied on this prognosis to decide, six weeks later, that the worker was no longer injured. The Panel observed that that "[p]rognostications are not necessarily accurate predictions." Further, Panel noted, the worker was never referred back to the medical centre to reassess his actual condition. The clinical evidence, on the other hand, showed the worker had ongoing symptoms past the date the Board decided he should have recovered.[111]

Driver/unloader
Suffered back injury

[T]he REC report offered a prognosis indicating that the worker had partially recovered, and a full recovery was expected in six weeks. ***Prognostications are not necessarily accurate predictions***, however, and in this case, ***the worker was not referred back to the REC to re-assess his actual condition***. – *942/16*

[110] *Workplace Safety and Insurance Appeals Tribunal Decision No. 43/16* (21 January 2016) at para 43. See also *Workplace Safety and Insurance Appeals Tribunal Decision No. 1007/16* (29 April 2016) at para 38, in which the Tribunal states,

> *"There is no evidence if [sic] substance that the worker does not suffer from a compensable psychological condition on an ongoing basis."*

[111] *Workplace Safety and Insurance Appeals Tribunal Decision No. 942/16* (25 April 2016) at para 29.

- In *Decision No. 1661/16*, the Board had decided the worker had recovered based on a prognosis from the Board's Specialty Clinic. The Panel observed that, while it was inclined to give weight to the Board's specialists, "the evidence before us in this appeal clearly establishes that the anticipated recovery . . . did not occur."[112]

The Tribunal has also noted instances where the Board's recovery prediction was predicated on the worker receiving treatment that the Board never provided. In other words, a medical professional predicted a worker would recover by a certain time *if* they received a specific treatment. The Board then relied on that prediction to find the worker had recovered, but never actually provided that worker with the prescribed medical care.

Labourer
Suffered back injury

However, we note that the restrictions of 16 weeks were predicated on the worker receiving an "active rehabilitation program […] We note that ***the worker did not receive this rehabilitation*** and was not provided with an independent exercise program.[113] – *1580/16*

In *Decision No. 1580/16*, for example, the Panel observed that the prognosis of full recovery for the worker's back injury was based on the

[112] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1661/16 (14 October 2016) at para 34.* See also, *Workplace Safety and Insurance Appeals Tribunal Decision No. 2596/16* (2 December 2016) at para 46. Here, the Tribunal stated

> *". . . while Dr. Malcolm reported that a recovery was anticipated in eight weeks' time, I find the medical reporting before me establishes that the worker's compensable low back strain did not resolve."*

[113] *Ibid* at para 30.

worker receiving an "active rehabilitation program of 16 weeks duration with attendance three times per week" as well as an "independent exercise program." The Board withdrew entitlement without providing the worker with either.[114]

D. The WSIB wrongly reduces permanent impairment awards due to pre-existing issues

In or around 2012, the Board started cutting workers' permanent impairment (NEL) benefits contrary to its own policy. The Board's policy states that only pre-existing impairments that actually affected the worker pre-injury can justify a reduction to the NEL. But, following the advice of American consultants, the Board started cutting NELs because of pre-existing conditions that had not impaired the worker pre-injury.[115]

The typical case is a worker who suffers a workplace back injury. Before the injury, she didn't have any significant back pain and never needed any medical care for her back. But, post-injury, an MRI shows the presence of degenerative findings. The Board decides to cut her NEL by 50% to account for this alleged "pre-existing condition."

Before 2016, there was already a large body of case law at the Tribunal reversing the Board's decisions on this issue.[116] In 2016, the Tribunal issued ***38*** more decisions stating that the Board had wrongly reduced a NEL because of pre-existing issues that are not, as per the law and policy, a reason to reduce a NEL award.

[114] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1580/16* (12 July 2016) at para 30.
[115] See footnote 77.
[116] See e.g., *Workplace Safety and Insurance Appeals Tribunal Decision Nos. 204/14* (12 February 2014), *588/14* (7 April 2014), *607/14* (2 June 2014), *10/15* (16 April 2015).

In most of these decisions, the Tribunal determined that the Board's decision to cut the NEL due to an asymptomatic pre-existing condition was contrary to the Board's own policy. It was therefore inappropriate. The Board had no basis to make such deductions.

In 2016, the Tribunal found:

- The Board's wrongly reduced a cabinet manufacturer's NEL for his back injury. The Board's decision did not comply with "numerous previous Tribunal decisions" that held that a pre-existing condition alone, that did not disrupt employment, "is not a sufficient condition to permit a reduction in NEL benefits." [117]

- There was **"no basis"** for the Board to reduce an electrician's NEL for his wrist injury. There was no evidence the pre-existing condition had resulted in periods of impairment or illness requiring health care or caused a disruption in his employment. In the absence of such evidence, the Board should not have cut his NEL award. [118]

I note that numerous previous Tribunal decisions have held that a pre-existing condition alone ... is not a sufficient condition to permit a reduction in NEL benefits. – *462 16*

- The Board wrongly reduced a carpenter's NEL for his back injury. The Board's decision did not comply with Board policy 18-05-05 which contains "no provision for reducing a pre-existing condition (as opposed to a pre-existing impairment or disability)."

[117] *Workplace Safety and Insurance Appeals Tribunal Decision No. 462/16* (1 June 2016) at para 21.
[118] *Workplace Safety and Insurance Appeals Tribunal Decision No. 313/16* (28 April 2016) at para 22.

> It was therefore **"inappropriate"** for the Board to apply the policy the way it did to reduce the worker's benefits. [119]

The Tribunal has also observed that the Board was failing to follow its own prior decisions in making these incorrect deductions. In *Decision No. 558/16*, the Board had already made a final decision that the worker did not have a pre-accident impairment before reducing the worker's NEL. The Tribunal concluded that, having made this final decision, it was "not open to the Board to subsequently characterize those findings as a pre-injury impairment and make a deduction from the worker's NEL award with respect to them."[120]

In another case, the Tribunal went further, taking the unusual step of directing the Board *in advance* not to implement its incorrect practice of apportionment. In *Decision No. 2449/15*, the Panel decided that there was no evidence to counter the medical opinions that the worker did not recover from his work injury and was not impaired before the injury. The Panel then advised, "For greater certainty, since we have found the worker's left knee was asymptomatic prior to the injury, the NEL benefit shall be calculated without any deduction on the basis of a preexisting impairment or condition."[121]

[119] *Workplace Safety and Insurance Appeals Tribunal Decision No. 946/16* (19 April 2016) at para 25.
[120] *Workplace Safety and Insurance Appeals Tribunal Decision No. 558/16* (11 May 2016) at para 36.
[121] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2449/15* (9 February 2016) at para 21.

Electrician
Suffered neck injury

If the Board takes the position that the Tribunal's interpretation of the phrase is incorrect, it has the right to request reconsideration of a Tribunal decision based on that interpretation. There is no evidence that the Board has done so. -*1975/16*

The Tribunal has also noted that the Board has not responded to the overwhelming body of Tribunal case law establishing that it is breaching its own policy. In *Decision No. 1975/16*, the Vice Chair observed the consistent body of case law establishing that the Board was cutting benefits in violation of the applicable policy. The Vice Chair commented that "[i]f the Board takes the position that the Tribunal's interpretation of the phrase is incorrect," it could "request reconsideration of a Tribunal decision based on that interpretation." The Board has never done so.[122]

[122] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1975/16 (12 September 2016)* at para 38.

V. The WSIB targets workers with mental health issues

A. Background to the issue

Workers and stakeholders report that the WSIB regularly denies workers' entitlement for their injuries, even in the face of unanimous or near-unanimous medical opinion evidence to the contrary. Doctors have also voiced serious concerns about how these adjudicative failures affect workers.[123]

Our review of the Tribunal's 2016 case law definitively shows that ignoring medical opinion is a systemic problem at the WSIB. The issue is not limited to a couple of poorly adjudicated claims: we found ***175*** cases where the Board's decision ran counter to all of the medical evidence.[124] In many, the Board ignored the only medical evidence on safe return to work, the only evidence on the impact of a pre-existing condition, or the only evidence on causation and entitlement.[125]

While this indifference to evidence extends to all kinds of claims, the Board's adjudication of psychological injuries stands out as particularly alarming. In this section, we address the Board's troubling willingness to

[123] *Prescription Over-Ruled supra* note 4; See also "Health Professionals for Injured Workers," (website) online: <https://www.hpiw.org>.
[124] Many of these are discussed elsewhere in this report. For a comprehensive chart of our findings, see http://iavgo.org/research-and-resources/.
[125] For example, see *Workplace Safety and Insurance Appeals Tribunal Decision No. 2730/15* (5 January 2016); *Workplace Safety and Insurance Appeals Tribunal Decision No. 245/16* (19 February 2016); *Workplace Safety and Insurance Appeals Tribunal Decision No. 788/16* (18 April 2016); *Workplace Safety and Insurance Appeals Tribunal Decision No. 363/16* (16 June 2016); *Workplace Safety and Insurance Appeals Tribunal Decision No. 1633/16* (29 June 2016); *Workplace Safety and Insurance Appeals Tribunal Decision No. 2322/16* (22 September 2016).

ignore the professional opinion of psychiatrists and psychologists. We also address the way the Board has targeted workers with mental health conditions for enhanced scrutiny and surveillance.

B. The WSIB denies psychological injuries contrary to unanimous medical evidence

Perhaps the most disquieting Tribunal cases are those where the Board had denied entitlement for psychological injury despite absolutely unanimous medical opinions that the worker's condition was work-related. Stakeholders and workers have expressed serious concern about how the Board treats workers with mental health conditions. Too often, these workers are denied compensation, denied care, or even subject to surveillance and other breaches of their privacy rights.[126] The Board's approach to workers with mental health issues is particularly inappropriate because of the strong, well-documented connection between workplace disability and psychological injury.[127]

> **Shipper/receiver**
> **Suffered shoulder injury**
>
> I find no reason to reject the opinions of Drs. Waldenberg, Fitzgerald and Rootenberg who were ***unanimously of the view that the worker's depression was directly related to her compensable right should injury*** and its sequalae.
> - *1723/16*

[126] Joel Schwartz, "Recent Developments on Entitlement for Psychotraumatic Disability" in *Current Issues in Workplace Safety and Insurance Law* (Ontario Bar Association: Ontario, 2014) at 13-15.
[127] Fergal T O'Hagan, Peri J Ballantyne & Pat Vienneau, "Mental Health Status of Ontario Injured Workers With Permanent Impairments" (2012) 103:4 Can J Public Health 303.

Tribunal case law shows the Board has repeatedly refused to recognize psychological injuries despite clear, uncontroverted medical evidence that the worker's condition is work-related. The following cases provide stark examples of this endemic issue:

- In *Decision No. 1714/16*, the Tribunal stated that "**the overwhelming balance of the medical reporting**" showed that the worker's depression was caused by her workplace accident. There was "no contradictory medical opinion in the case materials."[128]

- In *Decision No. 2780/15*, the Tribunal observed that the medical evidence "**overwhelmingly support[ed]**" the causal connection between the worker's psychological condition and his compensable "persistent and ongoing pain."[129]

- In *Decision No. 907/16*, the Tribunal held that the Board's decision to deny entitlement for depression and anxiety was **contrary to the "unanimous opinion of the worker's treating and assessing health care providers.**"[130]

- In *Decision No. 914/16*, the Vice Chair observed that there were "several medical reports" indicating that the worker's psychiatric

[128] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1714/16* (10 November 2016) at para 13.
[129] *Workplace Safety and Insurance Appeals Tribunal Decision No. 2780/15* (13 January 2016) at para 28.
[130] *Workplace Safety and Insurance Appeals Tribunal Decision No. 907/16* (21 April 2016) at para 37

condition was work-related, and **"no medical report" to the contrary**.[131]

- In *Decision No. 1723/16*, the Vice Chair found that the worker's three treating doctors were "**unanimously of the view that the worker's depression was directly related** to her compensable right shoulder injury and its sequelae." The Vice Chair held that there was "no reason" to reject these opinions.[132]

- In *Decision No. 1532/16*, the Vice Chair noted that the Board's decision ran contrary to "the opinions of all the three health care professionals who have assessed or treated the worker." Each was aware that the worker had experienced depression prior to his compensable accident and still, each opined his psychological condition was work-related. The Vice Chair ultimately concluded that "**all of the medical opinions . . . support the existence of an injury-related psychological impairment**" and "no medical reports indicating an alternative cause."[133]

- In *Decision No. 1871/16*, the Vice Chair noted that a number of doctors attributed the worker's psychological condition to his workplace injury and "**there was no objective evidence of significance to challenge [them]**."[134]

- In *Decision No. 43/16* the Panel noted that "**all available medical evidence**" supported finding that the worker's psychotraumatic

[131] *Workplace Safety and Insurance Appeals Tribunal Decision No. 914/16* (16 April 2016) at para 9.
[132] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1723/16* (4 July 2016) at
[133] *Workplace Safety and Insurance Appeals Tribunal Decision No. 1532/16* (21 June 2016) at para 5, 11.
[134] *Workplace Safety and Insurance Appeals Tribunal Decision No.1871/16* (28 November 2016) at para 30.

disability, accepted by the Board as a temporary compensable condition, had become a permanent impairment.[135]

- In *Decision No. 1503/15* the Tribunal noted that there was "**no evidence of any significance**" that the worker's ongoing psychological condition was due to non-work-related factors. Rather, the Tribunal found, "the medical evidence [was] essentially silent on . . . non-work-related factors, and instead relates the worker's psychological condition to her compensable injury."[136]

- In *Decision No. 435/16*, the Vice Chair noted that the ARO's decision contradicted "**unanimous opinions** expressed by the worker's treating psychologists and psychiatrists, and independent assessors that the worker's depression resulted form her workplace injury." The Vice Chair further found that the factors the ARO attributed to the worker's condition – "loss of accommodated work/work with the accident employer, difficulty in retraining; financial strain, difficulty in the pain program and strain with the WSIB" – were all difficulties which "flow[ed] directly from the worker's compensable injury." Thus, the ARO not only ignored the medical evidence, but also ignored the Board policy that the sequelae of a workplace injury are also compensable.[137]

[135] *Workplace Safety and Insurance Appeals Tribunal Decision No.43/16* (21 January 2016) at para 43.
[136] *Workplace Safety and Insurance Appeals Tribunal Decision No 1503/15* (2 Feb 2016) at para 54.
[137] *Workplace Safety and Insurance Appeals Tribunal Decision No. 435/16* (26 February 2016) at para 56.

C. The WSIB targets workers with mental health conditions for scrutiny and surveillance

A few cases from the Tribunal further suggest that the Board is unduly suspicious of workers with mental health conditions, and further, uses intrusive methods to scrutinize their claims. Three cases in particular show that the Board ignored credible medical opinion that the worker's condition was genuine and, instead, undertook a suspect and unnecessary investigation of that worker.

i. *Decision No. 2264/15*

Decision No. 2264/15 concerned a welder who, at age 33, twisted his knee while lifting a 75 pound pipe. The injury resulted in a permanent knee injury, and he was subsequently diagnosed with major depressive disorder, anxiety, and chronic pain.[138] The Tribunal found that the Board wrongly ignored the decision of its own Appeals Services Division, failed to provide treatment and, instead committed significant amounts of money to investigating the veracity of his claim.

The worker's knee injury took place in 2004 and he was first diagnosed with depression and anxiety in 2007. In 2009, the Board accepted his entitlement for a psychological injury and began a labour market re-entry program. The following year, however, the Board decided the worker was not cooperating in retraining and cut his benefits.[139]

The worker appealed, and in 2011, the ARO found that the worker was entitled to compensation for his pain and major depression. The ARO noted that the "consensus opinion" from the treating specialists (including specialists at the CAMH Psychological Trauma Program) was that the work

[138] *Workplace Safety and Insurance Appeals Tribunal Decision No.2264/15* (18 March 2016) at para 4.
[139] *Ibid* at para 4.

injury was a major contributor to his pain and major depression.[140] Further, the ARO found, the Board had been premature in referring the worker to retraining before he had received adequate treatment. At that time, he was totally impaired from a psychological and physical perspective. As such, the Board was wrong to find that he was not cooperating with retraining.[141]

> The CM also **continued to focus on returning the worker to the workforce rather than on offering him treatment for his psychological conditions**. It was in this context that the CM posed questions to Dr. Notkin that had already been addressed by the ARO and decided in the worker's favour.[142] - *2264/15*

The ARO instructed the Board to provide the worker with treatment for his compensable psychological disability, including Cognitive Behavioral Therapy. The ARO directed the Board to assess the worker's entitlement for a permanent impairment award for his psychological condition after the worker had received medical treatment.[143]

Even after the ARO decision, the Tribunal noted, the Board doubted that the worker actually suffered from a compensable psychological condition or was cooperating in treatment.[144] Instead of focusing on providing the worker with treatment, the Board directed its energies towards returning the worker to work.

[140] *Ibid* at para 5.
[141] *Ibid* at para 5.
[142] *Ibid* at para 52.
[143] *Ibid* at para 5.
[144] *Ibid* at para 52.

Rather than referring the worker to Cognitive Behavioural Therapy, as directed by the ARO, the Board referred him to an occupational therapist. The OT reported that communication with the worker was difficult because he limited eye contact and was unresponsive to questions. He did participate in assigned physical exercises, but his pain level was very high, and the OT reported no significant improvements in his symptoms or psychosocial barriers.[145]

> The CM's conviction that there was a lack of genuineness in the worker's presentation and a failure to cooperate was reflected in the decision to **commit very substantial Board resources to obtaining a new IPE and conducting covert surveillance** of the worker over a period of several days during his participation in the IPE.[146] - *2264/15*

At the same time, the Board interpreted the worker's experience with psychiatrists as a suggestion that he was not cooperating with his medical treatment. The worker's psychiatrist did not provide an update to the Board, and the worker attempted to see a new psychiatrist, which the Board decided was an indication of non-cooperation.[147] The Board then ordered an independent psychiatric assessment. Dr. Cashman, the psychiatrist performing the assessment,

> **Based on the findings of the ARO … there was no reason for the worker to expect that the genuine nature of his psychiatric condition was in question. – *2264/15***

[145] *Ibid* at 55, 56.
[146] *Ibid* at para 53.
[147] *Ibid* at paras 39-40.

met with the worker but advised that he did not believe the worker understood the nature of the interview and was therefore unable to continue the assessment. The Board interpreted this report from Dr. Cashman "as an indication of the worker's non-cooperation and immediately decided to suspend the worker's LOE benefits."[148]

The Board referred the worker for a second independent psychiatric assessment, this time by Dr. Notkin, and arranged for the worker to be placed under covert surveillance. Dr. Notkin's report doubted the genuineness of the worker's pain, and opined that he was attempting to feign a mental disorder.[149]

The Board then denied the worker entitlement for a permanent impairment award for his psychiatric injury and decided he was not cooperating in his retraining. It therefore punished him by deeming him able to work fully restoring his pre-accident wage as an experienced CNC Programmer making $43.27/hour. This eliminated his loss of earnings benefits.[150]

The Panel assessed the evidence and found that the worker was entitled to full loss of earnings and a permanent impairment award.

The Panel held that Dr. Cashman was correct that the worker did not understand the nature and context of the independent psychiatric assessment. There was "no reason for the worker to expect that the genuine nature of his psychiatric condition was in question," that he would "continue to be viewed as uncooperative by the Board," or that he would "be referred for further assessments to determine the nature of his psychiatric condition(s), as opposed to being offered psychological

[148] *Ibid* at para 38.
[149] *Ibid* at paras 42, 43.
[150] *Ibid* at paras 9, 10.

treatment." The worker thought this assessment was actually psychological treatment. The report was not evidence that the worker was un-cooperative.[151]

The Panel further found that the opinions of the CAMH Psychological Trauma Program and the treating psychiatrist were preferred over that of Dr. Notkin. The Panel noted the Board spent $17,585.63 on Dr. Notkin's report but failed to provide Dr. Notkin with a complete and accurate factual background.[152] The Panel held that the Board also failed to inform Dr. Notkin that the ARO had already made binding findings of fact that were central to the topic of his report.[153]

The worker was entitled to full loss of earnings and a permanent impairment award. The OT report showed that the worker did not benefit from further treatment. The only reasonable interpretation of the ARO decision in these circumstances was that the worker was totally impaired until he was provided an effective course of psychological treatments, and even then, only if he actually improved. Since the Board failed to provide any treatment, he remained totally disabled.[154]

Finally, the Panel found that the covert surveillance evidence was of no use to determining the issues in the case.[155]

ii. *Decision No. 1087/16*

Decision No. 1087/16 concerned a construction equipment operator who was struck by a piece of asphalt at age 30. He suffered an eye injury and subsequently developed PTSD.[156]

[151] *Ibid* at para 49.
[152] *Ibid* at paras 45, 50.
[153] *Ibid* at para 50.
[154] *Ibid* at paras 56, 63.
[155] *Ibid* at para 43.

The Tribunal found that the Board used surveillance evidence that was four years old to decide, "without foundation", that the worker was able to work as a heavy equipment operator.[157]

The worker's injury took place in 2005. The Board accepted that he developed PTSD and headaches as a result and awarded him a 53% NEL.[158]

In 2009, the Board referred the worker for retraining and, in 2011, decided he had recovered and was able to work as a heavy equipment operator. The Board's decision in 2011 relied heavily on 35 minutes of surveillance footage obtained by the Board in 2007. The Board felt that that surveillance evidence from 2007, "showing that the worker could walk and park a vehicle in the general vicinity of a construction work-site," was evidence that he could return to heavy equipment operation.[159]

The Panel finds that the worker's walking and parking in the general vicinity of construction activities in 2007 does not equate to him being able to work as a heavy equipment operator in 2011 or since that time - *1087/16*

The Tribunal did not agree with these findings. The Tribunal found, first of all, that the Board's decision that the worker's condition had resolved by 2011 was "without foundation."[160] The worker's doctors had

[156] *Workplace Safety and Insurance Appeals Tribunal Decision No.1087/16* (10 June 2016) at paras 5, 6.
[157] *Ibid* at para 31.
[158] *Ibid* at para 7.
[159] *Ibid* at para. 34.
[160] *Ibid* at para 31.

not suggested he was recovered. He continued to get psychiatric care and his doctors gave him a "highly guarded prognosis."[161]

Further, the Tribunal found, the surveillance evidence from 2007 shed "no probative light" on whether the worker was still impaired by his compensable injuries in 2011. The Panel held that "the worker's walking and parking in the general vicinity of construction activities in 2007 does not equate to him being able to work as a heavy equipment operator in 2011."[162] The job the Board selected was "unsafe."[163]

iii. *Decision No. 861/16*

Decision No. 861/16 concerned a general labourer employed by a book binder. At age 37, the worker developed a lower back sprain from repetitive bending and lifting and subsequently developed chronic pain disorder and anxiety. The Tribunal determined that the Board had relied on an "impartial psychiatric assessment" from an unreliable expert to determine that the worker was malingering.[164]

The worker's lower back injury took place in 2007. In 2011, the Board granted initial entitlement for his psychological conditions including full loss of earnings from 2008 to 2011. In 2012, however, a psychiatrist named Dr. Monte Bail conducted an independent medical assessment and reported that the worker was malingering. Relying on this report, the Board retracted entitlement, denying any ongoing entitlement for psychological injury, chronic pain disability, or loss of earnings benefits.[165]

[161] *Ibid* at paras 31, 32.
[162] *Ibid* at para 34.
[163] *Ibid* at para 37.
[164] *Workplace Safety and Insurance Appeals Tribunal Decision No. 861/16* (3 August 2016) at paras 9, 12, 33-34.
[165] *Ibid* at paras 12, 22-23.

The Panel found that Dr. Bail's report was not credible and preferred to rely on evidence from the assessors at CAMH and the worker's own specialist who reported that the worker's condition was genuine.[166]

The Panel noted that while the CAMH report was "highly detailed" and 27 pages in length, Dr. Bail's report did not provide adequate basis for its conclusions.[167] The Panel also noted the worker's testimony that Dr. Bail had yelled at and belittled him during the appointment, and the appointment only lasted 45 minutes.[168] The Panel further observed that Dr. Bail had been criticized in other legal proceedings before the courts and the Tribunal. These adjudicators had found that he was not a credible expert witness.[169]

The WSIB has used Dr. Bail fairly often for independent psychiatric assessments.[170] Very recently, the Ontario Court of Appeal weighed in on Dr. Bail in the context of his testimony in a car accident case.[171] The Court of Appeal stated that, "the admission of Dr. Bail's testimony resulted in a miscarriage of justice."[172] The Court noted, "[i]t was evident from a review of Dr. Bail's report that there was a high probability that he would prove to be a troublesome expert witness, one who was intent on advocating for the defence and unwilling to properly fulfill his duties to the court."[173]

[166] *Ibid* at para 24.
[167] *Ibid* at para 27.
[168] *Ibid* at paras 33-34.
[169] *Ibid* at para 37; See also *Daggitt v Campbell*, 2016 ONSC 2742, *Sohi v ING Insurance Co of Canada*, [2004] OFSCD No 106, *Gordon v Greig*, 2007 CanLII 1333 (ON SC).
[170] E.g. *Workplace Safety and Insurance Appeals Tribunal Decision Nos. 1766/14, 266/16, 1290/15.*
[171] *Bruff-Murphy v. Gunawardena,* 2017 ONCA 502 (CanLII).
[172] *Ibid* at para 69.
[173] *Ibid* at para 42.

iv. *Conclusion*

In these cases, the Board chose to scrutinize workers suffering from psychological injuries despite having no reason to doubt the veracity of their claims. The Board misinterpreted psychiatry reports, misused covert surveillance, and relied on expert witnesses whose credibility had already been questioned. These troubling methods prolonged these workers' wait for badly-needed treatment and left them in a precarious financial position while they navigated the appeal process.

Conclusion

There is a crisis at the Workplace Safety and Insurance Board. Not a financial crisis; a crisis of confidence and trust. Despite the government's promise to the contrary, the Board has been getting its financial house in order at the expense of injured workers.[174] Using the language of "right-sizing costs" and "modernization," the Board has reduced its benefit costs the expense of injured workers.

The WSIB denies making adjudicative changes to cut benefits. It denies the cries of concern from doctors that their opinions are being dismissed. But the WSIB cannot deny the lived experiences of the hundreds or thousands of workers who have been forced to pursue lengthy, stressful and costly appeals to the Workplace Safety and Insurance Appeals Tribunal. It is clear their benefits should never have been denied in the first place.

[174] *Mr. Peter Tabuns: So if, in fact, it's found that there are financial problems with the WSIB, the government will ensure that the changes that are needed are not going to be done on the backs of workers. Is that correct? Ms. Leeanna Pendergast: That's correct, Mr. Tabuns. Full funding will not be achieved on the backs of injured workers.*[174] Hansard, Standing Committee on Finance and Economic Affairs, Dec. 6, 2010, page 261.

WSIB ONTARIO CSPAAT
Workplace Safety & Insurance Board
Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

Toronto Office
200 Front Street West
Toronto ON M5V 3J1

Telephone:
(416) 344-1000
1-800-387-0750

TTY:
1-800-387-0050

Fax:
(416) 344-4684

Web site:
www.wsib.on.ca

Bureau de Toronto
200, rue Front Ouest
Toronto ON M5V 3J1

Téléphone :
(416) 344-1000
1-800-387-0750

ATS :
1-800-387-0050

Télécopieur :
(416) 344-4684

Site Web :
www.wsib.on.ca

February 6, 2017

Maryth Yachnin
Staff Lawyer
IAVGO Community Legal Clinic
1500-55 University Ave
Toronto, ON
M5J 2H7

Dear Ms. Yachnin:

Thank you for your letter of December 22, 2016, in regard to appeal time limits related to suitable occupations and work transition plans.

I am pleased to provide you with an update regarding the process changes that we proposed to implement subsequent to meetings with yourself and various injured workers groups during 2016.

In recognition of the need to enhance communication with the workplace parties during the development of a suitable occupation (SO) and Work Transition (WT) plan approval process, the WT plan approval letter was revised and implemented at the end of 2016. After the SO and WT plan is agreed to by the worker, the decision letter confirming the plan now includes detailed information regarding the impact that the SO selection will have on the determination of future LOE benefits upon completion of the WT plan.

We have implemented improvements in the monitoring of WT plans. After each plan intervention, the file is reviewed to ensure that specific factors are confirmed before progression to the next phase of the WT plan. The WSIB confirms the following factors:

- that the worker's functional abilities are aligned with the job demands of the SO, with or without accommodation,
- that the worker is acquiring the appropriate skills in preparation for RTW in the selected SO,
- that the SO continues to be available in the local labour market, and
- that the appropriate SO wage is based on worker's skill level (entry or average) using the most up to date labour market wage information.

Finally, we have developed a single letter to be sent out at WT plan completion which addresses both the WT plan closure and the loss of earnings (LOE) decision resulting from the closure. The letter offers more clarity and will be jointly signed by both the WT Specialist and the Case Manager. Once again, the WT completion letter will confirm that the specific factors (outlined above) have been met and these factors form the rationale and basis for the LOE determination. Furthermore, a six month period to appeal any or all of the four factors that confirm the appropriateness of the SO and the resulting LOE adjustment will be provided. The letter is targeted for implementation in April of 2017.

Thank you for your patience as we implement the final process change. We appreciate that these matters are important to injured workers and we are confident that the changes will better serve their interests.

Sincerely,

Kate Lamb
Chief Corporate Services Officer

Rob Timlin
Vice President, Operations

cc. Laura Lunansky
Laurie Hardwick
Debbie Coulson
Cindy Trower
Margaret Keys

VIA EMAIL

December 21, 2016

Kate Lamb
Chief Corporate Services Officer
WSIB
200 Front Street West
Toronto, ON
M5V 3J1

Dear Ms. Lamb:

Re: WSIB time limit practices - suitable occupation decisions

We are writing to follow up on our meetings with you on May 19, 2016 and August 12, 2016 of this year and the letter sent by IAVGO on April 29, 2016, attached.

As you know, we raised serious and urgent concerns about an issue affecting many vulnerable workers hurt on the job. In recent years, the WSIB has been using time limits to unfairly stop workers from pursuing their appeal rights. In particular, the WSIB has been preventing workers from appealing decisions on loss of earnings benefits if the worker missed the 30-day time limit to appeal the choice of suitable occupation at the outset of retraining.

This WSIB practice most disadvantages unrepresented and precarious workers who don't realize that there is an issue to appeal until their benefits are cut at the end of work transition. These workers often have no idea there is a problem with the retraining goal until they do the retraining and then try to find a job. The WSIB is unfairly preventing these workers from pursuing the benefits to which they are entitled.

In August 2016, we met with you and you told us about a series of concrete changes the WSIB intends to make to fix this problem.

Beyond the brief update at the November 30th Appeals meeting attended by two of the signatories of this letter, we have not received a specific update since that meeting four months ago that demonstrates how and when this serious issue will be addressed. We now understand the WSIB may be delaying taking action on this issue by moving it into its 2017 policy review process. This is extremely troubling. As we have repeatedly noted, this issue is of urgent concern to workers. Until the WSIB changes its practice, workers continue to be denied their appeal rights. The WSIB does not need to make any policy changes in order to implement the proposed practice changes.

We are writing to request a written update on the proposed practice changes and the expected date of implementation.

The WSIB's proposed practice changes

When we met on August 12, 2016, you advised that the WSIB would be changing its current practices to address some of our concerns. You advised that:

- The Case Manager will send a letter at the end of the WT Plan, confirming the selection of the suitable occupation based on four key criteria: functional abilities, essential skills, availability and wages. The Case Manager will adjust benefits as a result;

- Workers will be able to appeal the suitable occupation at the end of retraining based on the listed criteria. So, workers will be able to challenge the SO/LOE adjustment if they believe the SO is not suitable because of their functional abilities/essential skills/availability/wages as at the end of the WT Plan, even if they did not appeal the SO as identified in the WT Plan Approval letter; and

- The WSIB will apply a six-month time limit to the Case Manager letters confirming the suitable occupation at the end of the WT Plan and adjusting benefits.

You asked us to give the WSIB time to make the proposed changes, which we have done. It has now been over eight months since we alerted you to our concerns in detail. We have waited because we believed you were moving forward with the intention of implementing the revisions as soon as possible.

We were also encouraged because the WSIB has confirmed its intention to change this appeal practice in other meetings, including at a meeting with the Executive of the Ontario Bar Association Workers' Compensation Section, attended by both employer and worker advocates, on November 4, 2016.

Recent developments show no movement in correcting the issue

However, it now appears that the WSIB may have no immediate plans to implement the proposed practice changes, and instead may be planning to delay the proposed changes pending an upcoming policy review consultation on the WT policies.

If this is true, we are extremely troubled by this approach. We don't understand the need for such a protracted process. There is no policy authorizing or requiring the current practice around suitable occupation time limits. The WSIB does not need to revise any policies to implement the changes it has proposed.

David Chezzi recently provided us copies of the draft WT plan approval and closure letters the WSIB is proposing to implement in January 2017. These proposed letters don't address the time limit issue whatsoever. We have no comment on the revised WT plan letters at this time because they don't correct the serious injustice we have raised.

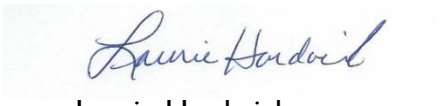
Since you have said the proposed practice changes will not apply retroactively, during this lengthy delay, many workers are still being denied their appeal rights. They will have to litigate complex time limit appeals just to pursue their claims. We renew our request that you immediately stop the practice of applying the SO time limit to subsequent decisions in a worker's claim.

Our request for a written response with a date

Please tell us when the WSIB plans to implement the proposed practice changes. We would appreciate your written reply.

Thank you. We recognize the thought and work you have put into this important issue, and look forward to a successful resolution.

Yours truly,



Laurie Hardwick
Director of Organization Services
Ontario Federation of Labour
15 Gervais Drive, Suite 202
Toronto, Ontario M3C 1Y8
Phone 416-443-7657
Fax 416-441-1893
Email: lhardwick@ofl.ca

per: Cindy Trower
General Counsel/Manager Central Client Service Unit
Office of the Worker Adviser
123 Edward Street, Suite 1300
Toronto ON M5G 1E2
Tel: (416) 326- 9688
E-mail: cindy.trower@ontario.ca

Maryth Yachnin
Staff Lawyer
IAVGO Community Legal Clinic
1500-55 University Avenue

Toronto, ON M5J 2H7
m_yachnin@lao.on.ca
Tel: 416-924-6477 ext 4525
Fax: 416-924-2472

Debbie Coulson
Manager of Social and Membership Services
International Union of Operating Engineers, Local 793
2245 Speers Road, Oakville, ON L6L 6X8
Email dcoulson@iuoelocal793.org
Telephone (905) 469-9299
Fax (905) 465-4354
Toll Fee (877) 793-4863

Per: Margaret Keys
Legislative Interpretation Specialist
Office of the Worker Adviser
1300 – 123 Edward Street
Toronto, ON M5G 1E2
margaret.keys@ontario.ca
Tel: 416-212-5468
Fax: 416-325-4830

Laura Lunansky
Staff Lawyer
Injured Workers' Consultants Community Legal Clinic
815 Danforth Avenue, Suite 411
Toronto, ON M4J 1L2
lunansl@lao.on.ca
416-461-2411 ex. 26

IAVGO Community Legal Clinic

PHONE: (416) 924-6477
1500-55 UNIVERSITY AVENUE, TORONTO, ON M5J 2H7
FAX: (416) 924-2472

VIA EMAIL

April 29, 2016

Kate Lamb
Chief Corporate Services Officer
WSIB
200 Front Street West
Toronto, ON
M5V 3J1

Dear Ms. Lamb:

Re: WSIB time limit practices & WSIB letter-writing practices

We are writing to ask that you stop the WSIB's practices in unfairly limiting workers' rights of appeal. In recent years, the WSIB Objection Intake Team is refusing to process timely worker appeals from WSIB decisions to cut their benefits at the end of a Work Transition Plan. The stated reason for refusing to allow workers to appeal is that workers missed the time limit to appeal the WSIB's initial determination of the WT Plan/ Suitable Occupation, usually made before the WT Plan even started.

The WSIB's practice is procedurally unfair and without legal foundation.

As a result of the WSIB's practices, workers have to pursue time limit extension appeals. These appeals are complex and often take years. During this time, workers are without benefits and forced further into poverty. In addition to the cases we have seen at our office, we have heard of many other similar cases from other worker representatives such as the Office of the Worker Adviser and private lawyers and paralegals. Other injured workers, who aren't lucky enough to have found representation, are no doubt abandoning valid appeals when the WSIB wrongly tells them they missed the time limit.

Injured workers can't know if a designated job is suitable and available until they 1) finish Work Transition, 2) look for work and 3) see how they are able to cope with retraining and working given their injuries. It is unreasonable to expect them to appeal until they have the facts needed to know whether they should.

Nor does the WSIB warn workers about the consequences of missing the time limit to appeal pre-WT Plan decisions. Indeed, its practices mislead workers into believing that they should not appeal these decisions. At the outset of Work Transition, WSIB staff tell workers that Work Transition is a collaborative process. They ask workers to let them know about any challenges they face so that the WSIB can provide appropriate support and make adjustments to the WT Plan as needed. The WSIB often doesn't tell workers about the significant benefit consequences of WT/SO decisions. It doesn't encourage them to appeal and protect their rights. Instead, WSIB staff tell workers they must fully cooperate and commit to the WT Plan.

The WSIB's practice also ignores the law: the WSIB is required to determine benefits based on the job that is suitable and that is available at the completion of the WT Plan (section 43(4)(a)). Workers are being denied the right to appeal from this statutorily-mandated decision.

The WSIB should immediately stop its practice of rejecting timely post-WT Plan appeals. It should also take steps to correct the injustices that have happened to workers who have been told they cannot pursue timely appeals.

We also ask that you address a closely related issue: the WSIB's decision-writing practices. On readability tests, WSIB SO/WT decisions require a college-level education to understand. This is unacceptable, especially considering that many of the most vulnerable injured workers speak English as a second language, have low-education status, have limited literacy skills (often even in their own languages), are not computer literate, and don't know how to access legal supports in the community. These vulnerable workers rely on the WSIB to frankly tell them about their rights.

A. Issues

I. Time limits wrongly enforced

Overview

In recent years, the WSIB Objection Intake Team is refusing to process timely worker appeals from WSIB decisions to cut their benefits at the conclusion of a Work Transition Plan. The alleged reason for refusing to allow workers to appeal is that workers needed to appeal the WSIB's initial determination of the WT Plan/Suitable Occupation, usually made ***before the WT Plan even started***.

As a result, the OIT is preventing workers from appealing issues like:

- the suitability of the Suitable Occupation;
- the availability of the Suitable Occupation;
- the worker's employability (since the worker is assumed to have agreed the job is suitable and available, the WSIB says they cannot argue they are unemployable and there is no suitable employment or business);
- whether they can work only part-time in the Suitable Occupation; and
- the worker's right to loss of earnings benefits following the WT Plan.

The WT process: the reality of what workers know

See attached chart outlining how these time limit issues around the WT/SO arise.

At the outset of Work Transition Services, workers meet (often several times) with a Work Transition Specialist. The Work Transition Specialist tells the worker that the return to work process is a collaboration between them and the WSIB, and that the WSIB is there to support them in their retraining and return to work. As far as we understand, the WTS does not have any ability to make benefit decisions. These meetings therefore don't include discussion of benefit issues. Rather, the focus is on identifying a job goal and assessing the worker's existing experience, skills and abilities. The WTS tells the worker that they need to cooperate in their return to work.

Before a WT Plan starts, most workers have no reason to suspect that the selected job won't be suitable and available. Often, they are being trained to enter a new field. They don't know what the job requires. They don't know what the job market is like. They have to rely on what the expert Work Transition Specialist has told them: that they will have the skills and abilities to do the job, and that the job is available in the job market. They have no reason to question this advice: they haven't done the training. They haven't done a work placement. They haven't done a job search. They simply cannot know if the selected job is unsuitable or unavailable.

And, many workers have a complete (and justified) misunderstanding about how Work Transition affects their benefits. Throughout their experience with Work Transition, the WSIB tells workers:

- Work Transition is a collaborative process;

- The WSIB will support them in their return to work; and

- They need to tell the WSIB about any challenges so that appropriate changes can be made.

But there is no discussion about deeming. Many workers don't understand that they will be "deemed" able to work even if they are unable to find a job after the WT Plan. They believe that the WSIB will support them if they don't get a job. Some workers think the WSIB is actually going to find them a job. As a result, most workers sign and move forward with the WSIB's recommended WT Plan without objecting.

The WSIB repeatedly tells workers that they need to fully cooperate. All workers must sign the WT Plan in order to signal their "commitment and agreement" (OPM Document 19-03-05). Most think that they need to agree to the WT Plan even if they have concerns about it. And they are not wrong: in our experience, where we tell workers to appeal the WT Plan, the WTS flags the appeal as a co-operation concern and we have to explain that we advised the worker to appeal.

In one recent return to work meeting we attended, the return to work specialist and her manager asked the worker no fewer than 12 separate times during a single meeting if he was willing to cooperate with the WT Plan. Each time he explained he was. In this context, workers reasonably conclude they cannot raise any objections to a proposed job goal.

Workers often only realize the problems with the selected job well into their WT Plan or after its conclusion. There any many varied barriers that may arise. During the WT Plan, they may discover that the ESL being offered isn't adequate to make them comfortable working in English. Or, they may find out when job searching that they actually need a different certification for the designated job. Or, they may simply discover when attending eight hours of classes that they physically cannot tolerate working for eight hours and need part-time work. Workers cannot know about these problems in advance. So, they should not be required to have appealed before the WT Plan started.

The WSIB misleads injured workers about the significance of pre-WT Plan decisions

After the initial WT meetings, the WSIB (usually the WTS, sometimes the Case Manager) writes to the worker explaining the WT Plan that has been chosen.

The letter often begins with an opening sentence like "I am pleased to confirm that the WSIB will sponsor you in a WT Plan". The first paragraph reads something like this:

> "We collaboratively developed your WT Plan based on your specific needs, interests and prospects for sustained employment. The WT Plan we have mutually agreed to outlines the activities and services that will provide you with the skills, knowledge, abilities and/or training to obtain a job as a Retail Sales Clerk/ Hardware Store Clerk/ Counter Clerk, NOC 6421. A copy of the Plan is attached for your reference."

According to the WSIB's current time limit practices, this paragraph contains the WSIB's final binding decision about the "employment or business that is suitable for the worker and is available". If a worker does not appeal the pre-WT Plan letter, the WSIB states they are unable to pursue an appeal about whether they can work in the designated job. This means that, after the WT Plan ends and the WSIB cuts their benefits, workers are not allowed to pursue timely appeals of the benefit reduction. They are denied the right to appeal because they missed the time limit to appeal the WT/SO decision.

The pre-WT Plan letters are unclear and, frankly, misleading if they are supposed to be advising workers that the suitable occupation will be considered suitable and available regardless of the worker's experience throughout the WT Plan. The letters heavily imply that the WSIB will (as it should) continuously reassess any support the worker needs in the WT Plan and the designated job goal. The letters:

- Imply that the worker has already agreed to the WT Plan, by "collaboratively develop[ing]" it with the WSIB;

- State that the WT Plan **will give** the worker the skills and abilities to do the designated job;

- State the Work Transition Specialists' role is "support you in your efforts to reach your Work Transition goal, coordinate the plan activities and services, monitor your progress and make adjustments to the Plan as required;"

- Tell workers to advise the WTS of any challenges in the WT Plan in order to make needed changes or get more help; and

- Tell workers that sponsorship in the WT Plan is dependent on the worker's cooperation in fulfilling the "mutually agreed upon" Plan commitments. These commitments include:
    - "working with the WSIB to develop a suitable occupation"
    - "suggesting adjustments to the Plan in the event that problems arise"
    - "informing the WSIB of any changes that affect your ability to participate".

The letters do **not**:

- State that, at the end of the WT Plan, the worker will be assumed to have the skills to do the designated job even if they actually don't; or

- State that, at the end of the WT Plan, the worker's benefits will be reduced based on their deemed earnings in the designated job, even if the worker cannot find a job.

Based on these letters, it is reasonable that workers would conclude the WSIB is open to changes in their WT Plan or SO as needed. It is the most reasonable way to read these letters. The letters specifically contemplate further discussions with the WSIB to develop a suitable occupation and adjustments to the WT Plan. Certainly nothing in the letters suggest that the suitability of the SO is being finally decided at this early stage.

The letters reinforce what workers are told in the WT meetings: the WSIB's role is to support them and provide them with skills to do a suitable and available job. They have no reason to think that they should start a legal appeal proceeding at the beginning of this retraining process. In light of this, it makes no sense to prevent workers from appealing because they didn't object to the WT Plan/SO at the outset.

The WSIB is not fairly interpreting its statutory powers

There is a statutory 30-day time limit for Labour Market Re-entry/ Return to Work decisions. But the WSIB is enforcing this time limit against workers in circumstances where it does not apply. The 30-day time limit reflects the fact that some workers may want a different WT Plan or have a specific objection to the selected WT Plan. For example, a worker may want to retrain as a nurse while the WSIB wants to retrain him as a lab tech. In that case, it may make sense there is a 30-day time limit to appeal the WT Plan because, if a change is needed, it should be done swiftly to avoid wasted effort.

On the other hand, the WSIB decision about the employment or business that is "suitable and available" for the worker is not a decision that can be finally made before the WT Plan. The *Workplace Safety and Insurance Act, 1997* states that the WSIB must determine benefits based on the employment that is suitable and available **at the completion of the WT Plan** (section 43(4)(a)). Therefore, the decision determining benefits at the completion of the WT Plan is an appealable decision about the job the WSIB thinks is suitable and available. If workers appeal this decision, they should be entitled to appeal issues around the suitable job that is available and any related benefit issues.

And, in practical terms, the WSIB actually reassesses the suitable and available job during the WT Plan and at its completion. The first principle of the WSIB's Work Reintegration programs is that "WR is a process" (OPM Document 19-02-01). WSIB policies outline that Work Transition considers changes in circumstances and may involve an ongoing assessment of job suitability. For example, work trials are often included in WT Plans because "it may be helpful to assess the suitability of a job through a work trial" (OPM Document 19-03-05). OPM Document 19-03-05 states that "WT plans may be adjusted to accommodate a significant change in circumstances related to the worker, the work-related impairment, or the labour market. If necessary, the WSIB may revise the original SO."

This is true especially for the availability of the job. As OPM Document 19-02-01 sets out, "available" work "must exist and be in demand in the labour market to the extent that the worker has a reasonable prospect of obtaining employment." Usually, at the end of the WT Plan, therefore, the WSIB conducts a review of the job market. This serves to determine availability and the likely wage of the designated job.

II. Unreadable decision-letters

The SO/WT decision letters are written for a college-level reading ability. In case example #1 set out below, the WT Plan decision letter (which was almost identical to other WT Plan letters we have seen) was written for a college-level reader who would be able to read and understand the Financial Times.

Many of the injured workers receiving these letters can't read at all, let alone at a college level. 48% of all Canadians struggle to understand and use information contained in editorials and articles, as well as basic instructions. Many of the most vulnerable injured workers have very limited literacy, have low levels of education and don't have access to legal support.

Legal experts have advised administrative decision makers to use plain language because complex writing undermines access to justice.[1] The WSIB has recognized this. The WSIB's new administrative practice documents state that decisions shall be communicated in plain language.[2] In 2013, the Chair of the WSIB Benefits Policy Review Consultation Process explained the importance of plain language in WSIB policy-drafting. He explained that even he, a legal expert, struggled to understand the existing policies.

But, despite all of this, WSIB letters remain extremely complex. They are full of jargon and are mealy-mouthed about the consequences of WSIB decisions. For example, the WSIB says this:

> "Contingent upon your participation and completion of the program, which is scheduled to end February 17, 2012, benefits will continue to be paid at the weekly rate of $533,12, subject to annual indexing, to duration. Upon completion of the program, future benefits will be based upon earnings for this occupation. Wage source research has provided that the average entry-level wages for positions in the SO are $10.25 per hour, based on a 40 hour work week".

This paragraph is unintelligible to a non-WSIB expert. The WSIB actually means to say something like:

> "As long as you keep going to the program, we will keep paying your normal benefits. After the program ends on February 17, 2012, we will reduce your benefits by the amount of money we think you can make. We will cut your benefits even if you don't find a job. Based on the job market, we think you will be able to make $10.25/hour (minimum wage). We think you can work full time, 40 hours a week."

The un-readability of WSIB letters is especially troubling because, unlike many other statutory tribunals, the WSIB regularly makes many decisions in a single claim. A typical WSIB file may well include 10 or more separate decision letters. Many of these will make binding decisions on multiple issues. Often, workers have no knowledge these decisions might affect them until years later when the denied injury gets worse or they lose their job. Injured workers, who are already often living in a state of crisis, must:

---

[1] Counsel of Canadian Administrative Tribunals, *Literacy and Access to Administrative Justice in Canada: A Guide for the Promotion of Plain Language,* p. 7.
[2] E.g. Administrative Practice Document, *Weighing of Medical Evidence,* p. 7.

- Understand letters written for college-educated readers.

- Parse out all the various decisions and implications of each letter. For example, the WSIB may allow the worker's claim for a back injury (health care and loss of earnings) in a four-page letter. At page 3 of the letter, the WSIB may comment "You also reported that your neck hurt; however, I am unable to determine based on the existing medical documentation and information provided by your employer that your neck complaints were compatible with your regular job duties". The letter doesn't say anything about the significance of this one sentence. The worker receiving this letter probably will not even notice this sentence, let alone understand that, if the neck injury becomes majorly disabling and stops him from working five years from now, he will be unable to pursue any benefits until he appeals this decision now. This worker has no reason to appeal the letter. From his view, it was entirely positive.

- Figure out how to appeal a WSIB decision. The WSIB has refused to include its Intent to Object form with its decision-letters. So, workers have to know to call the WSIB and request a copy or have access to a computer to get it online. Many workers understandably think they cannot send the form without detailed legal arguments. They have no idea they just have to fill it out with their name and the decision-date and sign it.

The WSIB should not enforce time limits where workers cannot reasonably understand decision letters. But, the WSIB has actually become more restrictive in enforcing time limits against workers. The WSIB removed its policy to apply broad discretion to extend time limits where the worker appeals within one year of the decision. And, it removed guidelines in the Appeals System Practices & Procedures Document stating that time extensions will consider "[w]hether the party was able to understand the time limit requirements." As a result of the WSIB's increased rigidity regarding time limit extensions, many workers have to pursue their time limit appeals to the WSIAT, a process that can take years.

B. The Appropriate Remedy

The WSIB should do the following:

- Immediately instruct the Objection Intake Team that workers are entitled to pursue timely appeals of decisions determining benefits post-WT Plan,

regardless of whether they met time limits to appeal SO decisions made before the WT Plan ended.

- Conduct a review of all cases since the creation of the Objection Intake Team where the OIT has identified a time limit barrier to processing an appeal and:

    - Contact all workers who were told they barred by time limits because they didn't appeal a WT/SO decision made before the end of the WT Plan.
    - Give these workers the chance to proceed with their appeals.

- Publish a clarification guideline to inform workers and the public that timely appeals of benefit reduction decisions after the WT Plan is completed will be honoured regardless of whether the worker appealed the WT/SO decision made before the WT Plan.

- Conduct an audit of its letter-writing practices.

C. Conclusion

Thank you for taking the time to review our submissions on this crucial access to justice issue. We understand that you have spoken with members of LIWAC about arranging a meeting on this issue. We welcome the opportunity to discuss further at that meeting.

Yours truly,

IAVGO Community Legal Clinic
Per: Maryth Yachnin

cc. Fair Practices Commissioner Tom Irvine (via courier)
Office of the Worker Adviser (Cindy Trower) (via email)
Ontario Federation of Labour (Laurie Hardwick) (via email)
Injured Workers Consultants (Laura Lunansky) (via email)
Toronto Workers' Health and Safety Legal Clinic (John Bartolomeo) (via email)

Encls. WT Chart
Anonymized decision letters
WSIB SO letter readability statistics

Appendix A: Case examples

Case example #1

In 2012, Mr. P injured his arm and shoulder. His injuries became permanent and it was clear Mr. P could no longer do his pre-accident job as a landscaper. His employer didn't have modified work.

In 2013, Mr. P met with the Work Transition Specialist at the WSIB. The WSIB sent him for a psycho-vocational assessment. It found that his overall intellectual abilities were in the "extremely low" range. His oral and reading skills were below a kindergarten level. He was unable to write anything in English.

The WSIB decided Mr. P should retrain to be a retail sales clerk/hardware store clerk/ counter clerk. It put him through a WT Plan which included ESL, a job placement and job search training.

Mr. P was anxious about the retraining program but wanted to cooperate and do whatever he needed to get back to work.

On August 30, 2013, while Mr. P was out of the country because his brother had died, the WSIB Return to Work Specialist sent him a "Work Transition Sponsorship Letter". A copy of this letter is attached. The letter:

- Attached a copy of the WT Plan. Its opening line stated "I am pleased to confirm that the [WSIB] will sponsor you in a Work Transition (WT Plan)".

- Stated "the WT Plan we have mutually agreed to outlines the activities and services that will provide you with the skills, knowledge, abilities and/or training to obtain a job as a Retail Sales Clerk/ Hardware Store Clerk/Counter Clerk, NOC 6241".

- Set out his cooperation obligations during the WT Plan. It told Mr. P to let the WTS immediately if he was "having difficulty completing any of the activities outlined in the Plan so that I can help you". The WTS said in the letter that her role was "to support you in your efforts to reach your Work Transition goal, coordinate the plan activities and services, monitor your progress and make adjustments to the plan as required."

- Stated that "If you disagree with your WT Plan and wish to appeal", Mr. P had to tell the Board within 30 days. It did not explain that he should appeal if he disagreed with the job goal.

- Did not mention how the WT Plan would affect Mr. P's benefits, if at all.

The August 30, 2013 letter was written at a college-level reading level. The reading level required to understand it is equivalent to that required to read the Financial Times. By way of comparison, the August 30, 2013 letter is harder to read than the IAVGO Reporting Service, a publication written specifically for expert workers' compensation advocates.

The WSIB Case Manager also sent Mr. P a letter dated September 3, 2013, with a subject line "Loss of Earnings Benefits During Work Transition Plan". This letter set out that Mr. P would continue to get full benefits during the WT Plan. It said that "When you complete your WT Plan, I will review your case and determine how much you will be able to earn in a category of jobs that are suitable." It did not state that the decision determined Mr. P's loss of earnings benefits after the WT Plan ended.

Mr. P started his WT Plan with ESL training in the fall of 2013. The ESL school noted in its updates that Mr. P was always present in class, often early and "keen on learning". He was "very dedicated and hardworking". But, despite his efforts, his speech was often unintelligible. After a couple of months of ESL, he continued to have very limited English and need an interpreter. Mr. P was very anxious about his future and had trouble sleeping. Mr. P tried a work placement at a Portuguese store, but was only able to attend briefly because he was having a number of health problems and starting to suffer depression.

In or around late 2013, Mr. P decided to get some help from IAVGO. He forwarded us some WSIB letters (August 30, 2013, September 3, 2013) and we advised him to appeal them, which he did in January 2014. His appeal of the August 30, 2013 decision was late. The WSIB said the September 3, 2013 letter was not a decision-letter. But, Mr. P did appeal it by January 2014, within six months of its issuance.

The WSIB closed his WT services by letter dated August 1, 2014. On July 15, 2014, the WSIB wrote to Mr. P and said it was reducing his benefits based on his ability to work as a retail store clerk. The July 15, 2014 letter explained that the WSIB had "reviewed the case to determine how much you will be able to earn in the SO…" and that "based on the labour market information for your specific

geographical area, there continues to be a wage loss [$55.44/week]". He appealed this decision on time.

In the summer of 2014, Mr. P requested entitlement for his psychological injury. After a long period of evidence gathering, on October 30, 2015, the WSIB denied his psychological injury as work-related. He appealed this decision on time.

On February 4, 2016, Mr. P filed an Appeal Readiness Form to appeal the WSIB's decisions to deem him able to work, reduce his loss of earnings and deny his psychological injury. He requested an oral hearing to have the chance to explain his work transition challenges, physical impairments and unemployability.

In February 2016, the Objection Intake Team contacted IAVGO. The OIT told us that Mr. P could not appeal the reduction of his benefits or for unemployability because he missed the time limit to appeal the Suitable Occupation/WT Plan decision made on August 30, 2013, before the WT Plan started. As a result, we were forced to advise Mr. P to return the appeal to claims to seek a time limit extension regarding the August 30, 2013 decision. He received this extension on April 5, 2016. While he received the extension, the matter added an unnecessary delay to his appeal which now must again be processed through the appeals system. An unrepresented worker may have been dissuaded from appealing at all.

Case example #2

In 2006, Mr. H, a bricklayer, suffered the gradual onset of work-related carpal tunnel syndrome. He became unable to continue his regular work doing manual labour.

In 2008, the WSIB decided that Mr. H would be unable to return to a suitable and available job. The WSIB told Mr. H he would therefore receive full loss of earnings benefits until he was 65 years old. The WSIB based its decision on the advice of the LMR provider, which concluded that Mr. H would not realistically be able to return to work. The LMR provider considered Mr. H's injury, functional illiteracy, limited cognitive abilities, non-compensable health issues and lack of transferable skills. Mr. H had only a grade 9 education. He could not read or write.

In 2010, even though it had promised him full LOE to age 65, the WSIB decided to re-open Mr. H's case. It decided to refer him for Work Transition. Mr. H attended various meetings, and expressed his concern to both the Work Transition Specialist and his Case Manager that he would not be able to return

to work. Neither the WTS nor the Case Manager told Mr. H his benefits would be cut after the WT Plan. Neither told him he should protect his right to appeal this eventual benefit cut by appealing the WT Plan/SO decision before the WT Plan started.

On September 15, 2011, before the Plan started, the Case Manager sent Mr. H a letter about the WT Plan/SO. An anonymized copy of this letter is attached.

The September 15, 2011 letter:

- States that it is a decision about Mr. H's retraining and return to work. It opens by stating that it is "written to advise you that the Workplace Safety & Insurance Board (WSIB) as agreed to sponsor you for Work Transition Services (WTS) to assist you to be able to return to the workforce."

- Uses extremely complex language. It states, for example, that the plan "identified options to ensure maximum mitigation of wage loss".

- Emphasized the importance of Mr. H's cooperating "to ensure that you receive your benefits".

- In discussing any impact on benefits, is extremely confusing. It vacillates between using the term "SO" and "SEB", and "WT" and "LMR". It states that benefits will continue "to duration" "[c]ontingent upon your participation and completion of the program". It states that upon completion of the program, future benefits will be based on upon the earnings for the occupation/SO. But, then it states that Mr. H may be entitled to PLOE after LMR is over based on the "wages you are considered able to earn within the SEB". It states that the WSIB may review loss of earnings benefits "Every year a material change in circumstances occurs". And it states that "the wages used to calculate the final LOE decision may be different from those identified on the SEB in the LMR plan."

Mr. H did not understand the September 15, 2011 letter. He knew he had to cooperate or his benefits would be cut off. But he didn't understand that his benefits would be reduced after the work transition program. He didn't understand that the WSIB was reneging on its commitment to pay full LOE benefits until he was 65.

Mr. H completed a 10-week WT Plan in late 2011/ early 2012. On January 24, 2012, the Case Manager sent him a letter stating he would be deemed at $10.25/hour, 40 hours per week. Two days later, the case manager sent him another letter stating he had reconsidered the January 24, 2012 letter and would wait until February 24, 2012 to review LOE benefits. The same day, the WTS sent a letter stating the WT Plan was closed.

Mr. H had told his Case Manager he wanted to appeal the reduction of his benefits. In trying to appeal the benefit cut, Mr. H sent a letter dated July 4, 2012 saying he wanted to appeal the decision made on or about January 24, 2012. His letter didn't mention the letter of February 29, 2012 which deemed him able to make $10.25/hour, 40 hours per week. But, it was clearly his intention to appeal the reduction of his benefits.

Mr. H then sought out legal assistance to pursue his appeal. He eventually retained the Office of the Worker Adviser, which filed an Appeal Readiness Form on February 21, 2014. Nearly a month later, an Objection Intake Team manager contacted the OWA and said that Mr. H had missed the time limit to appeal the July 15, 2011 letter and the February 29, 2012 letter deeming his benefits. It therefore refused to process his appeal asking for restored full LOE benefits.

Mr. H was then forced to pursue a time limit extension request with the assistance of IAVGO. The Board, at both operations and the ARO, denied his request.

Mr. H had to appeal to the WSIAT. On August 11, 2015, almost 18 months after he filed his Appeal Readiness Form to pursue an appeal on the substance of his case, the WSIAT granted his time limit extension request in *Decision No. 1600/15*. Mr. H should not have had to ensure this delay in the adjudication of his appeal.

July 21, 2023

Workplace Safety and Insurance Board

appealsfeedback@wsib.on.ca

Dear Workplace Safety and Insurance Board,

Re: WSIB Consultation on dispute resolution and appeal processes audit recommendations

Introduction

We, Injured Workers Action for Justice (IWA4J), are a collective community-based group of injured workers with over 700 members and supporters in the Greater Toronto Area and other areas of Ontario with partners across the province, such as the IAVGO Community Legal Clinic, Justice for Migrant Workers, other injured workers groups and community legal clinics, unions, and community organizations and groups. We are writing to express our grave concern and opposition to the proposed changes to the WSIB dispute resolution and appeals processes. These proposals are against legislative obligations to injured workers. We demand the Board discard these proposed recommendations manufactured by KPMG.

The WSIB hired a consulting firm, KPMG, to complete a 'Value for Money Audit' of their dispute resolution process. KPMG's recommendations indicate a highly problematic and misinformed view of the purpose of the appeals process at the detriment of injured workers. Ultimately, KPMG's report neglects the perspective of workers and focuses solely on cutting costs for employers and the WSIB.

The report makes three core recommendations, with the overarching theme of reducing the time limits for appeals. First, the Intent to Object form (ITO) must now be submitted within a 30-day period after the initial decision, a reduction from the current 6-month deadline. The ITO would also need to have much more information than before, requiring workers and their representatives to indicate why the decision is incorrect, why it should be changed, and what outcome the injured worker is looking for. Additionally, supplemental information such as medical documentation must be provided within 30 days of submitting the ITO, when before there was no time restriction. This means that within **2 months** of an initial decision, an injured worker must: 1) obtain the decision, 2) understand the decision, 3) obtain legal advice regarding their ITO, 4) complete the ITO, and 5) obtain additional medical information, often from specialists. This is an untenable

and unrealistic expectation for even the most informed worker without considering the impact of the worker's injury. The main effect of these recommendations will be to irreparably damage workers' chances to have meaningful appeals.

Second, an Appeal Readiness Form (ARF) would need to be submitted 1 year after the initial decision date when previously there was no time limit. This will compel workers to proceed to dispute resolution at the ARO far before they are ready. Presently, it may take workers and their representatives several years to finalize their appeal. Now, they will have to do so on a much shorter timeline, often when they are unprepared to do so. This is in contravention of the WSIB's current recommendation, which tells workers to only submit the ARF once they are "sure you are ready."[1] The contrast between the current policy and the proposal highlights that the WSIB seeks to trade off fully informed cases decided on their merits in exchange for faster and sloppier decision-making.

Many workers, particularly the most vulnerable without representatives, will be dissuaded from appealing altogether. Faced with the stress of constant deadlines and the daunting task of collecting a massive amount of complicated evidence, many workers who would have had their case succeed at appeal will simply accept the injustice that they experienced at the operations level. Putting workers in the position where the most attractive option is to give up and abandon their case demonstrates that these recommendations are completely contrary to the WSIB's duties to injured workers.

Suppressing workers' ability to meaningfully appeal decisions is not the way to fix broken WSIB practices. Aiming to reduce the number of appeals is not only a miscarriage of justice, it is an ineffective method of addressing inefficiencies. Moreover, KPMG's concern for the amount of appeals is misplaced, as there has already been a marked reduction in them. From 2000 to 2021, the appeals caseload dropped by 37%. Since 2017, the WSIB has continued to meet targets for the percentage of appeals resolved within 6 months. Even the KPMG report itself outlines that in the first quarter of 2022, 92% of appeals were resolved within 6 months – greatly exceeding the target of 80%. If there is an issue with the timeline of appeals, the answer is not to place further onus on injured workers. These new burdens will only cause workers and their representatives to provide the WSIB with poor, hastily collected evidence. If the KPMG report had instead examined the overall quality of the decision-making at the operations level of the WSIB, they would have found already the real rampant issue in the poor quality of adjudication. As indicated by the *No Evidence* report, in reviewing just 1 year of WSIAT decisions:

- 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.
- In 175 appeals, the Tribunal found that the Board's decision was contrary to all, or all discussed, medical evidence.

[1] A Condensed Guide to Appealing a WSIB decision by WSIB:
https://www.wsib.ca/sites/default/files/documents/2019-01/condensedguidetoappealing020717.pdf

- 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.[2]

The solution lies not with restricting appeals or limiting the possibility of workers obtaining evidence. To fix the broken WSIB system, the problem must be stopped at the source: the poor decisions at the operations level. The WSIB must examine their faulty decision-making at first instance and provide justice to workers without forcing them to appeal.

Third, KPMG recommendations have suggested placing limits on the power to appeal decisions that are said to be based on "standardized" calculations, such as non-economic loss benefits. Instead, injured workers will be forced to appeal directly to the WSIAT, stripping the right to appeal these compensation awards at the ARO. In 2021, the ARO allowed 24% of NEL appeals in full or in part. Despite being described as "standardized," these calculations are based on a wide range of discretionary factors, involving the interpretation of a great deal of medical evidence, evaluation of pre-existing conditions, and the impact of the workplace injury on the worker's daily life. Their discretionary nature causes them to be anything but standardized, heavily dependent on the adjudicator assessing them. Limiting appeals for these calculations to only the WSIAT creates a greater onus on workers to have to re-adjudicate a calculation issue, leading to longer wait times, less opportunities to access a just assessment, and higher costs for workers.

The KPMG recommendations will hurt injured workers

KPMG's recommendations will further injure workers. The barriers created will effectively strip injured workers of their right to appeal. By implementing the decisions, the WSIB will be abandoning its statutory responsibilities to injured workers. The negative impacts of these time limits and reduction of appeal powers are numerous:

1) Providing insufficient time to obtain evidence

The time limit will force injured workers to appeal without the opportunity to obtain medical evidence. Obtaining medical documentation can often take months or even years, because the WSIB highly depends on the opinions of specialist doctors whose waitlists would not accommodate the proposed tight timelines. It often takes months for clinical notes from healthcare practitioners and 1-3 years to obtain a full medical specialist report. The effect of this restriction virtually guarantees the worker to have a losing appeal. 60 days to obtain medical evidence will be the shortest time limit on worker's compensation within Canada. This is especially concerning as many jurisdictions have no time limits at all.

[2] *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

2) Being unable to access legal representatives

Not only is 30 days insufficient time to file an ITO and gather evidence, but it is also not enough time to obtain legal representation. Even if a worker was to obtain immediate representation, lawyers have already experienced difficulties in managing WSIB files that are hundreds of pages long. The Office of the Worker Adviser often takes several months to work through a file in order to offer advice. If even highly trained lawyers specializing in this area of law require longer than one month, while also experiencing delays in obtaining letters from WSIB, can a self-represented injured worker be expected to be able to navigate the system?

3) Creating additional barriers for injured workers

Injured workers are already disadvantaged in the legal process as they are experiencing catastrophic and life-changing injuries. Workers who have low capacity may be overwhelmed by the expectation that while attempting to recover from their injury, experiencing loss of income, and attempting to access the health care system, they must file for an appeal within a month. Workers with language barriers and/or mental health challenges will continue to be disproportionately impacted by these recommendations, especially those who are racialized in the precarious workplace.

IWA4J & Justicia (J4MW) International Day for the Elimination of Racial Discrimination at WSIB in Toronto, March 21, 2023

4) Increasing stress and damage to workers

It is already a reality that workers are damaged by the WSIB processes. In a 2021 study by the Dalla Lana School of Public Health and Monash University, it was found that injured workers' mental health can deteriorate when dealing with the WSIB. [3] Increasing barriers and access to justice with tight timelines will further damage workers, contradicting the very purpose of the WSIB. These mental health impacts will then have the potential to exacerbate the damage of workplace injuries.

[3] *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"

5) Deterring access to justice altogether

Many workers, especially those who are unable to find representation, will likely be deterred from appealing altogether. The mounting pressure of stress from their injury, the numerous time limits, and the need to collect extremely sophisticated medical evidence will cause many workers to abandon their pursuit of justice. The WSIB should not design a system which simultaneously provides inconsistent, poorly reasoned decisions at the operations level while also deterring victims of that system from appealing. The Ontario Federation of Labour said, "In 2010, the WSIB issued compensation benefits to injured workers in the amount of approximately $4.8 billion, by 2017 that number was cut to $2.3 billion. Studies of injured workers with permanent impairments found that 58% have long-term reduced earnings, 46% of permanently impaired injured workers live in or close to the poverty level, and 9% live in deep poverty." The WSIB has continued reducing the employers' premium since 2018 and rebating $1.5 billion in "$6.4 billion surplus" funds to employers in 2022. This shows that more injured workers will pour into poverty while employers get more money in their pockets if the WSIB just goes ahead with these unacceptable recommendations.

6) Increasing detrimental impact to migrant and temporary foreign workers

Migrant workers, despite being integral to many industries, are disproportionately impacted by poor WSIB policies and practices. These recommendations will further increase the widening gap between migrant workers and access to compensation as well as justice. Many workers note that they do not know anything about the WSIB system. Access to any information ultimately comes from their employer, or employment liaisons who have been noted to "hide the letters."[4] Injured workers may not receive notification of decisions in time to appeal. Many workers, especially migrant workers, will not receive notification from the WSIB within time for appeal. Workers located within Jamaica have noted that it will take more than 2-3 weeks for any correspondence from the WSIB to arrive. Others have noted that the letter may take months to arrive. As workers are frequently repatriated immediately to their country of origin upon injury, this means that migrant workers will be further negatively affected and lose their right to appeal in addition to what they have already been facing.

IWA4J & Justicia (J4MW) Day of Mourning at WSIB in Toronto, April 28, 2023

[4] A comment from an Injured Worker at Injured Workers Action for Justice Consultation on Dispute Resolution and Appeals Process Value-for-Money Audit by KPMG on Friday, June 23 2023.

7) Removing internal appeals on "standardized" calculations will eliminate a viable path to remedy

Eliminating the right to appeal calculations at the ARO will strike down an important pathway to justice for injured workers who have received an incorrect decision at the operations level. Despite the WSIB's assertion that their awards calculations are "standardized," this could not be further from the truth. These calculations involve the evaluation of complex medical opinions, the weighing of conflicting evidence, and subjective assessments of how the workplace injury affects the injured worker's daily life. Mistakes in calculations of non-economic loss benefits and losses of earning benefits at the operations level occur frequently. In 2021, the ARO allowed 24% of non-economic loss appeals in full or in part. Stripping workers of the right to have these decisions appealed at the ARO will lead to less workers getting the benefits they are rightfully owed. Moreover, the appeals process at the ARO is much less cumbersome on workers in comparison to the WSIAT. Appeals at the Tribunal require much more time and are more legally complex. Forcing injured workers to make their appeals there will therefore not only strip them of a viable pathway to justice, but will introduce new barriers which may deter them from accessing justice altogether.

Conclusion

The recommendations from the KPMG 'Value for Money Audit' are misinformed, misguided, and will lead only to further harm to injured workers. The WSIB was designed to *help* injured workers, and is instead mentally damaging workers, eliminating options for compensation or access to much needed healthcare, and leaving workers in poverty without redress. If the WSIB seeks to eliminate delays or inefficiencies, the answer is not creating new barriers on workers with impossible timelines and limiting their right to appeal. The WSIB should review its adjudication practices at first instance, and give appropriate weight to medical evidence from treating healthcare practitioners. A recent Freedom of Information request from the Ontario Network of Injured Workers Groups revealed that in 2022, the WSIAT overturned almost 80% of WSIB decisions that came before them. Similarly, the first quarter of 2023 has seen almost 75% overturned. This highlights the poor decision making at the operations level, the real problem in the WSIB. If fixed, better decision making at the operations level would have the best effect on reducing the number of appeals while simultaneously providing justice for injured workers.

The WSIB should be guided by the voices of the workers it was designed to serve, and not by false determinations of 'value for money' by their misinformed auditors. We have reached out to the Board consistently with our allies and community delegations, but there has been no proper communication or consultation. All we heard from the Board was that no one was able to talk to us, and the Board locked us out at the door of the WSIB head office building in Toronto during our community delegations on Injured Workers Day in 2022 and Day of Mourning in 2023. All injured workers, with their injuries and pains, had to stand outside of the WSIB building to deliver our group letters to demand justice. This shows that the Board has no accountability for injured workers and the community.

We demand the Board get rid of the KPMG recommendations and best carry out its mandate to serve the community for a more fair and full compensation system for workers.

Regards,

Injured Workers Action for Justice

Contact us for more info:
facebook.com/justiceforinjuredworkers
twitter.com/IWA4Justice
instagram.com/iwa4j
Email: iwaction4J@gmail.com
Phone: 647-832-1514

INJURED WORKERS
COMMUNITY LEGAL CLINIC

21 July 2023

Jeffrey Lang, President
Workplace Safety and Insurance Board
200 Front St W, Toronto,
ON M5V 3J1
By email to: Corporate_SecretarysOffice@wsib.on.ca

Dear Mr. Lang,

Re: WSIB Consultation Process on Changes to the Appeals System

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.

Regarding the legal issues in the consultation, we endorse the submission of the Ontario Legal Clinics' Workers Compensation Network. Our submission will focus on the WSIB's process and its impact on the community we represent, which appears to us to represent a serious erosion of democracy. As the President, we urge you to consider this and restructure the consultation.

The Process: What does Democracy have to do with it?

There is ferment in the injured and labour communities about the KPMG VFM report and the WSIB consultation, due at an impossible timeline. We would like to suggest the WSIB reach into its institutional memory, of which we are part, to think of a consultation format that will be, and will be seen to be credible, fair and indeed, welcoming.

Our legal clinic specializes in workers' compensation law and as such, we tend to view workers' compensation matters in isolation to other social trends. Our community has pointed out that the KPMG report is part of a general trend in our society to severely limit democracy and limit the participation of people in matters that affect them. There is merit in that observation. The KPMG report, how it was set up and the way it is being used, are profoundly anti-democratic. The injured worker community feels the WSIB should circle back redesign the consultation process. The WSIB has the opportunity to come to the injured worker community and solicit our opinions on any matter. This will be welcomed and has produced good results in past consultations.

Tel: (416) 461-2411
Fax: (416) 461-7138

411-815 Danforth Ave
Toronto, ON M4J 1L2

At this time, the consultation process is not welcoming at all. In fact, it is highly undemocratic. Part of any democratic process is consultation. When you delimit the forms of participation, especially with regard to vulnerable groups, you are delimiting crucial components of the democratic process. The primary users of the appeals process are injured workers, the system exists to serve them.

When injured workers opposed the introduction of time limits on appeals in 1997, WSIB Chair and President Glen Wright went on CBC to explain to the public that it is just a "simple bookmark" and your right to appeal is secured forever. Many thousands of inured workers have filed 'Intent to Object' forms. Their rights will be affected by the proposed changes and they have not been notified.

Most of our clients did not know about this consultation. Many have limited English or literacy skills. One of our board of directors is Francophone and was unable to find a French translation of the KPMG report or the WSIB consultation paper.

The paper asks questions that relate directly to all workers who have already filled out an intent to appeal but did not proceed. All workers should be informed of this consultation and be actually involved in issues that affect their lives. The WSIB will benefit from the experience and lived experience of its most important priority: injured workers. They have not been informed of the changes. As we begin to reach out to inform the injured worker community, injured workers are telling us they feel their views have been eliminated from the WSIB's discussion of their appeals process. They feel invisible and their opinions irrelevant.

We are told that the KPMG already had its own consultation. We spoke to several of the worker side people listed in the report. They were not really consulted. They were not made aware of the recommendations in the report and asked for comment. Had they been, they tell us they would not have endorsed them at all. The WSIB should reach out to them for confirmation of our distinct impression.

The WSIB Consultation paper begins by saying that the WSIB will implement the KPMG recommendations within 2 years. It does not invite comments on the KPMG report itself - or its basic tenets- but only on details within it. There is no interest in comments about the research or jurisdictional scan used by KPMG. It does not invite comments on the recommended legislative changes, which the WSIB Management has already endorsed.

The general impression in our community is that this "consultation" is simply going through the motions, the WSIB appears to feel "forced" to consult, and not really reaching out and attempting to reach consensus of any kind. Injured workers have told us this they see this as authoritarian, a transfer of power to auditors, an erosion of democracy. We suggest a fresh and more meaningful start.

Not Simply Procedural Changes – A Major Erosion of the Right to appeal

Our clinic has been an active participant in WSIB changes and consultations for many decades. The KPMG report represents major changes in compensation law and legal standards in at least 3 areas that merit thoughtful review:

1. It changes the time limit legislation brought about by Bill 99 (1997).
2. It adds additional obstacles to injured workers pursuing their right to appeal.

The reduction of the time limit to appeal, the new time limits for mediation and submission of the ARF will have a huge impact on a disadvantaged group: injured workers. Shorter timelines and additional time limit hurdles to get over will result in many missing out on the opportunity to appeal and thereby losing the right to appeal.

The changes will reduce the availability of the independent appeals tribunal. Most cases will hardly reach the ARO level (as said in the report itself), not to speak of the independent tribunal.

The Workers. Compensation Appeals Tribunal, now the WSIAT, was a major reform introduced by the 1980 Weiler report. It is central to the wage loss workers compensation system we have in place post 1990. The new wage loss system of workers' compensation gave more discretion to the WSIB, therefore the system needed an appeals body that would be separate from the WSIB, independent, expert and impartial, and to give confidence that injured workers would get fair hearings and decisions when not in agreement with the WSIB decisions.

3. Full Justice or half measures for injured workers?

The KPMG proposals present a new, and in our view dangerous interpretation of the legal responsibility of the WSIB. The clear impression is that the KPMG report wants to have early and mediocre settlements, facilitated by mediators/arbitrators who are in a conflict of interest role.
That is a huge change in the legal standard set out by Justice Meredith. Please note the concluding paragraph in his 1913 final report:

> *"In these days of social and industrial unrest it is, in my judgment, of the gravest importance to the community that every proved injustice to any section or class resulting from bad or unfair laws should be promptly removed by the enactment of remedial legislation and I do not doubt that the country whose Legislature is quick to discern and prompt to remove injustice will enjoy, and that deservedly, the blessing of industrial peace and freedom from social unrest. Half measures which mitigate but do not remove injustice are, in my judgment, to be avoided. That the existing law inflicts injustice on the workingman is admitted by all. From that injustice he has long suffered, and it would, in*

> *my judgment, be the gravest mistake if questions as to the scope and character of the proposed remedial legislation were to be determined, not by a consideration of what is just to the workingman, but of what is the least he can be put off with; or if the Legislature were to be deterred from passing a law designed to do full justice owing to groundless fears that disaster to the industries of the Province would follow from the enactment of it. All of which is respectfully submitted.* W.R. MEREDITH, Commissioner. Dated at Osgoode Hall, Toronto, the 31st day of October, 1913.*"*

The KPMG report is explicit about wanting to avoid workers going to a formal appeal, where the standard is what the legislation and policy provides. The report speaks of monetary "incentives" to representatives to settle disputes early, and disincentives for insisting to go to the appeal level. Tellingly, KPMG wants to permanently retire the term "Appeals Officer" to "Resolution Officer" or "Resolution Specialist" (p. 29) and predicts fewer worker representatives will be involved (p.37). WSIB Management predicts there will be fewer oral hearings (p.31).

Can the WSIB appreciate why workers seeking "full justice" might be very alarmed by these statements? It reminds us of Meredith's impassioned statement that workers need full justice, not the least they can be put off with. Instead, the KPMG report sets the new standard of justice to "half measures" with incentives for quick compromises and disincentives for pursuing legal rights in the appeal hearing process.

Is the WSIB accepting this with limited consultation?

Can more appeal time limits fix the problems created by the first appeal time limit?

We have heard indirectly that the WSIB is concerned that some 60% of registered appeals did not go ahead by filling out an Appeal Readiness Form. This is not a "time-bomb", it will not create a sudden volcano of appeals. There has not been such an occurrence since 1998 when appeal time limits were introduced.

Our clinic participated in those debates. We opposed the 6 month time limit because there had not been a problem with the open-ended right to appeal. No government study, including two Ontario Cam Jackson studies had documented any problem. When there was no time limit to appeal, injured works would appeal when they were ready to go ahead with it. Due to the legal complexity of workers compensation law and related medical issues that may take years. The WCB appeals division had no difficulty with this.

The creation of a time limit for exercising the right to appeal meant that injured workers had to use it or lose it. It is therefore best legal practice to appeal all negative decisions in order to protect the right to appeal. Injured workers want to ensure that the time limit is met just in case. It's insurance. The WSIB has told you if you do not register the appeal, you will not be able to do so after 6 months.

The WSIB announced this as “bookmarking” the appeal. It bookmarks the possibility of an appeal, not an appeal itself. The fact that 60% of the bookmarked appeals do not go ahead with an actual appeal is a function of the time limit legislation, it is not a “time bomb” that the WSIB need to be concerned about. The last 25 years of Ontario’s experience with time limits should bear this out. Has there been a problem in other provinces? The KPMG report did not address the fact that the majority of provinces have longer time limits than Ontario and 2 have no time limits at all.

For the first 78 years of Ontario’s workers compensation system there was no time limit on appeals. There were no problems with this appeal process. It would be ironic indeed if the perceived problem created by one time limit (30 days for RTW and rehabilitation and 6 months for all other decisions) was addressed by adding more time limits. That is a multiplication of bureaucracy.

Consider the additional staff resources that would be available to the WSIB for assisting injured workers if it did not have a large bureaucracy dedicated to policing ITO forms and time limits? That waste of resources will expand with the addition of more time limits. The WSIB has been able to deal with the workers who want to appeal and should focus on providing a forum for full justice. The “parked” appeals are harmless and do not require any attention.

Consultation experiences from the past

We are suggesting a fresh and more meaningful start to the consultation process. We encourage the WSIB reach into its institutional memory and establish a consultation format that will be, and will be seen to be credible, fair and indeed, welcoming

The Harry Arthurs Funding Review 2010

This inquiry provides a good methodology for how to create a credible process. In 2010 the WSIB asked the government to appoint Prof. Harry Arthurs to review the WSIB funding model. He was a former Osgoode Hall Law School Dean, a law professor with expertise in labour and administrative law and an arbitrator and mediator in labour disputes. The WSIB chose a credible, independent expert.

Prof. Arthurs Report notes “the credibility of the review and its capacity to make sensible recommendations depends heavily on the quality of the research that underpins its analysis” (p. 9). His review had research staff of its own. He aimed to provide “a convenient way for concerned parties to communicate with the review” (p.10). He established a website, met informally with 39 umbrella organizations, circulated a green paper, and held 12 days of public hearings in 6 Ontario cities. The hearings were advertised in 12 newspapers across the province, direct invitations were sent to all major stakeholder groups, and notices mailed to individual employers and injured workers as part of regular WSIB mailings. As well, people were

given the opportunity to provide their views orally to staff who transcribed the comment for the review.

During the consultation, the WSIB made an extensive presentation of the data, assumptions and analysis that shaped its own understanding of the issues. Participants were invited to question the WSIB's presenters and to ask for further information if required. The WSIB subsequently provided considerable additional information that was posted online. Oral or written submissions were made by 75 organizations and 55 individuals and posted online. The Arthurs review provides an excellent model for future WSIB reviews.

The Jim Thomas Benefit Policy Review Process (2012)

The President and CEO of the WSIB asked Jim Thomas to lead the review of benefits policies in the capacity of an independent chair, similar to the appointment of Professor Harry Arthurs. He was a labour lawyer, a former founding Vice Chair of the WCAT, a former Assistant Deputy Minister of Employee Relations and former Deputy Minister of Labour in the Ontario government. In choosing Thomas, WSIB Management sent an important message. Thomas was a sound choice for engaging stakeholders and giving credibility to the process.

This review came on the heels of the 2011 KPMG VFM audit on WSIB Adjudication &Claims Administration Program. Jim Thomas produced a report called "WSIB Benefits Policy Review Consultation Process," dated May 2013. There are some lessons that we think are relevant today in designing a consultation process.

Although this review followed the KPMG VFMA report of 2011, the KPMG report was not considered the key consultation process. The KPMG VFM audit that sparked the Thomas review was not considered "independent" nor a "consultation" and was the subject of widespread criticism by the labour and injured worker communities. Jim Thomas observed that there were 2 main concerns that were barriers to stakeholder engagement: the belief by worker representatives that the WSIB had already agreed and implemented the KPMG recommendations in claim decision making and that the new approach was motivated solely by cost considerations (p. 27-28). The WSIB is facing the same challenges again today.

It should be said that the 2011 KPMG report listed the worker and employer organizations contacted but, unlike the 2023 KPMG VFM Report, the 2011 report also provided a list of themes they raised (Section C), which suggested there was a sharp divergence of views. The 2023 KPMG report has no list of themes it heard. Rather, it lists individuals contacted, some of whom tell us they feel "manipulated" because they had no idea of the recommendations being put forward. The Thomas Inquiry, therefore, cleared the air about the KPMG report and allowed stakeholders to feel the process was still open, and they were genuinely engaged to improve the system, not deal with cost considerations.

The Thomas Review developed an engaging consultation process. The process is described in Chapter 1 of the report. It is interesting to note the carful steps taken. After preliminary meetings with WSIB officials and informal meetings with some stakeholders, Thomas released a discussion paper. Stakeholders were invited to send written submissions or participate in public hearings.

There were 7 days of public hearings in Toronto, London, Ottawa and Thunder Bay. After the hearings, Thomas met with WSIB officials and some stakeholders to communicate his preliminary observations. He then invited stakeholders to a half-day session to play back what he heard and to indicate what he was planning to propose to afford everyone an opportunity to ask questions and comment on what they heard. This he had learned from the Arthurs review and was well received.

Part of the Thomas Review mandate was to provide advice to the President about how future consultation processes might be conducted where the significance of the policies under review would warrant a stakeholder consultation process. We urge you to consider his advice. "The WSIB must count and depend on establishing and maintaining a positive and constructive working relationship with employer and worker stakeholders. It is for this reason that the WSIB should continually seek the best ways of involving and engaging stakeholders in making changes that will impact them." (p.30)

Thomas noted that the Arthurs review provided a good methodology for creating a credible process. "What is encouraging about the Arthurs process is the very positive way it was received by all stakeholders as I discovered in my early informal conversations with representatives of workers and employers and WSIB officials. I have met with Professor Arthurs, learned about the consultation approach he used in the funding review, and intend to apply many of the positive features of that process in this benefits policy review consultation process." (Consultation Discussion Paper p.2)

Chapter 9 is "Advice on Future Consultation Processes." These were some of his observations:

1. Setting out an early on discussion paper helped frame the inquiry. What a discussion paper process does is establish in the first instance an open and transparent approach to policy reform in those relatively rare situations where the policy reviews go well beyond seeking clarity and certainty, and instead have the potential to impact on entitlement. The most important element of the discussion paper would be the description of the way in which the re-drawing of the line is being recommended for work-related and not cost reasons. The discussion paper must demonstrate that the proposed change is grounded in the Act and is consistent with the Meredith Principles. The discussion paper would, where appropriate, describe how the proposed changes would be consistent with common law practices.

2. The involvement of the WSIB in the discussions. Providing the rationale for a policy review is one important role for the WSIB to play in a policy review process. Thomas requested the WSIB to prepare case scenarios describing the WSIB's view of the challenges it faced. Please note that neither KPMG nor the WSIB paper on consultation provide any case scenarios, real nor theoretical, that explains the reason for the drastic changes proposed.

3. There were public hearings around the province and they were designed to be as informal as possible to allow back and forth dialogue, which was very useful. Please note that the current method of "depositing" a written submission online is not conducive to dialogue or responding to other ideas. It's ironic that at an individual hearing, the ARO affords the parties the opportunity to respond to the other party's submission or to the evidence that has been heard. However, no such opportunity exists in discussing the entire appeal's system!

4. Sharing the preliminary conclusions with stakeholders was positive. In contrast, we note the lack of sharing of conclusions by the KPMG VFM report.

5. The process helped the WSIB maintain positive and constructive dialogue between worker and employer stakeholders.

6. The WSIB should in the future involve its established Advisory Committees as a "sounding board" in order to determine the anticipated level of interest and extent of that interest in participating in a review of a particular policy. (page 30). In Thomas' words: "I would hope that the WSIB and its stakeholders would take advantage of Advisory Committees meetings to explore together how the lessons learned from this process could best be implemented. The best way to reach common ground is to talk to each other. This report might usefully serve as a catalyst for those discussions." (Page 32).

   In this respect, our clinic works with the Ontario Network of Injured Workers' Groups, which is a member of the Labour and Injured Workers Advisory Committee. Was this committee approached as a "sounding board" for the radical ideas advanced by the KPMG VFM report? We do not have a sense it was, subject to WSIB clarification.

We urge the WSIB not to forget the lessons learned about consultation from past experience. History is important, there is much to be learned from past. The Thomas review was required because of a huge outcry of opposition from the labour and injured worker communities to the KPMG's recommendations in its 2011 VFMA Report.

Jim Thomas asked the question “One cannot rewind the tape, but if the WSIB had implemented a discussion paper approach when it decided to re-draw the work-relatedness line in situations where pre-existing conditions arise, would worker stakeholder opposition have been less intense? I would hope so, because that is what one should expect from a good working relationship. Given the importance of ensuring a vibrant Workers’ Compensation system, I do not think it is too much to expect. Mutual commitments are critical to making this work.” (p.30)

Today the WSIB does not appear to appreciate that these proposals will result in extinguishing the appeal rights of tens of thousands of injured workers and restricting the right to appeal of all future injured workers. If that is not the goal of these changes, the WSIB has certainly not provided the injured worker community with any explanation of the problem it is trying to solve and there has been no discussion of less harmful ways to address it.

The WSIB’s past experience shows there is a way forward. Let’s start again and establish a fair consultation process where these issues can be properly explored. That process requires a credible leader, notice to all injured workers in multiple languages, and public hearings.

Respectfully Submitted,
Injured Workers Community Legal Clinic

John McKinnon
Lawyer/Director

Copies: appealsfeedback@wsib.on.ca
Grant Walsh, WSIB Chair
Monte McNaughton, Minister of Labour
Ontario Network of Injured Workers Groups
Ontario Federation of Labour

From: Chris Grawey
Sent on: Wednesday, July 12, 2023 3:52:58 PM
To: appealsfeedback
Subject: KPMG Consultation

Good Morning,

I'm concerned about the WSIB consultation process and the eventual loss of appeal rights for injured workers.

The WSIB is providing barely any time to complete and submit responses to the consultation questions on the dispute resolution and appeals process. More concerning, is that this is taking place during the summertime – when many people are off work and on vacation. This is unacceptable.

I would like to request the following:

1. That the deadline to make submissions be extended for 6 months;

2. The consultation should occur in a public setting and should be led by experienced workers' compensation advocates;

3. All injured workers should be notified of the consultation – the radical changes proposed will impact tens of thousands of injured workers, most of whom have no idea about this consultation. Plain and simple, that is wrong.

I look forward to hearing back from you as soon as possible.

Chris Grawey
Community Legal Worker, Licensed Paralegal
Injured Workers Community Legal Clinic

International Union Of Operating Engineers Local 793
2245 SPEERS ROAD OAKVILLE ONTARIO L6L 6X8 T 905.469.9299 F 905.469.3007
www.iuoelocal793.org
Mike Gallagher
BUSINESS MANAGER
Joe Redshaw
PRESIDENT

Dispute resolution and appeals process value-for-money audit consultation feedback

Submitted to:

The Workplace Safety & Insurance Board

Submitted by:

The International Union of Operating Engineers, Local 793

July 19, 2023

Introduction:

Local 793 of the International Union of Operating Engineers represents more than 18,000 crane and heavy equipment operators and other skilled workers employed in all sectors of the construction industry, and industrial and mining sectors across the province of Ontario and the territory of Nunavut.

On January 1, 1998, Bill 99 came into effect, changing the Workers' Compensation Board to the Workplace Safety and Insurance Board (WSIB). The legislation denied unionized workers access to no-cost government agencies that provide WSIB representation and added many changes, including creating appeals time limits. As a result of the legislation, Local 793 Business Manager Mike Gallagher, and former WSIB Board Member decided to expand the scope of the Local's representation to include assisting members with WSIB claims.

In response to the WSIB's decision to accept KPMG's recommended changes to the dispute resolution and appeals process flowing from the 2022 VFMA, Local 793 is compelled to formally respond and oppose KPMG's recommendations. Specifically, the appeals process recommendations that will suppress Workers' ability to appeal a WSIB decision. Like the *Ontario Legal Clinics' Workers' Compensation Network (OLCWCN)* representing over 70 Ontarian legal aid clinics, we urge the WSIB Board of Directors not to overhaul an appeals system based on a third-party consultants' report that does not consider the fundamental principles of workers' compensation and the historic compromise workers made when they gave up their right to sue their employers for access to a fair and just compensation system.

Executive Summary:

- The WSIB should model their Alternate Dispute Resolution (ADR) and Mediation program after the Workplace Safety & Insurance Appeals Tribunal (WSIAT)
- The time limitations stipulated by the Workplace Safety Insurance Act (WSIA) should remain unchanged, and the proposed time limitation to submit an Appeals Readiness Form (ARF) should not be implemented.
    - If the WSIB opts to implement a new time limitation for an ARF despite the significant concerns for claim and appeal suppression a 24-month time extension from January 1, 2024, is recommended, as well as an exemption for claimants to not have to file an ARF for decisions rendered before January 1, 2024.
    - The proposed 12-months deadline to submit an ARF is insufficient, at least 24-months would be required.
    - There should be an ability to file an ARF based on extenuating circumstances beyond what is specified in the WSIB appeals and procedures documents. Specifically, if a worker requires more time to obtain evidence, the worker should be provided this time, as well as the ability to file an ARF under a late provision if significant evidence later comes to light.
- The WSIB should defer to the worker for their choice of hearing format.
- We support the WSIB to implement a process that would expedite return-to-work appeals as directed by section 120 of the Act.

- We support a 30-day timeline for appeals implementation by the front-line operating area.
- We disagree with the recommendation that the Board should exclude decisions based on standardized calculations (i.e., Non-Economic Loss (NEL) or Second Injury Enhancement Fund (SIEF) from its internal appeals process.
- We agree that the WSIB should provide the option for Workers to request the holistic resolution of a case at the WSIAT, through excluding some decisions from the internal appeals process. The WSIB should provide a clear disclaimer to unrepresented parties to make sure they understand the consequences of foregoing a level of appeal.

The following represents our detailed feedback on the VFMA recommendations.

KPMG's proposed tightening of time limits to appeal do not provide Worker's enough time to prepare for an appeal and will contribute to claim and appeal suppression

Based on KPMG's appeals process recommendation to slash the time limits to file an appeal – a Worker must object to a WSIB decision within 30-days, compared to the current time limit of 6-months. KPMG has also recommended a **new 12-month time limitation for a Worker to either be ready to move forward with their appeal or have their case thrown out.** This is not practical, and consequently will lead to claim and appeal suppression.

The following illustrates a common example of **the process a Worker follows upon denied WSIB benefits.** This will demonstrate how both the proposed reduction in time limits to object from 6-months to 30 days, and the proposed 12-month time limit for a complete appeals readiness form are impractical recommendations made by KPMG.

1. Receive a copy of the WSIB decision

Some Workers may need more time to interpret a decision due to literacy or language barriers. Additionally, it has been our direct experience that some Workers do not use e-mail, may work in remote locations, or may not have access to their home mailbox if working on a site for extended periods. It could take several weeks to receive the WSIB denial letter, which drastically reduces the time available to the Worker to interpret, receive assistance from the Union, and make a decision regarding their appeal.

Please consider that some of our Union members working in the construction and mining industries face computer, literacy or language barriers and may not immediately comprehend the impact of missing deadlines.

2. Requesting a copy of your WSIB claim

To review the information a WSIB decision-maker possesses or considered when denying the claim, the WSIB commits to providing access to your file *within 30-days*. In our experience getting a copy of a claim takes **at least 2-4 weeks**. Since the proposed time limit to appeal a denial is the same as the time limit for receiving information about the denial, it will be impossible for the Worker to make an informed decision to appeal the denial.

3. Finding a legal representative

Not only can it take time to find and retain a legal representative, such as an Ontario legal aid clinic, or from a Union, Workers generally face long wait times to access legal experts who can review their file, as these experts provide no-cost representation. The office of the Worker Advisor (OWA) for example, has a **7–17-month**[1] average wait time for a file review. Again, this does not fit in the proposed timelines of deciding on an appeal within 30 days and beginning the appeal process within 12 months

If Ontario's leading WSIB legal aid clinic (OWA) has such significant queues to review a file when the OWA limits the scope[2] of what WSIB appeals they will help with, and by extension their volume of work, how are Unions fairing? Again, Bill 99 made Union workers ineligible for legal aid. In this context, it is reasonable to assert Unions, are similarly constrained and likely have comparable average wait-times to Ontario's legal aid clinics.

Additionally, Unions, unlike private firms/representatives do not "reject prospective clients" due to excess volume, potential "waiting lists" nor do they limit the scope of issues that can be included in the appeals process. The "clients" are MEMBERS, and no member in good standing would be turned away or refused assistance or representation.

The proposed time-limit changes will create immense pressure for unions with the exponential increase in volume of work created by the proposed changes, with no way of being able to provide timely or quality representation for the aforementioned reasons. Special consideration should also be given to the unpredictable flow of advocacy work, with inevitable surges in claim activity at times, eroding one's ability to adequately prepare and execute submissions and appeals.

In addition to the time for a Worker to receive a WSIB denial letter, find representation and serve a waiting-period, a legal representative would then have to review, request and obtain relevant outstanding information to be ready to proceed with an appeal.

4. Preparing for an appeal

If a Worker has secured representation, it is likely because there is missing information, or the WSIB satisficed on porous evidence. At this point, the Worker and/or their legal representative will identify and attempt to obtain any outstanding evidence, such as a second medical opinion.

Requesting a medical report to get an expert opinion assessing the impact of a Worker's workplace injury or exposure on their disability takes additional time and money. Since expert opinions related to an appeal are often not covered by benefits, OHIP, or the WSIB, Workers may not be able to afford the cost or the time off work required to obtain an expert opinion in a manner congruent with the proposed timelines.

---

[1] OLCWN, KPMG Value for Money Audit (VFMA) Dispute Resolution and Appeals Process submission, pg. 6

[2] OWA representation services excludes certain issues of appeal

One of the most valuable resources available to Workers who are seeking a cost-free medical report is the Ontario Health Clinics for Ontario Workers (OHCOW) who have offices all over the province that help workers by providing free consultations. These reports are exceptional and fortunately cost-free. It is our understanding that there is **a several month wait** for review, and approximately **18-month** queue to obtain a report from OHCOW's Toronto clinic.

The above-noted review of the common steps following a WSIB denial speaks volumes in how long this process can take for a Worker to be ready to move forward with a WSIB appeal. From receiving and interpreting the WSIB denial letter, securing a legal representative, waiting to have a file reviewed, identifying what information is required to move forward, and the time required to obtain key evidence, such as a medical report, can take anywhere from 7 to 24 months.

If a Worker commonly requires 7-17 months to get their WSIB file reviewed, how are Workers going to be able to meet KPMG's proposed stricter and added time limits to appeal?

The answer is many injured and ill workers will not be able to meet these deadlines and will have their appeal considered abandoned. While KPMG may have been unaware of the realities of the current process, the WSIB, with its vast and clear understanding of these workflows and challenges, ought to consider the proposed changes with more care and concern for all impacted stakeholders.

Missed time-limits, claim suppression and constrained access to due process should never be the goal of any provincial workers' compensation system. Unfortunately, this will be the obvious and inevitable result of these proposed changes.

Recommendation from the recent value-for-money audit

Dispute Resolution – Mediation and Early Resolution

Recommendation 1.1:

If the Board decides to create a mediation stream, we submit that the WSIB should model their Alternate Dispute Resolution (ADR) and Mediation program after the Workplace Safety & Insurance Appeals Tribunal (WSIAT).

The WSIAT has successfully been providing an early intervention program[3] for years and the Tribunal's experience and expertise would be a valuable resource for the WSIB to model.

[3] Early Intervention Program (EIP) https://www.wsiat.on.ca/en/appealProcess/early_intervention_program.html

Appeals Process – Stricter & Additional Deadlines

The VFMA recommends that the WSIB create a new one-year time limit for a Worker to submit the Appeal Readiness Form (ARF) or have the appeal considered permanently abandoned.

It is important to underscore that the WSIB has no statutory power to create a new time limit. Once a worker or representative completes an intent to object form (ITO) they have met their time limit under the Workplace Safety Insurance Act (WSIA) s. 120, and the Board can't impose an additional time limit.

The WSIB acknowledges that they are aware that these appeals changes are contrary to the WSIA, but concerningly the WSIB is committing to pursue these changes, anyway. Below, we have provided our feedback to the appeals process changes.

Recommendation 1.2: If we were to implement a new one-year time limit from the decision date to submit an appeal readiness form on January 1, 2024, how should we manage appeals from before this date where an appeals readiness form has not yet been submitted

a. **Should appeals before this "date" be exempt from the requirement to send an appeal readiness form within one-year?**

Response: While we maintain that the 1-year requirement to submit ARFs should not be implemented for the reasons set out above, the obvious response to this question is ***yes***, there most certainly should be an exemption for all appeals prior to the *yet to be determined* implementation date.

In our opinion there would be a tidal wave of forced appeals being submitted, out of time-limit obligations, if all existing objections are included in the proposed ARF submission deadline. This would result in an overwhelming volume of appeals for Board staff to contend with. Delays in processing such an extraordinary capacity of appeals would create undue hardship for both Board staff and stakeholders alike as inevitable delays and pressurized appeals and decision making would lack quality.

b. **If we were to make appeals from before this date exempt from the requirement to send an appeal readiness form within one year, what would a reasonable time limit be? Would one year form the new effective date be reasonable?**

Response: If the 1-year requirement to file ARFs moves forward, it should have a reasonable start date in the future to allow both the Board and stakeholders alike to attempt to prepare for the increased volume in workloads. In consideration of the wait time reported by the office of the Ontario Legal Aid Clinics Compensation Network and other key services such as the Ontario Health Clinics for Ontario Workers (OHCOW) – **at least a 24-month extension** would be in order. This would greatly be improved by exempting current appeals completely from the proposed 1-year filing requirement for an ARF.

2. **Under what extenuating circumstances should we consider extending the 1-year time limit for submitting the ARF?**

Response: Further to how long it can take for a Worker to receive and interpret a decision, get legal support, have a representative review a file, and obtain the necessary evidence, such as a medical report – 1-year from the date of denial is insufficient time to submit an ARF. It is submitted that at **minimum** a Worker should have **2- years** to submit their ARF. Additionally, the process needs to be open to extensions based on extenuating circumstances, beyond the current criteria in the WSIB's appeals practices and procedures documents. For example, if the Worker can show that they are seeking evidence, but need more time to obtain evidence, such as a medical report they should be provided a time extension. Similarly, if new evidence becomes available that otherwise was not available for a workplace party, the WSIB should allow one to submit an ARF under some form of late provision.

Another example of why the proposed appeals process changes are problematic include forcing Workers to file appeals that they otherwise may not have wanted to file.

In our experience, our Members often do not want to file an ARF, while their Injury Employer (IE) is providing safe and suitable work. We have experienced that some of our Members only want to move forward with a WSIB appeal if their IE stops accommodating them. By implementing these new time limits, Workers will be forced to file ARF's, potentially aggravating IE's who are accommodating Workers, conceivably creating a toxic workplace.

By allowing Workers to file an ARF under some sort of late provision, for example, if the return-to-work becomes frustrated, this may avoid adding unnecessary tensions between workplace parties and additional appeals to the WSIB's appeals division.

It is submitted that these proposed appeals changes will result in an increase in self-represented and unprepared Workers being forced through a complicated appeals system. It is further submitted that this will also result in many injured and ill workers failing to meet these unrealistic deadlines and involuntarily forfeiting their right of appeal.

3. **Is January 1, 2024, a reasonable start date for the new one-year appeal readiness form time limit? How much time would you need to make sure you have enough notice for a start date?**

Response: Given the considerations outlined in this submission highlighting how it generally takes 7 to 24 months to be ready for appeal, we do not believe forcing a Worker to be ready within 12-months of a denial is practical nor fair. If the WSIB disagrees, obviously we do not believe January 1, 2024, is a reasonable start date. A reasonable start date can be discussed once we can determine legal aid clinics, unions, and OHCOW no longer have the significant several month queues to support Workers.

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability, and appropriateness of technology, and accessibility.

1. **What other factors should we consider in determining whether the oral hearing should be offered in-person or online?**

Response: The worker's preference.

Recommendation 3.1: We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process…

1. **What factors should we consider in expediting return-to-work issues when there are multiple issues in an appeal?**

Response: We support the WSIB to implement a process that would expedite return-to-work appeals as directed by section 120 of the Act.

If there is still an ongoing decision that the return-to-work issue is going to be dependent on, the WSIB should not expedite this process to the exclusion of these dependent and unresolved issues. In other words, we submit the WSIB must contend with any periphery decisions that may impact the adjudication of a return-to-work decision.

For example, if there is a secondary injury, the WSIB should decide on this new area of injury and confirm the associated limitations and restrictions, before seeking to adjudicate whether a job is safe and suitable.

Recommendation 3.2: We should reinforce the 30-day calendar-day time limit for appeal implementation and ensure this is measured across the organization.

1. **What factors should we consider in reinforcing the 30-day-calendar-day timeline for appeal implementation?**

Response: We support a 30-day timeline for appeals implementation by the front-line operating area.

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

1. **If we were to exclude decisions that rely on standardized calculations from our internal appeals process, what are some factors we should consider?**

Response: We disagree with the recommendation that the Board should exclude decisions based on standardized calculations (i.e., Non-Economic Loss (NEL) or Second Injury Enhancement Fund (SIEF) from its internal appeals process. If the WSIB proceeds with KPMG's recommendation, both workers and employers will lose a level of appeal to have their case heard.

It is important to reiterate that the Workplace Safety & Insurance Act (WSIA) does not provide for the WSIB to refuse to hear certain appeals, making KPMG's recommendation impossible[4].

2. **Are there other decision types that we should exclude from our internal appeals process?**

Response: No.

3. **Sometimes in different claims for the same person, an issue in dispute may be active with WSIAT while another issue is active with us. Should there be options to request for us to exclude some decisions from our internal appeals process to pursue the holistic resolution of the issues for the person or business at the WSIAT? Under what circumstances would this be best? What else should we consider?**

Response: Yes, there should be options to request the holistic resolution of a case at the WSIAT, through excluding some decisions from the internal appeals process. The WSIB should provide a clear disclaimer to unrepresented parties to make sure they understand the consequences of foregoing a level of appeal.

[4] Section 119(3) of the WSIA provides that "The Board shall give an opportunity for a hearing."

July 21 2023

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

Dear Workplace Safety and Insurance Board:

Re: WSIB Consultation on dispute resolution and appeal processes audit recommendations

Justice for Migrant Workers (J4MW) is an all-volunteer collective of current and former migrant workers, community organisers, students, lawyers, academics and community members who are committed to fairness, dignity and justice for all migrant agricultural workers in Canada. Today we are writing in response to the audit undertaken by KPMG at the behest of the WSIB, and in particular the findings that call for drastic changes to WSIB processes.

Since the early 2000's J4MW is a leading advocate for the rights of migrant agricultural workers. In our organizing and partnership with organisations such as the Industrial Accident Victims Group of Ontario (IAVGO) we have identified numerous systemic barriers that workers with precarious immigration status specifically migrants employed with tied work permits.

We stand in solidarity with the Injured Workers Action for Justice, who submitted a letter earlier today that set out, in detail, injured workers' objections to the findings of this audit. It is unreasonable and incorrigible to even further limit and restrict, an already limiting and restricting workers' compensation system by shortening time limits to appeal vital decisions by the WSIB. IWA4J details in their letter the difficulties that injured migrant workers have with accessing workers' compensation at all, let alone in a timely manner.

From our experience we know that employers intentionally exclude migrant workers from information about workers' compensation, refuse to cooperate with WSIB processes, and that as a result, many workers who would otherwise be entitled to WSIB benefits or at least the ability to apply for them, do not get that opportunity. KPMG's recommendation to further shorten appeal times would ensure that workers are even less able to access benefits.

As stated by IWA4J, KPMG's report is focused on cutting costs and streamlining processes, without considering what that means for the workers *for whom this system was built.* There is no meaningful incorporation of workers' perspectives in this audit and recommendations. No worker would agree to shorter appeal times and a smaller window of access to WSIB benefits.

We wholeheartedly endorse IWA4J's thoughtful, thorough letter which addresses the audit in depth, and to which WSIB must take seriously and heed in its decisions moving forward.

Sincerely,

Justicia for Migrant Workers

Kendal McKinney
1139 Argyle Rd., Windsor, Ontario, N8Y 3K2
Telephone 519-252-2106, Cell: 519-566-8070
e-mail kendal.mckinney.law@gmail.com

21/July/23

Via email: appealsfeedback@wsib.on.ca

Workplace Safety and Insurance Board
200 Front Street, Toronto, Ontario, M5V 3J1

Dear Sirs and Mesdames:

Re: Dispute resolution and appeals process value-for-money audit consultation

Although I have scant hope that this consultation process is sincere, the following constitutes my opinion on the above captioned issue, which I will refer to as the KPMG report for ease of reference.

Before entering into the detailed questions that you pose in this matter, I state that the KPMG report is without value and should be disregarded in its entirety. I will give detailed reasons for this opinion below.

Recommendation(s) 1.1: (paraphrased)

(A) Add an "Alternative Dispute Resolution" (ADR) process to the objection and appeals process;

(B) Additional details required from Injured Workers (IW's) to commence objection/appeal/ADR process;

(C) Shortening the time for an IW to commence an objection/appeal to 30 days in all cases, with strict thirty day time limits on other steps in the appeal process.

The Board's Questions:

1. What appealable issues do you think are appropriate for this (proposed) mediation-arbitration? See Recommendation 1.1(A).

A. None.

The entire proposition that there can be an ADR appropriate

relationship between a claimant of statutory rights and benefits and a statutory adjudicator of the benefits is so bizarre and outrageous that it is difficult to know where to start. There is no analogy to family law ADR practices.

Who are the parties to this proposed ADR process? The recommendation is not at all clear. It seems like the Board is assuming that Board staff will act as both a party and as the Mediator-Adjudicator. Alternatively, is the Board assuming that employers will be opposing worker appeals and they will become a party, thus recreating adversarial litigation processes?

Assuming the less bizarre scenario from the above paragraph, it is plain and obvious that the Board cannot act as a party to a dispute in the presumptive form of a Case Manager or other decision maker, and act as a neutral Mediator-Adjudicator, presumptively from the Appeals Branch of the same Board. It is impossible for such an arrangement to be either fair or to be seen as fair. It will be a flagrant breach of the principal of natural justice that no one can be a judge in their own cause. (*Nemo iudex in causa sua*). Please note that the *Nemo iudex* rule is a cardinal rule of natural justice, which in turn constitutes both a *Charter* right and a *Charter* value.

ADR presumes a dispute between two or more rights holders or claimants under law to property or rights that they both have a *prima facie* claim to, such as in family law disputes over custody or property, landlord-tenant disputes, labour relations disputes, civil law disputes, *etc*. A rough legal equality between the parties is assumed and the none of the parties has the power of legal decision making over the other.

In very rough terms ADR may be referred to as assisted bargaining. However, statutory rights cannot be bargained. Either the rights claimant is entitled or they are not. There is no bargaining. One cannot claim to have a voting right and be expected to bargain with the Electoral Officer and presumably accept half a ballot. There can be no claim to a Canada Pension Plan benefit followed by bargaining with an adjudicator or Referee, and presumably being willing to accept a discounted pension

Kendal McKinney
1139 Argyle Rd., Windsor, Ontario, N8Y 3K2
Telephone 519-252-2106, Cell: 519-566-8070
e-mail kendal.mckinney.law@gmail.com

benefit.

The Board can call their proposal ADR if it pleases them, but it will not be a process that any ADR practitioner will recognize or engage in. It is likely not even recognizable as a legal process.

2. What principles should guide the mediation-arbitration approach? What else should we consider? See Recommendation 1.1(A).

A. As noted above, a principled approach to mediation-arbitration or any other form of ADR as proposed by the Board is oxymoronic. The proposal is a violation of natural justice and ADR principles. It should also be noted that the proposal is so vague that it is not even clear whether the proposed ADR would be optional or mandatory. In either case, it is not specifically stated what the consequences would be. In the event of no "agreement", does the arbitration portion of mediation-arbitration displace the right to appeal the matter to an Appeals Resolution Officer within the Board? If not, what is the point? Does ADR preclude an appeal to the Tribunal?

At best this proposal will create another step in the internal review process that will simply duplicate the processes now done by Case Managers and Appeals Resolution Officers. There is no gain in efficiency for either the appealing IW or the Board. It is simply more work and delay, including the continuing loss of the disputed benefits, and possibly more expense for the worker. The Board will save money by discouraging more IW's in what amounts to a deep-pockets defence, but will have higher expenses for more staff time duplicating existing steps.

Finally, if mediation-arbitration displaces the right to appeal to the Tribunal, it will render every arbitrated resolution subject to Judicial Review. Is this what the Board wants?

3. If Mediation does not resolve the issue, what factors should be considered to determine whether an oral hearing or a hearing in writing should be

Kendal McKinney
1139 Argyle Rd., Windsor, Ontario, N8Y 3K2
Telephone 519-252-2106, Cell: 519-566-8070
e-mail kendal.mckinney.law@gmail.com

used for the arbitration component by the Appeals Resolution Officer? See Recommendation 1.1(A).

A. The preference of the injured worker.

The question illustrates exactly why the Board cannot and should not attempt to implement mediation-arbitration. The Board implicitly arrogates to itself the right to dictate the means of hearing. There is no mutuality, which is the entire foundation for ADR methods.

Criteria for the Board to select one method over another is set *apriori*, not on a case by case basis with regard to the needs of the injured worker. The *Ontario Human Rights Code* requires the Board to accommodate disabled persons. Injured workers are, by definition, disabled to one degree or another. Injured workers may also have other *Code* related issues such as non-work related medical or disability issues, or family care issues. The Board is obliged to consider the needs of these people on an individual, case by case basis, and meet those needs up to the point just short of undue hardship. As a multi-billion dollar corporate entity, the bar for undue hardship for the Board will be quite high.

In addition to *Human Rights Code* considerations there may be a host of other factors to be considered in method selection: The remoteness or proximity of a Board office to the injured worker; transportation, child care, non-work-related medical or disability issues, immigration related issues. The potential list of relevant factors is virtually infinite. The sensible option is to simply leave the matter up to the injured worker's discretion, not the Board's.

4. To ensure expediency, what would be a reasonable time frame for the mediation component? Is 30 calendar days reasonable. See Recommendation 1.1(C).

The Board's convenience does not constitute a need for expedience.

Kendal McKinney
1139 Argyle Rd., Windsor, Ontario, N8Y 3K2
Telephone 519-252-2106, Cell: 519-566-8070
e-mail kendal.mckinney.law@gmail.com

Once injured workers have made their submissions at this or any other stage, I would have no objection to a proposal that if a decision with reasons was not delivered in a set amount of time, that the matter would be automatically decided in favour of the appellant injured worker.

However, that is not the case or the proposal. The proposal is to terminate the rights of appeal of injured workers by imposing arbitrary and very short deadlines.

Injured workers appealing the denial of a claim for benefits are by definition vulnerable and lacking in resources. If an injured worker needs to obtain anything at any stage, they will likely not have adequate time to do so within a thirty-day window. For example, if an injured worker needs a medical opinion in a matter, it might take half the thirty-day window just to obtain an appointment, assuming that the IW already has a family physician. Approximately one quarter of Ontarians do not have a family physician. Obtaining a meaningful written opinion from a busy doctor would test the limits of even this scenario. If a medical specialist's opinion is required, it is almost entirely impossible to get an appointment, let alone a written opinion, in thirty days. In many cases, it cannot be done in a year.

If legal assistance is sought, few lawyers or paralegals can simply drop their ongoing matters to devote time to a new client to meet the convenience of the Board and their arbitrary deadlines. Private lawyers and paralegals also need to be paid. Legal clinics all have lengthy waiting lists.

In short, no arbitrary deadline is reasonable. A thirty day deadline is patently unreasonable, for this or any other stage of an appeal process.

5. How might alternative dispute resolution be used by front-line decision makers? If there is a dedicated team of front -line operational experts delivering alternative dispute resolution, how much should other front-line decision makers be trained in the approach? See Recommendation 1.1(A).

Kendal McKinney
1139 Argyle Rd., Windsor, Ontario, N8Y 3K2
Telephone 519-252-2106, Cell: 519-566-8070
e-mail kendal.mckinney.law@gmail.com

A. For the reasons outlined above, ADR should not be used at all by the Board. To reiterate the matter, a decision maker cannot be a party to a dispute no matter what the process is. This is doubly true of ADR techniques that rely on mutuality and equitability.

This entire report reflects a very muddled mind set by KPMG and the Board. On the one hand, it implicitly recognizes the underlying truth that the Board has either accepted or fostered an adversarial relationship with injured workers. On the other, it wishes to retain the power of decision making at all stages, including this new proposed stage. Giving up power in favour of the interests of injured workers or even a truly neutral and independent third party is not even considered, even while attempting to mimic the appearance, but not the substance, of ADR processes.

In the alternative, the Board should consider training Case Managers and other frontline workers in active listening techniques, which is a component of effective ADR. They should also be trained and supported in a normative culture that encourages CM's and others to try to work with injured workers to problem solve and find ways for the IW's to obtain benefits, rather than to take an adversarial approach to deny benefits.

There is statistical evidence (see attachments) that the quality of frontline decision making and subsequent appeals processes are seriously defective. This should be the focus of a major overhaul in training and retraining. The rate at which Board decisions are overturned in whole or in part at the Tribunal is shocking.

There is a very major problem with the Board appeals processes, but it is not a matter even examined by KPMG: The Board simply gets things wrong in the vast majority of appealed cases. The problem is not the injured workers, or deadlines, or ADR. The problem is that the quality of decision making by the Board in appealed cases is terrible.

6. What factors should we consider in making the above information mandatory to initiate the dispute resolution and appeals process? See

Kendal McKinney
1139 Argyle Rd., Windsor, Ontario, N8Y 3K2
Telephone 519-252-2106, Cell: 519-566-8070
e-mail kendal.mckinney.law@gmail.com

Recommendation 1.1(B).

A. Additional information is not necessary and should not be mandatory.

An appeal is automatically related to a request for benefits or the termination of a benefit. The subject matter is already determined by what the Case Manager or other Board staff member has denied or terminated. The subject matter is therefore already known to the Board, as is the remedy, which will be the original request for benefits that was denied or the received benefits that were terminated by the Board. All that is necessary for the injured worker to do is to specify which decision on which date is objected to. Once specified, there is no rational need for the Board for further information.

The demand for further particulars at the outset of a matter which is already known to the Board again resembles an administrative equivalent of a “deep pockets defence”, as noted above. It places additional burdens on the injured worker along with extremely truncated time lines. It is more evidence of an adversarial mind set, and an indication of an approach to administrative law that is more akin to civil procedure. With the additional feature of the Board acting as both an adverse party and judge.

A more detailed objection starts to look like a statement of claim. Mandatory mediation becomes mediation-arbitration. Access and appeal readiness start to look like discovery. Case management becomes arbitrary time lines, enforceable by one party, but not the other.

Administrative law systems are supposed to replace expensive, elaborate, and drawn-out civil procedure with timely, accessible, easily understood processes. Ideally, no legal help should be required to access benefits or to appeal decisions. But the need for legal help only increases for injured workers with more burdens placed them, as in this issue, with outrageously tightened time frames. The worst of both civil and administrative law.

Kendal McKinney
1139 Argyle Rd., Windsor, Ontario, N8Y 3K2
Telephone 519-252-2106, Cell: 519-566-8070
e-mail kendal.mckinney.law@gmail.com

6. What factors should we consider when implementing 30-calendar-day timeframes (*sic*) for each step in the above reconsideration process?

A. The Board should not adopt a thirty day deadline in any of the steps in the appeal process.

Aside from the blatant one-sidedness of the whole scheme, as noted at various points above, it is fair to also note that the right to seek a remedy for negligence in civil court, which is taken away from injured workers by the *Act* and its predecessors, allows for an injured party to file a claim within two (2) years. That is a period that is over 24 times longer than the thirty day limit that the Board wishes to impose for the first step in appeal.

Likewise, in civil procedure case management there is no automatic lockstep progression, let alone a timetable set by one of the parties. Each matter is assessed on its own merits by a Master or Judge. There is certainly no question of one party imposing an arbitrary case management plan and timetable on the other party.

Recommendation 1.2:

We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

A. As noted above, this recommendation is rejected in its entirety. A single example, also as noted above, will suffice: If a medical specialist opinion is required, how is this to be obtained by the injured worker in less than one year?

The arbitrariness of the imposed deadline is not just irrational, it is offensive. There is no demonstrated hardship on the Board under the current rules, nor is there any discussion, let alone proof of a loss of “value for money”. Just how does KPMG or the Board think this scheme is going

to provide better value for money? What value? To who? How much money? Winnowing out the appeals of injured workers by imposing more specious requirements and very tight deadlines might result in savings to accident employers, but it is certainly not "value" for the injured workers. It is also a breach of the obligation of the Board under subsection 4 of s. 1 of the *Act*:

> *4. To provide compensation and other benefits to workers and to the survivors of deceased workers.*

Simply put, the Board has a legal obligation to provide benefits to injured workers. That mandate is breached when the Board seeks ways to limit appeal rights over the often egregious denial or termination of benefits. I submit that the proposed process changes also amount to a deliberate assault on the principles of natural justice and the established precepts of administrative law.

The Board's questions:

1. If we were to implement a new one-year time limit from the decision date to submit an appeals readiness form on January 1, 2024, how should we manage appeals from before this date where an appeal readiness form has not yet been submitted?

A. Do not implement such a limit.

If implemented, like all such rule changes, matters arising before the implementation date should be fully "grand-fathered", with the rules as they were before that date to remain in effect. Retroactive applications of rules, especially those limiting rights, are repugnant.

2. Should appeals from before this date be exempt from the requirement to send an appeal readiness form within one-year?

A. Yes. See question 1 above. No retroactive application, full grand-fathering.

Kendal McKinney
1139 Argyle Rd., Windsor, Ontario, N8Y 3K2
Telephone 519-252-2106, Cell: 519-566-8070
e-mail kendal.mckinney.law@gmail.com

3. If we were to make appeals from before this date exempt from the requirement to send an appeal readiness form within one year, what would a reasonable time limit be? Would one year from the new effective date be reasonable?

A. Any retroactive application of a rule change that limits rights is unethical. No retroactive application, full grand-fathering.

4. Under what extenuating circumstances should we consider extending the one-year time limit for submitting the appeals readiness form?

A. See above.

5. Is January 1, 2024, a reasonable start date for the new one-year appeal readiness form time limit?

A. No. At a bare minimum the coming into force of these proposed rule changes should be delayed for one full year after Royal Assent and/or publishing in the Operational Policy Manual. One year rules should go both ways..

6. How much time would you need to make sure you have enough notice for a start date?

A. The time required in each matter is case specific which is why arbitrary deadlines are contrary to the principles of natural justice. There should be no deadlines.

Recommendation 2.3:

We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility. What other factors should we consider in

determining whether the oral hearing should be offered in person or online?

A. The wishes and preferences of the injured worker. It is their rights that are being adjudicated. The issues in dispute are frequently intimate and have profound consequences for the injured worker. Disempowering workers as to choice of forum just adds to the psychological trauma of a profoundly disempowering accident or disease and a disempowering bureaucratic process to try to obtain compensatory services or benefits. Let the injured worker tell the Board what their needs are. Do not presume and impose.

Other Recommendations

Timely action by the Board on any aspect of appeal processes, especially implementation of ARO decisions, will be welcome. Otherwise I shall forego detailed comment on the remaining recommendations.

Why the KPMG Report Should be Rejected

What is not discussed in any of these issues is what KPMG or the Board thinks the problem is.

The report mentions the overall Board goal of achieving return to work outcomes as quickly as possible as much as possible. What is missing is how that goal is connected to appeal processes.

The process was described as a “value for money audit”. What is the “value” of the intangible right to a fair appeal for an injured worker? Especially for a permanently injured worker? How does saving money for the Board, and ultimately the employers, balance against the value of natural justice for people whose lives have been permanently altered?

The things that the KPMG did not report on or measure are telling:

- The KPMG report did not include any assessment of staffing levels at either the front line level (usually Case Managers) or the ARO level.
- Staffing was not assessed in relation to the varying level of rates of appeal . (See attachment)

Kendal McKinney
1139 Argyle Rd., Windsor, Ontario, N8Y 3K2
Telephone 519-252-2106, Cell: 519-566-8070
e-mail kendal.mckinney.law@gmail.com

- There was no flow chart of processes to identify redundancies or bottlenecks.
- There was no discussion or apparent analysis of average processing times by type of issue or under appeal.
- There was no discussion or apparent analysis of average processing times by type of injury to the worker.
- There was no analysis of self-represented workers, union represented workers, paralegal represented workers or lawyer represented workers and appeal times
- There was no discussion of staff retention and training issues.
- Worst of all, there was no mention of the atrocious record of the quality of decision making by the Board in the appeal process.

In the attached documents it is noted that the majority of Board decisions appealed to the Tribunal have been overruled by the Tribunal in whole or in part. This record of failure has not only persisted for over a decade, it has gotten steadily worse over that time.

At its best, the decision making and internal Board appeal process was upheld in its entirety at the Tribunal 45% of the time. (See Outcomes for Worker WSIAT Decisions - 2012 to 2021, page 3 of FOI Response 6556.) That was in 2012. In simple terms, of all the cases appealed to the Tribunal, the Board's decision making and appeals process was 5% worse than flipping a coin in 2012.

The worst record of decision making and Board appeals process was found in the statistics for the last half of 2022 and the first quarter of 2023. See the attached document "WSIAT Overturn Rate of Board Decisions" and a copy of the FOI response that the statistics were given. The Tribunal found that the Board's decision making and appeal process was wrong in whole or in part an astonishing 79% of the time. A .210 batting average may be acceptable in baseball, but is not acceptable for an organization that holds the power of life affirming support or life destroying rejection over seriously injured workers.

The statistics also make clear that the most recent outcomes are not a fluke. The trend from 2012 to 2021 makes it clear that the statistics of Q3 &4 of 2022 and Q1 of 2023 is merely the predictable culmination of a steadily deteriorating process spanning a decade.

Kendal McKinney
1139 Argyle Rd., Windsor, Ontario, N8Y 3K2
Telephone 519-252-2106, Cell: 519-566-8070
e-mail kendal.mckinney.law@gmail.com

All these things were knowable to KPMG and the Board. But the questions were apparently never asked.

Given how logical, obvious, and even standard such questions would be to a competent inquirer interested in efficiency, it must be questioned what the Board and KPMG were looking for, if not these things?

The outcome suggests that the Board and KPMG were not looking at these obvious and logical issues, but simply looking for a framework of words on which to hang a predetermined desire to limit access to appeals for injured workers.

Quod erat demonstrandum that the KPMG report is useless as a tool to measure "value for money", no matter how defined, and a shoddy and perverse basis on which to construct any changes at the Board. Logic, reason, equity, and ethics all demand that this travesty be abandoned and rejected.

Respectfully Yours,

Kendal McKinney

encl.

cc. ONIWG
A. Farquhar

Decision Outcomes for Worker Appeals - 2000 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all appeal decisions between January 1, 2000 and December 31, 2021 where the objection origin was the worker, the worker representative or a dual objection.
Excludes appeals that were returned or withdrawn.
Excludes appeals where the objection origin was the employer or employer representative.
Virtual Hearings are oral hearings where the hearing location is "teleconference" or videoconference".

Data Source:

Appeals Branch Tracking System as of April 12, 2017 for appeals decisions between 2000 and 2016.
InfoCenter as of March 31, 2022 for appeals decisions between 2017 and 2021.

Decision Outcomes for Worker Appeals

Decision Outcome	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
# of Worker Appeal Decisions	**6,800**	**6,203**	**6,002**	**6,084**	**5,984**	**6,048**	**5,774**	**5,620**	**5,288**	**5,539**	**5,603**	**6,392**	**7,864**	**9,096**	**7,570**	**6,792**	**5,550**	**4,106**	**3,530**	**3,329**	**3,319**	**4,305**
% Allowed	29%	30%	28%	29%	27%	27%	28%	27%	28%	26%	23%	21%	19%	18%	17%	18%	19%	18%	18%	20%	20%	19%
% Allowed in Part	19%	18%	18%	17%	17%	17%	17%	18%	17%	17%	16%	15%	16%	17%	16%	14%	15%	14%	14%	14%	15%	16%
% Denied	52%	51%	53%	54%	55%	56%	56%	55%	55%	58%	61%	64%	65%	65%	67%	68%	66%	68%	68%	67%	66%	65%

Decision Outcomes for Worker Appeals by Method of Resolution

Method of Resolution/Decision Outcome	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Oral Hearing	**2,372**	**2,255**	**2,414**	**2,456**	**2,357**	**2,326**	**2,299**	**2,334**	**2,052**	**2,198**	**2,028**	**1,834**	**1,510**	**1,814**	**1,480**	**1,298**	**1,012**	**819**	**709**	**689**	**271**	**586**
% Allowed	33%	33%	32%	30%	30%	31%	31%	31%	33%	31%	28%	26%	26%	25%	26%	27%	29%	29%	31%	29%	28%	26%
% Allowed in Part	27%	26%	23%	24%	23%	23%	23%	25%	25%	23%	24%	22%	24%	29%	28%	22%	25%	21%	20%	19%	22%	22%
% Denied	40%	40%	45%	46%	47%	46%	45%	44%	42%	46%	48%	52%	50%	46%	46%	51%	46%	50%	50%	53%	51%	52%
Hearing in Writing	**4,428**	**3,948**	**3,588**	**3,628**	**3,627**	**3,722**	**3,475**	**3,286**	**3,236**	**3,341**	**3,575**	**4,558**	**6,354**	**7,282**	**6,090**	**5,494**	**4,538**	**3,287**	**2,821**	**2,640**	**3,047**	**3,719**
% Allowed	27%	29%	26%	28%	25%	25%	25%	24%	25%	22%	21%	19%	17%	17%	15%	15%	16%	15%	15%	17%	19%	18%
% Allowed in Part	14%	13%	15%	12%	14%	13%	12%	13%	11%	13%	11%	12%	14%	14%	13%	13%	13%	12%	13%	12%	14%	15%
% Denied	58%	58%	59%	60%	61%	62%	63%	63%	63%	65%	68%	69%	69%	69%	72%	72%	70%	72%	72%	70%	67%	67%

Decision Outcomes for Worker Appeals with Virtual Hearings

-Prior to 2019 there were less than 5 virtual hearings per year therefore results have been summarized for 2000-2018.

Method of Resolution/Decision Outcome	2000-2018	2019	2020	2021
Virtual Hearings	**40**	**6**	**67**	**330**
% Allowed	33%	0%	34%	25%
% Allowed in Part	18%	17%	22%	21%
% Denied	50%	83%	43%	55%

Outcomes by Issue Category for Worker Appeals - 2000 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all appeal issue decisions between January 1, 2000 and December 31, 2021 where the objection origin was the worker, the worker representative or a dual objection.
Excludes appeals that were returned or withdrawn.
Excludes appeals where the objection origin was the employer or employer representative.
Appeal issues are not mutually exclusive to an appeals decision as an appeal can have multiple objection issues.

Data Source:

Appeals Branch Tracking System as of April 12, 2017 for appeals decisions between 2000 and 2016.
InfoCenter as of March 31, 2022 for appeals decisions between 2017 and 2021.

Outcomes by Issue Category for Worker Appeals

Issue Category/Issue Outcome	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Loss of Earnings	**291**	**579**	**861**	**1,065**	**1,298**	**1,556**	**1,709**	**1,776**	**1,827**	**1,907**	**2,127**	**2,546**	**3,348**	**4,401**	**3,266**	**2,922**	**2,525**	**1,722**	**1,522**	**1,453**	**1,517**	**1,967**
Allowed	106	210	310	390	479	546	600	640	726	661	654	668	787	1,007	757	656	590	407	350	372	394	527
Allowed in Part	37	100	136	179	201	281	284	325	326	348	359	416	561	687	521	433	371	229	193	194	227	261
Denied	148	269	415	496	618	729	825	811	775	898	1,114	1,462	2,000	2,707	1,988	1,833	1,564	1,086	979	887	896	1,179
Other	**5,404**	**4,225**	**4,021**	**3,704**	**3,303**	**3,011**	**2,692**	**2,455**	**1,984**	**2,061**	**1,879**	**1,721**	**1,982**	**2,231**	**1,975**	**1,643**	**1,361**	**1,023**	**822**	**817**	**786**	**1,005**
Allowed	1,806	1,403	1,245	1,194	1,039	901	838	765	611	575	461	348	386	436	386	316	287	210	140	156	163	238
Allowed in Part	619	525	469	426	386	318	276	261	182	191	162	139	165	182	147	131	116	84	63	55	57	60
Denied	2,979	2,297	2,307	2,084	1,878	1,792	1,578	1,429	1,191	1,295	1,256	1,234	1,431	1,613	1,442	1,196	958	729	619	606	566	707
Non-Economic Loss (NEL)	**1,141**	**970**	**1,009**	**1,084**	**1,168**	**1,103**	**1,051**	**1,085**	**1,105**	**1,071**	**1,140**	**1,301**	**1,804**	**2,357**	**1,943**	**1,610**	**1,223**	**978**	**787**	**625**	**831**	**1,209**
Allowed	381	328	276	258	310	282	288	305	287	290	258	235	364	507	320	247	215	143	122	94	130	209
Allowed in Part	47	38	47	44	60	56	43	50	51	57	48	52	87	169	123	107	78	73	46	34	37	78
Denied	713	604	686	782	798	765	720	730	767	724	834	1,014	1,353	1,681	1,500	1,256	930	762	619	497	664	922
Initial Entitlement	**1,406**	**1,344**	**1,272**	**1,201**	**1,147**	**1,218**	**1,146**	**1,142**	**1,005**	**1,159**	**1,070**	**1,271**	**1,422**	**1,684**	**1,364**	**1,300**	**1,137**	**966**	**860**	**907**	**713**	**1,032**
Allowed	525	543	482	472	398	420	401	367	344	354	325	373	351	412	322	331	283	246	228	217	190	236
Allowed in Part	71	76	57	51	58	52	47	42	38	33	28	46	49	54	48	36	37	40	41	28	28	48
Denied	810	725	733	678	691	746	698	733	623	772	717	852	1,022	1,218	994	933	817	680	591	662	495	748
New Condition	**719**	**634**	**606**	**634**	**677**	**635**	**620**	**584**	**551**	**618**	**555**	**677**	**754**	**982**	**859**	**875**	**825**	**636**	**419**	**393**	**420**	**520**
Allowed	190	169	123	143	164	121	150	154	133	135	107	112	110	140	146	136	131	99	68	70	73	98
Allowed in Part	44	26	37	28	34	38	28	33	24	34	28	29	33	38	37	43	36	28	14	17	15	24
Denied	485	439	446	463	479	476	442	397	394	449	420	536	611	804	676	696	658	509	337	306	332	398
Recurrence	**821**	**674**	**614**	**529**	**515**	**504**	**520**	**399**	**396**	**398**	**389**	**443**	**610**	**691**	**624**	**517**	**417**	**372**	**277**	**233**	**239**	**283**
Allowed	300	233	225	198	177	175	191	158	148	150	116	108	133	167	138	111	107	71	65	73	57	83
Allowed in Part	60	66	45	27	32	28	33	24	25	20	20	23	27	26	35	24	16	18	14	7	9	12
Denied	461	375	344	304	306	301	296	217	223	228	253	312	450	498	451	382	294	283	198	153	173	188
Health Care	**280**	**298**	**277**	**289**	**241**	**272**	**266**	**243**	**294**	**334**	**329**	**391**	**485**	**712**	**643**	**536**	**447**	**274**	**217**	**211**	**193**	**282**
Allowed	100	132	86	92	85	71	79	75	90	93	76	76	86	134	109	87	77	49	27	45	27	53
Allowed in Part	37	26	31	32	25	31	22	31	19	27	33	31	42	48	52	42	34	12	10	9	17	15
Denied	143	140	160	165	131	170	165	137	185	214	220	284	357	530	482	407	336	213	180	157	149	214
Psychotraumatic	**207**	**227**	**213**	**218**	**216**	**314**	**344**	**303**	**269**	**307**	**414**	**542**	**737**	**755**	**516**	**488**	**353**	**255**	**193**	**179**	**198**	**368**
Allowed	47	49	62	48	56	74	81	76	76	68	108	108	152	153	92	88	70	44	37	39	42	101
Allowed in Part	5	6	<5	<5	<5	13	7	10	9	11	18	25	30	29	18	14	12	10	8	6	9	18
Denied	155	172	147	167	157	227	256	217	184	228	288	409	555	573	406	386	271	201	148	134	147	249
Chronic Pain	**434**	**411**	**393**	**380**	**354**	**374**	**371**	**339**	**303**	**318**	**338**	**435**	**537**	**568**	**454**	**434**	**314**	**221**	**165**	**131**	**105**	**165**
Allowed	95	103	90	71	85	76	82	70	51	52	68	52	63	61	51	48	39	34	24	25	18	36
Allowed in Part	7	<5	<5	<5	<5	5	5	<5	<5	<5	6	<5	<5	12	<5	6	<5	<5	-	-	-	<5
Denied	332	304	301	305	267	293	284	267	250	265	264	381	470	495	399	380	273	186	141	106	87	127
Traumatic Mental Stress (TMS)	**-**	**-**	**8**	**35**	**63**	**67**	**49**	**46**	**50**	**50**	**64**	**66**	**71**	**62**	**57**	**72**	**48**	**43**	**27**	**79**	**45**	**84**
Allowed	-	-	<5	-	11	20	8	5	12	8	6	9	11	7	9	7	7	12	<5	<5	7	8
Allowed in Part	-	-	-	-	<5	-	-	-	-	<5	<5	<5	<5	<5	-	-	-	-	-	-	-	-
Denied	-	-	6	35	51	47	41	41	38	39	56	56	58	54	48	65	41	31	25	75	38	76
Chronic Mental Stress	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**12**	**85**	**56**	**72**
Allowed	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	10	<5	5
Allowed in Part	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	<5	<5
Denied	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	12	75	53	65
SIEF	**69**	**62**	**68**	**61**	**50**	**57**	**48**	**49**	**62**	**41**	**20**	**21**	**25**	**26**	**8**	**8**	**<5**	**5**	**8**	**8**	**36**	**11**
Allowed	34	33	32	27	23	25	21	25	29	17	6	5	8	11	<5	<5	-	<5	<5	<5	9	5
Allowed in Part	8	9	<5	9	<5	<5	<5	<5	7	8	<5	<5	6	<5	<5	<5	-	-	<5	<5	8	<5
Denied	27	20	35	25	23	28	23	20	26	16	13	12	11	13	5	<5	<5	<5	<5	<5	19	<5

Outcomes for Worker WSIAT Decisions - 2012 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all WSIAT decisions between April 1, 2012 and December 31, 2021 where the appellant was the worker or both (referring to both the worker and the employer).
Excludes WSIAT decisions that were withdrawn, abandoned, adjourned, or interim.
Excludes WSIAT decisions where the appellant was the employer, board, other or respondent.
WSIAT decisions at the claim level so a WSIAT decision that pertains to multiple claims will be counted more than once.

Data Source:

WSIAT Database from Legal Services Division for WSIAT decisions between 2012 and 2017.
InfoCenter report 3116 WSIAT Outcome Report For Claims as of April 12, 2022 for WSIAT decisions between 2018 and 2021.

Outcomes for WSIAT Decisions

Decision Outcome	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
# of Worker Appeal Decisions	**1,691**	**2,191**	**2,272**	**2,589**	**3,130**	**3,565**	**2,320**	**2,360**	**1,398**	**1,577**
% Allowed	33%	33%	34%	35%	38%	36%	36%	34%	35%	38%
% Allowed in Part	21%	24%	24%	23%	25%	29%	29%	34%	31%	35%
% Denied	45%	43%	42%	42%	38%	35%	35%	32%	34%	27%

Outcomes for WSIAT Decisions by Method of Resolution

-Method of resolution not available prior to 2018.

Method of Resolution/Decision Outcome	2018	2019	2020	2021
Alternate Dispute Resolution (Mediation)	**59**	**83**	**96**	**197**
Allowed	24%	47%	47%	40%
Allowed in Part	76%	52%	53%	60%
Denied	0%	1%	0%	0%
File Review	**592**	**539**	**497**	**261**
Allowed	41%	42%	37%	42%
Allowed in Part	14%	20%	21%	21%
Denied	45%	38%	42%	37%
Hearing	**1,650**	**1,723**	**801**	**1,112**
Allowed	34%	31%	33%	36%
Allowed in Part	33%	37%	34%	34%
Denied	33%	32%	33%	30%

Outcomes by Issue Category for Worker WSIAT Decisions - 2018 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all WSIAT decisions between January 1, 2018 and December 31, 2021 where the appellant was the worker or both (referring to both the worker and the employer).
Excludes WSIAT decisions that were withdrawn, abandoned, adjourned, or interim.
Excludes WSIAT decisions where the appellant was the employer, board, other or respondent.
WSIAT decisions at the claim level so a WSIAT decision that pertains to multiple claims will be counted more than once.
WSIAT issues are not mutually exclusive to a WSIAT decision as they can have multiple objection issues.

Data Source:

InfoCenter report 3116 WSIAT Outcome Report For Claims as of April 12, 2022 for WSIAT decisions between 2018 and 2021.

Outcomes by Issue Category for Worker WSIAT Decisions

-Results not available prior to 2018 as only the outcome of the overall WSIAT decision was captured prior to 2018 as opposed to the decision for each individual issue.

Issue Category/Issue Outcome	2018	2019	2020	2021
Loss of Earnings	**990**	**1,054**	**568**	**788**
Allowed	432	485	261	346
Allowed In Part	245	273	159	262
Denied	313	296	148	180
Non-Economic Loss (NEL)	**592**	**653**	**385**	**487**
Allowed	276	293	163	219
Allowed In Part	47	54	31	49
Denied	269	306	191	219
Other	**555**	**518**	**438**	**447**
Allowed	264	220	189	208
Allowed In Part	58	68	51	59
Denied	233	230	198	180
Initial Entitlement	**406**	**493**	**275**	**351**
Allowed	193	215	108	168
Allowed In Part	22	30	15	30
Denied	191	248	152	153
New Condition	**329**	**317**	**217**	**252**
Allowed	124	112	72	90
Allowed In Part	24	23	16	14
Denied	181	182	129	148
Psychotraumatic Disability	**188**	**208**	**102**	**126**
Allowed	89	102	38	54
Allowed In Part	6	7	<5	7
Denied	93	99	62	65
Recurrence	**174**	**200**	**102**	**119**
Allowed	93	109	51	55
Allowed In Part	6	9	<5	9
Denied	75	82	48	55
Chronic Pain Disorder	**192**	**188**	**84**	**84**
Allowed	63	59	28	34
Allowed In Part	<5	<5	<5	0
Denied	126	128	54	50
Health Care	**129**	**171**	**110**	**124**
Allowed	65	67	52	64
Allowed In Part	13	18	7	5
Denied	51	86	51	55
Traumatic Mental Stress (TMS)	**<5**	**<5**	**12**	**15**
Allowed	<5	0	<5	<5
Denied	<5	<5	8	14
CMS-Chronic Mental Stress	**0**	**<5**	**<5**	**23**
Allowed	0	0	<5	<5
Denied	0	<5	<5	19
SIEF	**11**	**<5**	**<5**	**<5**
Allowed	6	0	<5	0
Allowed In Part	<5	0	0	<5
Denied	<5	<5	<5	<5

Overturn Rates at WSIAT

I received a response to my FOI request dated April 17, 2023. The response from WSIAT is dated May 2, 2023. The request was for statistics on rates of WSIAT overturning Board decisions in whole or in part.

WSIAT informs me that they only recently began compiling such data.

I do not have a functioning scanner, so I am reproducing the data below. A scan of the full letter will follow.

WSIAT Overturn Rate of Board Decisions per FOI Request Dated 17/April/23 as of 2/May/23				
Final Decision Outcome	**2022 (July1-December 31)**	**% of Final decisions**	**Q1 2023**	**% of Final decisions**
Allowed	614	64%	219	49%
Allowed in Part	158	15%	117	26%
Deemed Abandoned	1	0%	0	0%
Denied	179	19%	112	25%
Withdrawn	4	0%	2	0%
Total	**956**	**100%**	**450**	**100%**

I will forego commentary until later. The numbers speak for themselves.

Please distribute this information.

Kendal McKinney
4/May/23

Workplace Safety and Insurance Appeals Tribunal

505 University Avenue 7th Floor
Toronto ON M5G 2P2
Tel: (416) 314-8800
Fax: (416) 326-5164
TTY: (416) 314-1787
Toll-free within Ontario:
1-888-618-8846

Web Site: www.wsiat.on.ca

Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

505, avenue University, 7e étage
Toronto ON M5G 2P2
Tél. : (416) 314-8800
Téléc. : (416) 326-5164
ATS : (416) 314-1787
Numéro sans frais dans les limites de l'Ontario : 1-888-618-8846

Site Web : www.wsiat.on.ca

Ontario

CONFIDENTIAL

May 2, 2023

Mr. Kendal McKinney
1139 Argyle Rd.,
Windsor, ON
N8Y 3K2

Dear Mr. McKinney:

RE: Your letter dated April 17, 2023

This is in response to your letter dated April 17, 2023 regarding statistics on rates of overturning or upholding of Board decisions. Your letter has been referred to me as WSIAT's Freedom of Information (FOI) Coordinator.

In your letter you requested statistics on how many Board decisions appealed to the Tribunal are upheld or overturned in whole or in part and if these statistics are publicly available. You also asked that if the data had been rendered into percentages, you would also appreciate those statistics.

As the WSIAT only recently began tracking outcomes, we have not yet made this data publicly available. I can share the data from the last two quarters in 2022 and the first quarter of 2023 for your information (see chart on page 2 of my letter). You can obtain information in relation to outcome prior to July 2022 by searching the WSIAT's decisions which are publicly available. All of the WSIAT's decisions are available on the WSIAT's website and on CanLII.

.../2

Final Decision Outcome	2022 (July 1-December 31)	% of Final decisions	Q1 2023	% of Final decisions
Allowed	614	64%	219	49%
Allowed in Part	158	17%	117	26%
Deemed Abandoned	1	0%	0	0%
Denied	179	19%	112	25%
Withdrawn	4	0%	2	0%
Total	**956**	**100%**	**450**	**100%**

The WSIAT is entitled to seek compensation for obtaining information pursuant to the *Freedom of Information and Protection of Privacy Act* (FIPPA). The WSIAT is responding to this request for information free of charge as a courtesy. You should also be aware that any further FIPPA request should be accompanied by the five dollar ($5.00) FIPPA fee. Please note that in responding to FIPPA requests, the Tribunal is entitled to charge for search time, photocopying and other processing costs at the rates permitted under FIPPA.

Yours very truly,

Sarah Schumacher

Sarah Schumacher
FOI Coordinator/Counsel to the Chair

SJS/ds

KINNA-AWEYA LEGAL CLINIC

86 S. Cumberland Street, Thunder Bay, Ontario P7B 2V3
Phone (807) 344-2478 Fax (807) 345-2842
Toll Free 1-888-373-3309 www.kalc.ca
Funded by Legal Aid Ontario

Grant Walsh, Chair
Workplace Safety and Insurance Board
200 Front Street West
Toronto, Ontario
M5V 3J1

By email: Corporate_SecretarysOffice@wsib.on.ca

Dear Grant Walsh:

Re: Dispute resolution and appeals process value-for-money audit consultation

Kinna-aweya Legal Clinic provides legal advice and assistance to people with low income who reside in the District of Thunder Bay, with a particular emphasis on providing services to Indigenous people. Our focus is on helping people get income maintenance benefits and maintain access to housing. Our services are provided at no cost to people who meet our financial eligibility guidelines.

We have serious concerns about the findings and recommendations of the value-for-money audit and the proposed changes in the WSIB appeal process. In particular, we are concerned about the proposals to drastically reduce the time for workers to file objections and appeals and to submit medical or other evidence.

We are concerned that those most affected by the proposed changes, i.e. injured workers, do not know about the audit, the proposed changes or how it will affect them and/or will not be able to participate meaningfully in a consultation that is being conducted online by written submissions only.

In our experience, injured workers often face difficulties understanding and navigating the WSIB claims and appeals process, as well as barriers to obtaining medical evidence such as specialist assessments and reports. Tighter deadlines will only create additional obstacles for workers in the WSIB claims and appeals process. Changes to administrative procedures cannot come at the expense of the fair and just adjudication of workers' claims.

The proposed changes, if implemented, would have a sweeping impact on the WSIB appeal process and should be the subject of a robust public consultation process. We urge you to extend the consultation period and provide more opportunities for injured workers to provide meaningful feedback.

Yours truly,

KINNA-AWEYA LEGAL CLINIC

Beth Ponka
Director of Administration

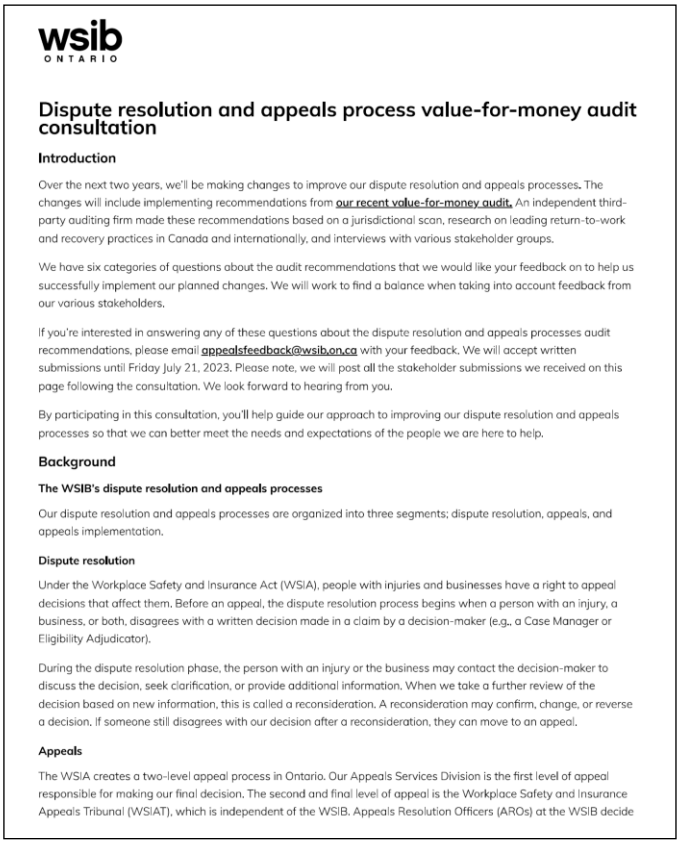
Cc:

- Hon. Monte McNaughton, Minister of Labour, Immigration, Training and Skills Development, 400 University Ave., 14th Floor, Toronto, ON M7A 1T7
  Email to: Monte.McNaughtonco@pc.ola.org

- appealsfeedback@wsib.on.ca

L. A. Liversidge, LL.B.
Barrister & Solicitor, Professional Corporation

Comment with respect to the WSIB Dispute resolution and appeals value-for-money audit consultation



wsib
ONTARIO

Dispute resolution and appeals process value-for-money audit consultation

Introduction

Over the next two years, we'll be making changes to improve our dispute resolution and appeals processes. The changes will include implementing recommendations from **our recent value-for-money audit.** An independent third-party auditing firm made these recommendations based on a jurisdictional scan, research on leading return-to-work and recovery practices in Canada and internationally, and interviews with various stakeholder groups.

We have six categories of questions about the audit recommendations that we would like your feedback on to help us successfully implement our planned changes. We will work to find a balance when taking into account feedback from our various stakeholders.

If you're interested in answering any of these questions about the dispute resolution and appeals processes audit recommendations, please email **appealsfeedback@wsib.on.ca** with your feedback. We will accept written submissions until Friday July 21, 2023. Please note, we will post **all** the stakeholder submissions we received on this page following the consultation. We look forward to hearing from you.

By participating in this consultation, you'll help guide our approach to improving our dispute resolution and appeals processes so that we can better meet the needs and expectations of the people we are here to help.

Background

The WSIB's dispute resolution and appeals processes

Our dispute resolution and appeals processes are organized into three segments; dispute resolution, appeals, and appeals implementation.

Dispute resolution

Under the Workplace Safety and Insurance Act (WSIA), people with injuries and businesses have a right to appeal decisions that affect them. Before an appeal, the dispute resolution process begins when a person with an injury, a business, or both, disagrees with a written decision made in a claim by a decision-maker (e.g., a Case Manager or Eligibility Adjudicator).

During the dispute resolution phase, the person with an injury or the business may contact the decision-maker to discuss the decision, seek clarification, or provide additional information. When we take a further review of the decision based on new information, this is called a reconsideration. A reconsideration may confirm, change, or reverse a decision. If someone still disagrees with our decision after a reconsideration, they can move to an appeal.

Appeals

The WSIA creates a two-level appeal process in Ontario. Our Appeals Services Division is the first level of appeal responsible for making our final decision. The second and final level of appeal is the Workplace Safety and Insurance Appeals Tribunal (WSIAT), which is independent of the WSIB. Appeals Resolution Officers (AROs) at the WSIB decide

Comment developed
by L.A. Liversidge, LL.B.
July 20, 2023

5000 Yonge Street, Suite 1901, Toronto, ON M2N 7E9
Tel: 416-986-0064; Fax: 416-590-9601; E-mail: lal@laliversidge.com

L. A. Liversidge, LL.B.
Barrister & Solicitor, Professional Corporation

Comment with respect to the WSIB Dispute resolution and appeals value-for-money audit consultation

PART I: A comment on the process and a suggestion for a better way forward

A. WSIB must improve consultation outreach

1. As I understand it, the WSIB dispute resolution and appeals value-for-money audit consultation ("Appeals Consultation") was posted on the WSIB website June 6, 2023.

2. I did not become aware of this consultation until attending an unrelated meeting at the WSIB June 19, 2023, with the discovery of the consultation being incidental to that meeting.

3. It seems that I was not alone. No non-WSIB participant at that meeting was aware of the consultation.

4. Significantly, this lack of awareness seems endemic. In a letter of June 19, 2023 from Mr. John Bartolomeo, a well-known and respected legal counsel and co-director of "Workers' Health and Safety Legal Clinic," Mr. Bartolomeo wrote:

> Despite being involved in the Value for Money Audit consultation and a regular attendee to Appeals Services Division Stakeholder meetings, I was not advised of the consultation. I would also point out that injured workers who will be directly impacted remain unaware that future appeals will be severely restrained by a new process effectively eliminating the worker's ability to bookmark appeals for later action.

5. My experience mirrors that of Mr. Bartolomeo.

6. If at least two legal representatives who have similar engagements with the WSIB and who directly participated in the KPMG value for money audit ("VFMA") (I was interviewed by KPMG on August 24, 2022) were not aware of this consultation until quite late in the process, one can reasonably conclude that few were.

7. More importantly, many more interested stakeholders unable to hear "through the grapevine" were likely not aware or perhaps, even to this day, have not been made aware.

8. This should concern the Board.

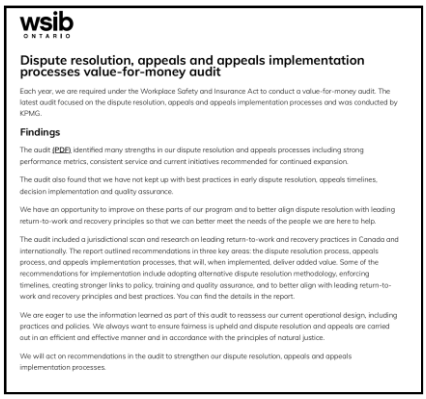
9. Respectfully, the absence of wide-spread early notice diminishes the integrity of the consultation exercise. I present a broad remedy later in this section with respect to the process overall and echo recommendations for a very different process along with a recommendation to commence a revitalized process afresh.

10. However, the Board is well advised to step back and assess how it reaches out for comment and seek to improve its processes. Thirty years ago, the Board did a better job of notice and outreach with far fewer tools available. Reaching a broader audience today should be much easier and far more effective, by many orders of magnitude.

11. Outside the scope of this consultation, I encourage the Board to pose this question to stakeholders: *How can we improve our consultation outreach?* The Board must then be prepared to listen to the advice.

B. Is the WSIB already proceeding with changes notwithstanding the consultation? Is the consultation a bona-fide exercise or an after-thought?

1. In February 2023 the WSIB made an announcement on its webpage advising that:



wsib ONTARIO

Dispute resolution, appeals and appeals implementation processes value-for-money audit

Each year, we are required under the Workplace Safety and Insurance Act to conduct a value-for-money audit. The latest audit focused on the dispute resolution, appeals and appeals implementation processes and was conducted by KPMG.

Findings

The audit (PDF) identified many strengths in our dispute resolution and appeals processes including strong performance metrics, consistent service and current initiatives recommended for continued expansion.

The audit also found that we have not kept up with best practices in early dispute resolution, appeals timelines, decision implementation and quality assurance.

We have an opportunity to improve on these parts of our program and to better align dispute resolution with leading return-to-work and recovery principles so that we can better meet the needs of the people we are here to help.

The audit included a jurisdictional scan and research on leading return-to-work and recovery practices in Canada and internationally. The report outlined recommendations in three key areas: the dispute resolution process, appeals process, and appeals implementation processes, that will, when implemented, deliver added value. Some of the recommendations for implementation include adopting alternative dispute resolution methodology, enforcing timelines, creating stronger links to policy, training and quality assurance, and to better align with leading return-to-work and recovery principles and best practices. You can find the details in the report.

We are eager to use the information learned as part of this audit to reassess our current operational design, including practices and policies. We always want to ensure fairness is upheld and dispute resolution and appeals are carried out in an efficient and effective manner and in accordance with the principles of natural justice.

We will act on recommendations in the audit to strengthen our dispute resolution, appeals and appeals implementation processes.

> The report outlined recommendations in three key areas: the dispute resolution process, appeals process, and appeals implementation processes, **that will, when implemented**, deliver added value. Some of the recommendations for implementation include adopting alternative dispute resolution methodology, enforcing timelines, creating stronger links to policy, training and quality assurance, and to better align with leading return-to-work and recovery principles and best practices. You can find the details in the report.
>
> We are eager to use the information learned as part of this audit to reassess our current operational design, including practices and policies. We always want to ensure fairness is upheld and dispute resolution and appeals are carried out in an efficient and effective manner and in accordance with the principles of natural justice.
>
> **We will act on recommendations in the audit to strengthen our dispute resolution, appeals and appeals implementation processes**. (emphasis added)

2. The announcement prompted me to email the Board on February 21, 2023 to query if the Board was planning a consultation process:

> **Consultation Secretariat:**
>
> I have read the WSIB notice re the "Dispute resolution, appeals and appeals implementation processes value-for-money audit" (link here and replicated below). It is unclear if the Board is planning on a public consultation process, similar to the process engaged in 2012, and which resulted in the "new" process (i.e., the current process), as described in the six page May 2014 WSIB document (no longer on the WSIB website) "Modernizing the Workplace Safety and Insurance Board's Appeals Program."
>
> It would be greatly appreciated if you would advise if a consultation is being planned. A related question. While the Board's web announcement declares, "We will act on recommendations in the audit to strengthen our dispute resolution, appeals and appeals implementation processes," no specifics are set out. This leads to a series of questions, such as but not necessarily limited to: a) What specific recommendations will the Board be implementing?; b) Are there recommendations in the KPMG report that the Board will not be considering or implementing; c) Is the Board still developing specific changes it will be implementing? There are more. All in all, the Board's web announcement is somewhat unclear as to what the next specific steps are, when they will be articulated and whether or not stakeholders will be engaged in a future consultation process. Any clarification that can be provided would be greatly appreciated.
>
> Thank you. Regards, LAL

3. A week later, I received this response:

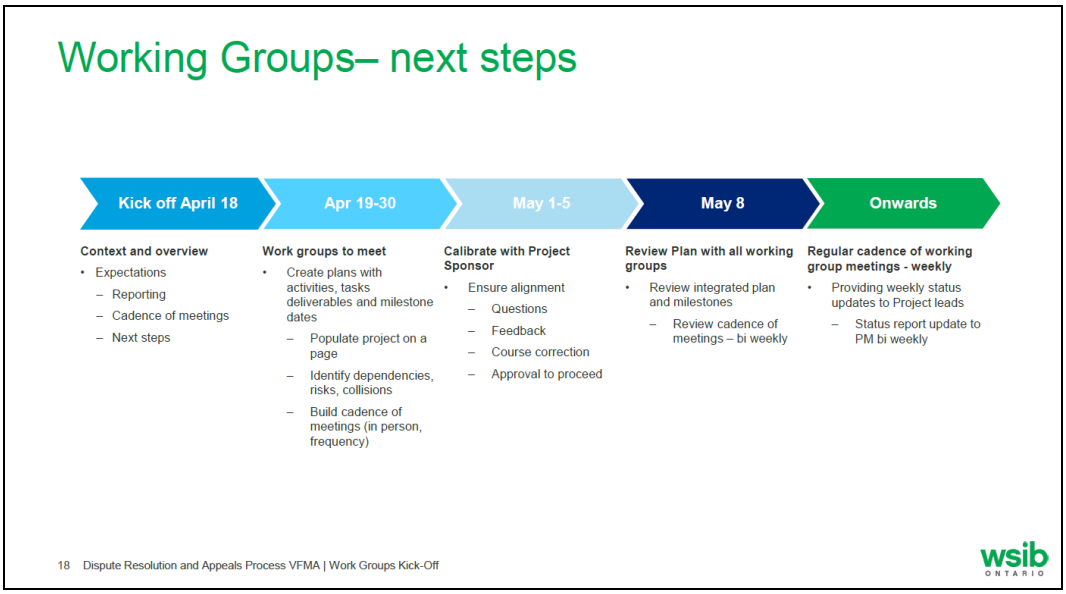
> We are planning out next steps which include **whether or not** there will be a consultation and what that framework might look like . . . (emphasis added)

4. It is clear that as late as early March 2023, no decision was taken with respect to whether there would be a consultation process or if there was, what it would entail. As mentioned, I did not learn of the specifics of the consultation process until June 19, 2023, although I was unofficially informed on May 17, 2023 that there would be some form of consultation.

5. I was therefore very surprised to recently discover that on April 18, 2023 the WSIB held an internal meeting with a PowerPoint presentation entitled, "VFMA Dispute Resolution and Appeals Process Working Groups Kick off." I would like to thank "Injured Workers Online" for obtaining this document via a freedom of information request and for making this document publicly available.

6. I strongly suggest to the WSIB that this document should be prominently posted on the WSIB consultation webpage, along with any subsequent similar documents. In reading this 31-page plan, I was unable to find any suggestion of a consultation process. From this, I can only reasonably conclude that the current Appeals Consultation was not a "go" at least as at April 18, 2023 and that the focus was towards implementation not stakeholder engagement. It is interesting that the "WSIB Policy Agenda 2023" published in January 2023 (after the November 30, 2022 KPMG VFMA had been received by the WSIB) makes no mention of an appeals consultation.

7. What is clear is that by mid-April 2023 the Board had crafted an elaborate implementation plan, (reflected in page 18 of the presentation, replicated below), that has likely been refined since:



8. In a June 28, 2023 webpage release, **Injured Workers Online** said:

> An implementation plan by the WSIB with staff teams already in progress and detailed time lines to put the KPMG proposals into effect (provided through freedom of information request) **casts doubt on whether the consultation will have any impact on the changes**. (emphasis added)

9. This, I submit, is a very reasonable position to voice.

10. Past WSIB Annual Reports have articulated the Board's commitment to stakeholder engagement and consultation. For example, in the **2012 WSIB Annual Report** (at p. 14) this was written:

> **Increased transparency.** We continue to change the way we do business with a focus on increasing transparency. In 2012, we published our strategic plan, as well as quarterly financial and operational results, on our website. We continue to implement our policy renewal process with a strong focus on stakeholder consultation. The WSIB is committed to maintaining consistent stakeholder engagement and consultations, and providing regular communications to stakeholders and the public.

11. In the Chair's Message in the **2013 WSIB Annual Report** (at p. 5):

> **Commitment to Stakeholder Engagement**
>
> The dialogue and consultation with stakeholders has been critical this year as we review issues of concern and policies of the Board. In particular, the Benefit Policy Review and Rate Framework Review have been influenced by stakeholder feedback and advice and we look forward to future consultation.
>
> I would like to thank the four Chair's Advisory Committees, (Labour & Injured Workers Advisory Committee, Industrial & Manufacturing Advisory Committee, General Business Advisory Committee and the Construction Industry Advisory Committee) for regularly meeting with me to present the collective perspective of their sectors as we engage in a meaningful and constructive dialogue on system issues and concerns. I value their insight and advice.

12. The approach and rhetoric of the Board a decade ago remains instructive today and I encourage the Board to critically assess its current protocols against the promises of the recent past. A simple question warrants reflection: *Why are so many stakeholders, and in particular labour and injured worker stakeholders, upset or concerned about this process?*

13. I respectfully suggest that the WSIB must re-establish the integrity of the Appeals Consultation through three actions:

    a. *One*, immediate and full public disclosure through its website of the Board's implementation plans beyond those articulated in the April 18, 2023 presentation;

    b. *Two*, by holding a post-consultation stakeholder meeting to publicly acknowledge and address stakeholder comments and suggestions;

    c. *And three*, by suspending continuing Appeals VFMA implementation action until the conclusion of the consultation, which includes the serious consideration of ideas and suggestions of various stakeholders, including the consideration of the adoption of a more preferred process.

C. Why stakeholder and especially labour and injured worker support for the consultation process is essential

1. In a January 2020 document, "Framework for operational policy development and renewal" the Board explained how effective consultation assists in legitimizing its polices (at p. 8):

> **4.3. Consultation**
>
> When necessary, consultation will form part of the policy development process at the WSIB, contributing to transparent, evidence-based decision-making. Obtaining and considering a range of views enables the development of policies that are effective, responsive **and viewed as legitimate by those they impact**. This in turn contributes to better understanding and acceptance of and compliance with policies. (emphasis added)

2. The consultation process is currently underway so of course there is limited public feedback available at the moment. What is clear however, is that the feedback that is publicly accessible is not supportive of the current consultation exercise. This should concern the Board. I will canvass a small sampling of that discontent for illustrative purposes. Later, I will comment more directly on some of the critiques that have been placed on the public record.

3. Without commenting on the persuasiveness of the complaints canvassed, several media reports are noteworthy:

> **June 2, 2023 Hamilton Spectator, "Injured workers under threat again":**
>
> "If the current recommendations are legislated by the Ford government, injured workers will face an array of new barriers when seeking WSIB compensation. The recommendations would force advocates to spend all our time trying to meet time limit requirements. We won't have time left to seek actual justice for injured workers."
>
> **May 31, 2023 news release, Ontario Network of Injured Workers Groups:**
>
> "It can take several months to a year just to get medical reports or assessments for injured and ill workers, and if these recommendations get implemented, then representatives will become time limit machines," says Maryth Yachnin, Staff Lawyer at the Industrial Accident Victims' Group of Ontario (IAVGO). "It's shameful the WSIB is even considering these suggestions from KPMG. Many of the workers we help will be forced into poverty because they can't appeal unfair decisions in time."
>
> **May 31, 2023, Canadian Occupational Health and Safety, "Outrage over recommended timeline for WSIB appeals":**
>
> "This is a slap in the face to those workers and their families," says Jamie West, Ontario NDP MPP and current labour critic.
>
> **Ontario Federation of Labour:**
>
> "Tell McNaughton to reject the KPMG recommendations."
>
> "Send an email to Ford's Minister of Labour, Monte McNaughton, to tell him that if he wants to improve the compensation system, to consult with the injured and ill worker community – not the out of touch and harmful KPMG recommendations. It is hard enough as it is for workers to seek justice after being harmed at work."
>
> **June 28, 2023 Injured Workers Online:**
>
> "All participants expressed concern that the WSIB has shown no interest in the opinions of injured workers, legal experts or any other stakeholders and therefore public and political pressure will be

necessary if injured workers are going to be heard. In addition to sending comments to the WSIB consultation email, they will be sending copies to the Minister of Labour, their own MPP and the Chair of the WSIB. Those addresses are set out below. If you are concerned about losing the right to appeal, please join the others in stating your concerns to the WSIB and politicians."

4. All of the very few currently available comments or responses from the labour and injured worker communities express similar comments:

June 5, 2023 letter from the Ontario Legal Clinics' Workers' Compensation Network:

"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." (p. 1)

"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." (p. 6)

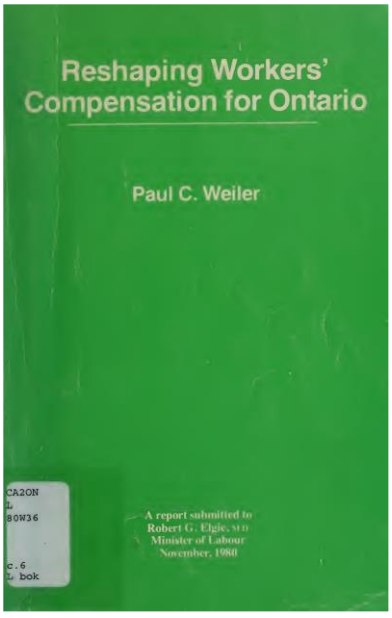
June 19, 2023 letter from Workers' Health and Safety Legal Clinic:

"Further, given the intention to impose new time limits on injured workers – who should all have been notified – this consultation should be done by an independent third party to verify if the recommendations are even correct. If the WSIB can retain Jim Thomas for a policy consultation with independent hearings, a similar approach should be taken for this consultation." (p. 2)

April 25, 2023 letter from the Thunder bay & District Injured Workers Support Group to the Ontario Ombudsman:

"We wish to complain about the KPMG value for money audit of the appeal system and the WSIB's response to it. We are concerned that this will disentitle most injured workers and ignores the disability needs of the injured worker population, especially those with significant permanent disabilities and who have developed mental health challenges as well as dealing with poverty and unemployment. Your office is no doubt aware of these challenges, as many injured workers deal with you." (p. 1)

5. It is instructive to turn to Prof. Paul C. Weiler's seminal November 1980 report "**Reshaping Workers' Compensation for Ontario,**" in which, among many other things, Professor Weiler addressed the structure of decision-making (Chapter 4). With respect to worker perceptions of the process, as it then existed, Prof. Weiler commented:



"Underlying these difficulties is a growing feeling that the Workers' Compensation Board has become a faceless, impersonal, even dehumanizing organization, one which puts injured workers through a mail-order assembly line." (p. 92)

"Worker groups insist on the fundamental principle that claimants for compensation must be treated fairly, and that they must be given 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 a legitimacy to its rulings, which renders them tolerably acceptable even when they are adverse." (p. 93)

6. From the few public comments that are presently available, these historic themes which until recently had been generally absent from WSIB discourse appear to be re-emerging.

7. What is striking, it seems to me, is that those opposing the current consultation and the KPMG VFMA recommendations specifically, are not suggesting that the Board ought not to facilitate a review of the WSIB decision review and appeals processes. In fact, now that door has been opened, it seems some groups are agreeable to participate in a more agreeable and broader process.

8. On June 28, 2023 Injured Workers Online said:

> The lack of legal expertise in the process is also an issue. The right to a fair hearing is the cornerstone of our administrative justice system. In past policy reviews the WSIB appointed outside legal experts to direct the consultation. Jim Thomas, former Vice Chair of the WSIAT and Harry Arthurs, former Dean of Osgood Hall Law School were appointed by previous WSIB administrations to design policy consultations, hold public hearings and prepare a report. Some participants are writing to request the involvement of someone like a judge or administrative law expert.

9. On June 5, 2013, the Ontario Legal Clinics' Workers' Compensation Network said:

> 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.

10. I would encourage the Board to peruse the 2008 article, "**Their only power was moral, The Injured Workers' Movement in Toronto**, 1970 – 1985," Robert Storey, Social History, Vol. 41, No. 81, May 2008. The magnificent title is also the concluding quote of the article, attributed to Orlando Buonastella, then and still, very active and very influential in the Ontario workers' compensation system.[1] I have always posited that it was the morality behind the movement that ensured the remarkable structural reform success. It wasn't might. It was right.

11. More than two decades ago, I wrote this (see the June 26, 2002 issue of **The Liversidge *e*-Letter**):

> **Worker inequities drove fundamental reform**
> From a 1973 Government Task Force on WCB administration, which radically expanded the Board's administration resources, to the first Weiler Report (1980) which would dovetail into two massive legislative reforms in 1985 and 1990, changing in absolute terms the legal and administrative framework, labour issues influenced, and then directly manoeuvred, every facet of

[1] Mr. Buonastella was co-author of the aforementioned April 25, 2023 letter to the Ontario Ombudsman.

> reform. This commanding influence was sparked and then fed by a potent and formidable ingredient – being on the side of fairness.
>
> **Before 1990 the system was structurally unfair to workers**
> Before 1990, the WSI legal and administrative framework was, by any measurement, systemically unfair to workers. It may require some effort to recall the depth of worker despair from today's vista. But it was meat chart pensions, a refusal to address disease, an autocratic and paternalistic Board, a strictly in-house appeal and review mechanism, that created true discontent, discontent allowed to ferment for years, until it erupted in a screaming demand for change, change which was delivered with an as yet unmatched political enthusiasm

12. This period represents the core narrative of contemporary workers' compensation. A populous but disenfranchised group, very slowly, but deliberately, incrementally and methodically, founded a movement that not only advanced a powerful case for change, but participated in its design and implementation. Many of those actors are active still, several of whom are currently voicing opposition to the present appeals consultation.

13. Ron Ellis, the inaugural Chair of the Appeals Tribunal, said this at the "**Workers' Compensation Board of Ontario 75th Anniversary Symposium**, September 20-21, 1989" (from the publication of the same name at p. 16):

> "It was the appearance for the first time of people who were experienced professional advocates knowledgeable about the system that put the adjudication processes of the Board under severe pressure to which in the end they were unable to respond effectively."
>
> "The impact of those advocacy resources on the adjudication processes evolving across the country are one of the major influencing factors at work today in my submission."

14. Some features of that period are beginning to resurface. In real time, we are witnessing a re-mobilization of grievances against the WSIB. The collective request for a different process does not appear to be unreasonable.

D. Managing consultation and reform: In the past, the Board has done well and not so well

1. The Board's history is replete with examples of the Board doing exemplary outreach work with the stakeholder community. In the mid to late 1980s, with the system alive with the spirit of engagement and reform in the wake of the commencement of the independent Appeals Tribunal, the Board's policy and consultation department was on overdrive.

2. That period was likely the zenith of the Board's openness to external viewpoints in every facet of its engagement with the public, from legalistic policy reviews flowing from WCAT policy decisions (such as **Decision 72R, 1986,** under the then s. 86(n) of the *Workers' Compensation Act*), and massive consultation undertakings on disablement arising out of the employment, occupational disease, and chronic mental stress, to identify just a few.

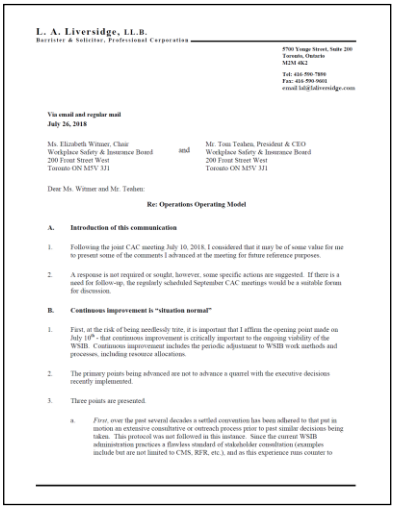
3. The commitment to consultation ebbed and flowed a bit in the decades since, but when it mattered, the Board always seemed to rise to the occasion often surpassing past consultation efforts. The September 30, 2010 WSIB Funding Review process, culminating in the highly influential Funding Fairness document, the 2012/13 Jim Thomas Benefits Review and the Board's 2015/16 Rate Framework consultation, are the highlights.

4. When the Board did misstep, it was noticeable.

5. In recent years, perhaps the most glaring mistake is when the Board proceeded unilaterally to adjust the case management process within the Board with no external consultative effort. The exercise was short-lived.

6. This prompted an urgently called post-implementation meeting on July 10, 2018 with stakeholders expressing outrage at the absence of any outreach or consultation effort on the part of the Board.

7. Some elements of my letter of July 26, 2018 jointly addressed to the Chair and President of the Board are germane to the current issue.



L. A. Liversidge, LL.B.
Barrister & Solicitor, Professional Corporation

5700 Yonge Street, Suite 200
Toronto, Ontario
M2M 4K2

Tel: 416-590-7890
Fax: 416-590-9601
email lal@lalliversidge.com

Via email and regular mail
July 26, 2018

Ms. Elizabeth Witmer, Chair
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

and

Mr. Tom Teshim, President & CEO
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Witmer and Mr. Teshim:

Re: Operations Operating Model

A. Introduction of this communication

1. Following the joint CAC meeting July 10, 2018, I considered that it may be of some value for me to present some of the comments I advanced at the meeting for future reference purposes.

2. A response is not required or sought, however, some specific actions are suggested. If there is a need for follow-up, the regularly scheduled September CAC meetings would be a suitable forum for discussion.

B. Continuous improvement is "situation normal"

1. First, at the risk of being needlessly trite, it is important that I affirm the opening point made on July 10th - that continuous improvement is critically important to the ongoing viability of the WSIB. Continuous improvement includes the periodic adjustment to WSIB work methods and processes, including resource allocations.

2. The primary points being advanced are not to advance a quarrel with the executive decisions recently implemented.

3. Three points are presented.

a. *First*, over the past several decades a settled convention has been adhered to that put in motion an extensive consultative or outreach process prior to past similar decisions being taken. This protocol was not followed in this instance. Since the current WSIB administration practices a flawless standard of stakeholder consultation (examples include but are not limited to CMS, RFR, etc.), and as this experience runs counter to

8. The bottom-line conclusion I reach is this: When the Board engages in a serious and comprehensive consultation for serious issues, the eventual reforms are usually successfully received by the public and successfully implemented. When it does not, they are not.

E. LAL's suggestion for going forward

1. The WSIB has convened a written response consultation with a short response window. This has attracted criticism. That criticism should be seriously considered.

2. Alternative suggestions have included: an extension of the deadline; more effective notice; in-person consultation meetings; and, an independent third-party facilitator, similar to the Harry Arthurs Funding Review or the Jim Thomas Benefits Review.

3. These are ideas that warrant consideration. This is my suggestion: Once the deadline has expired (July 21, 2023), the WSIB should secure the services of an independent and acceptable (to stakeholders) third-party reviewer on par with a Jim Thomas or Harry Arthurs, to review the submissions and offer process recommendations to the Board, which could include:

   a. continuing the current process as planned;

   b. recommending an entirely different review focus along the lines set out in the June 5, 2023 Ontario Legal Clinics' letter, i.e., public meetings to allow "an honest conversation about the shortcomings of the WSIB appeals process";

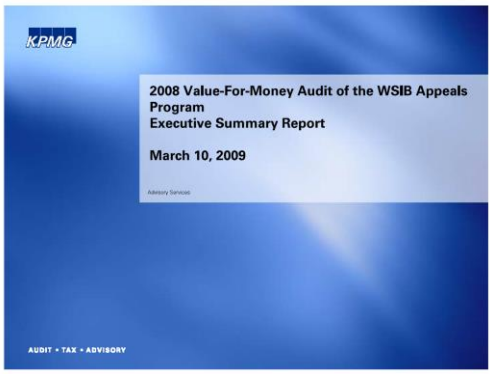
   c. arranging discussions/meetings at the call of the reviewer, in a manner not at all dissimilar to the process engaged by Prof. Paul Weiler in 1980;

   d. or, recommending a different consultation process, in scope and process.

4. I envision a process that should be completed no later than the end of November 2023, thereby avoiding a counter worry of "delay." However, it must be accepted that any urgency is of the Board's making. In fact, addressing WSIB decision-making and appeal efficacy was not on the radar of the injured worker or employer communities prior to the November 2022 release of the KPMG VFMA. More to the point, as canvassed in the next section, it wasn't on the Board's radar either until 2022.

PART II: What exactly was so wrong the WSIB decision-making and appeals processes before the November 2022 KPMG report?

A. A 2009 KPMG WSIB Appeals Program VFMA report concluded "The Appeals program is delivering value-for-money." *What changed?*



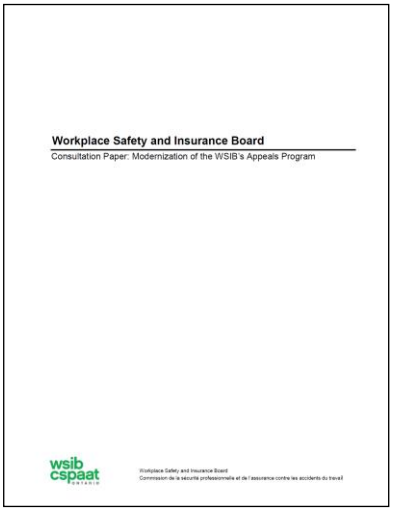
1. In 2008, KPMG conducted a similar VFMA on the WSIB Appeals Program. An Executive Summary Report was released March 10, 2009.

2. The March 10, 2009 report concluded "*The Appeals program is delivering value-for-money.*" (Slide 7)

3. The findings of the 2008 KPMG VFMA will be explored in a moment.

4. Even though KPMG provided a "thumbs-up" in 2009, the Board did not rest on its laurels and still proceeded to improve the appeals system.

B. WSIB 2012 Consultation Paper: Modernization of the WSIB's Appeals Program



1. In 2012 the Board released a very comprehensive consultation document setting out proposals to "modernize" the Board's appeals system. "Modernize" was the corporate buzz of the day akin to today's "efficiencies."

2. (Note: This document is no longer available on the WSIB website it would seem. However, I have an archived copy and it is available here.)

3. The 2012 consultation document set out the case for change (at p. 3). Some of these observations seem similar to the 2022 KPMG findings.

The Case for Change

Workplace parties and their representatives deserve a timely and responsive appeals program that produces quality decisions. In recent years, the WSIB's Appeals Services Division's ability to meet that standard has been eroding. Workplace parties/representatives have understandably been asking why the WSIB's appeals process is so lengthy.

In recent years our inventory of unassigned cases has grown to approximately 4,500 cases and resulted in a six-month wait time for assignment of a case to an Appeals Resolution Officer.

Several systemic inefficiencies have been identified as contributing to delays in the current process. These include:

- Incomplete Objection Forms that provide minimal information to support the objection.
- Initial decisions that sometimes do not outline the reasons for a decision clearly enough.
- Absence of a central depository for recording Objection Forms to ensure they are properly addressed and they are referred to the appropriate front-line decision maker or to the Appeals Services Division.

- The front-line decision maker is required to reconsider a decision based on new information and/or a defect in the decision-making process, but the reconsideration process is not as robust as it could be.
- Cases where there are significant information gaps and/or outstanding issues identified by the objecting party at the time of discussion with the Appeals Resolution Officer, or which are recognized by the Appeals Resolution Officer upon their review of the file. This may result in the case going back to front-line decision maker, and may contribute to further delays in the workplace parties receiving a final decision from the WSIB.
- Withdrawal of approximately 20% of appeals after numerous Appeals Services Division staff have spent time dealing with them. In addition, the lack of appeal preparedness leads to late submissions, the postponement of hearings, or post-hearing submissions.
- Significant time investment by Appeals Resolution Officers performing administrative tasks to get cases ready (e.g., calling or writing to the workplace parties/representatives to clarify the issues that are being objected to; requesting outstanding information that should have been obtained prior to referral to the Appeals Services Division; and clarifying why an oral hearing is being requested when the nature of the case suggests it is not warranted).

4. The consultation document set out the (then) "new" appeals program (at p. 4):

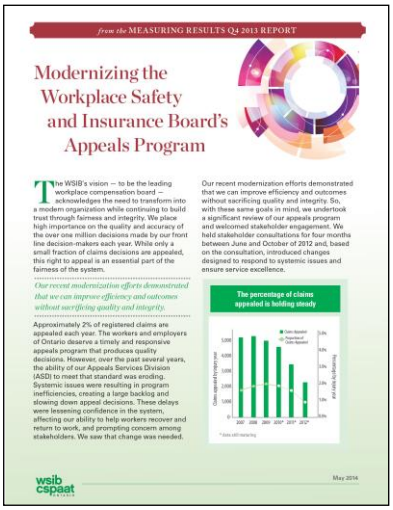
The New Appeals Program Model
Highlights

The benefits of the modernized appeals program include:

- ✓ A simple and easy-to-complete Intent to Object Form that benchmarks the right to object within six months; invites objecting parties to provide new information that will allow fast-tracking of reconsiderations; and allows for greater coordination and tracking.
- ✓ A more robust reconsideration process by front-line decision makers.
- ✓ Immediate access to file information for objecting parties where reconsideration of decisions is not warranted.
- ✓ Advancement of cases to the Appeals Services Division only when the workplace parties submit a "declaration of appeal readiness" through completion of an enhanced Objection Form.
- ✓ No time limit for workplace parties to come forward with their "declaration of appeal readiness" on the enhanced Objection Form.
- ✓ Oral hearings retained for complex entitlement objections.
- ✓ Improvement of the resolution timelines of appeal-ready cases.

C. So, were the changes a success? What the Board itself said

1. In a May 2014 document "**Modernizing the Workplace Safety and Insurance Board's Appeals Program**," one could only believe, YES! (NOTE: This document is also no longer on the Board's website but I have an archived copy available here).


from the MEASURING RESULTS Q4 2013 REPORT

Modernizing the Workplace Safety and Insurance Board's Appeals Program

The WSIB's vision — to be the leading workplace compensation board — acknowledges the need to transform into a modern organization while continuing to build trust through fairness and integrity. We place high importance on the quality and accuracy of the over one million decisions made by our front line decision-makers each year. While only a small fraction of claims decisions are appealed, this right to appeal is an essential part of the fairness of the system.

Our recent modernization efforts demonstrated that we can improve efficiency and outcomes without sacrificing quality and integrity. So, with these same goals in mind, we undertook a significant review of our appeals program and welcomed stakeholder engagement. We held stakeholder consultations for four months between June and October of 2012 and, based on the consultation, introduced changes designed to respond to systemic issues and ensure service excellence.

Our recent modernization efforts demonstrated that we can improve efficiency and outcomes without sacrificing quality and integrity.

Approximately 2% of registered claims are appealed each year. The workers and employers of Ontario deserve a timely and responsive appeals program that produces quality decisions. However, over the past several years, the ability of our Appeals Services Division (ASD) to meet that standard was eroding. Systemic issues were resulting in program inefficiencies, creating a large backlog and slowing down appeal decisions. These delays were lessening confidence in the system, affecting our ability to help workers recover and return to work, and prompting concern among stakeholders. We saw that change was needed.

The percentage of claims appealed is holding steady

wsib cspaat

May 2014

2. This document (at p. 4) advises:

> ### Performance improvements
>
> While the modernized appeals program has only been in effect since February, 2013, a number of benefits are already being realized:
>
> - new appeals are being resolved faster, and
> - the backlog of appeal cases has now been completely eliminated.

3. And at p. 5:

> Stakeholder engagement remains one of our key priorities and we continue to dialogue with representatives to discuss and more fully understand any remaining concerns. In addition, we will continue to monitor the effectiveness of the modernized program as it matures and as additional outcome data becomes available.
>
> Looking ahead, we are confident that our dedication to a fair, transparent and timely adjudication process, both by front line decision makers and by the AROs, will continue to play a key role in our becoming the leading workplace compensation board.

4. Ongoing reports through the Board's Annual Reports outline a similar narrative of success:

> **2013 WSIB Annual Report, p. 14:**
>
> **Appeals modernization improves efficiency.** Following significant engagement with stakeholders, we introduced reforms to our Appeals system to respond to the growing backlog of appeals and ensure timelier resolution of appeals in the future. While these reforms have only been in effect since February 1, 2013, early indications are that the new system has greatly improved timeliness and maintained the quality of decision making, thus increasing fairness to workers and employers. All outstanding appeals registered prior to 2012 have been resolved and the active inventory of appeals has decreased by 68%, from approximately 8,000 at December 31, 2012 to just over 2,500 by December 31, 2013. We fully expect the efficiency of the system to further improve as the appeals backlog has now been eliminated.

2014 WSIB Annual Report, p. 20:

The timeliness of eligibility decisions continued to improve – over 93% of decisions were made within two weeks, compared to 91% in 2013. The modernized appeals process also showed decision making efficiencies. On average, appeals were resolved in 97 days, a vast improvement from 223 days in 2012.

2015 WSIB Annual Report, p. 24:

Reduced appeals inventory. The number of appeals received by the WSIB decreased by nearly one-fifth or 19% in 2015; 8,063 new appeals were received compared to 9,995 in 2014. The decrease in incoming appeals, together with ongoing timeliness of appeal resolutions, resulted in a 21% decrease in the inventory of active appeal cases, from 2,646 cases at the end of 2014 to 2,088 at the end of 2015.

In 2015, 87% of appeals were resolved within six months which was a decline from the 2014 level of 92% resolved within six months. The decline was anticipated as longer timelines were introduced as of mid-2014, allowing more time for appeal responses, thereby improving the effectiveness of the appeal process.

2016 WSIB Annual Report, p. 20:

Fewer incoming appeals. The WSIB has been working to enhance front-line decision making, the results of which are now being reflected in the declining volume of incoming appeals. After decreasing by 19% in 2015, the number of appeals coming into the WSIB's Appeals Services Division has once again declined in 2016, by 13%. The volume of incoming appeals has decreased from 8,063 in 2015 to 6,979 in 2016. This ongoing reduction in appeals is also attributed to the long-term decline in registered claims and the work effort from the Operations team at the WSIB to ensure that cases are "appeal ready" before they are forwarded to the Appeals Services Division.

In 2016, 90% of appeals were resolved within six months, an improvement of 3% from the 2015 level. The strong 2016 result for timeliness of resolution has helped to keep the inventory of active appeals at a reasonable level. There were 1,867 active appeals at the end of 2016, a decrease from 2,088 appeals in 2015.

2017 WSIB Annual Report, p. 18:

Appeals volume and inventory remain low. For the third consecutive year, the number of appeals coming into the WSIB's Appeals Services Division has decreased. There were approximately 6,000 incoming appeals in 2017, down from 6,979 appeals in 2016. With fewer new appeals, the inventory of active appeals has also declined for the third year in a row, from 1,867 at the end of 2016 to 1,072 at the close of 2017.

2018 WSIB Annual Report, p. 5:

Decision timeliness maintained

Even though more claims were registered in 2018, the time required to make eligibility decisions beat our target for the year. In 2018, we made 93% of eligibility decisions within two weeks, exceeding our target of 90%.

Also, 89% of appeals were resolved within six months, up 1% from 2017 and above the 87% target. We achieved this despite a 5% increase in the number of appeals registered with our Appeals Services Division.

2019 WSIB Annual Report, p. 4:

Stable appeal outcomes

Of the issues resolved by our Appeals Services Division in 2019, 29% were allowed or allowed in part. This decision reversal rate is within our expected range of 26% to 33% and consistent with our 2018 result of 27%.

Our appeal decisions continued to be timely, with 87% of appeals being resolved within six months, well above our target of 80%.

2021 WSIB Annual Report, p. 4:

Appeal decisions also continued to be timely, with 86% of appeals decided within six months in 2021 compared to the target of 80%.

5. Up to the end of 2022, the Board seems to be continuing to perform quite well. This is from the Board's Q4 Quarterly Metrics report (p. 3):

Q4 2022 Executive summary

Key metrics for the Appeals Services Division (ASD) in Q4 2022 and the full year 2022 are summarized in the table below.

Key metrics at a glance

Legend: Expectations met or surpassed; Metric needs close monitoring; Expectations not met

Appeals Measure	Target	Q4		Full year Jan-Dec	
		Q4 2022	Compared to historical average Q4, 2019-2021	Jan-Dec 2022	Compared to historical average Jan-Dec, 2019-2021
Incoming new appeals registered	n/a	1,290	1,350 (4% ↓)	5,688	5,593 (2% ↑)
Appeals resolved	match/exceed incoming	1,635	1,282 (28% ↑)	6,511	5,225 (25% ↑)
% of decisions resolved by oral hearing *(oral hearing includes teleconferences, video conferences, and in-person hearings)*	n/a	10%	13% (3% ↓)	10%	12% (2% ↓)
% resolved within 6 months of appeal registration	80%	92%	79% (13% ↑)	91%	85% (6% ↑)
% resolved within 30 days of assignment to the ARO (or from oral hearing date)	90%	89%	91% (2% ↓)	89%	92% (3% ↓)
Average overturn rate at issue level	n/a	30%	29% (1% ↑)	30%	30% (0 -)
Inventory of appeals in progress (at end of period)	Less than 2,500	1,580	2,141 (26% ↓)	1,580	2,141 (26% ↓)

Through the continued efforts on stabilization of the Appeals program through 2022, open inventory continued to decline and has reached historical averages. Even though the 2022 volume of incoming appeals was marginally above the historical average, continued efficiency and effectiveness efforts as well as the recruitment of additional AROs to maintain budgeted complements in 2022 allowed resolution of appeals to overwhelm incoming issues. Additionally, the proportion of appeals relating to initial entitlement issues and those relating to SIEF issues had climbed in 2020-2021. These temporary increases - likely associated with the rate framework modernization - have now returned to traditional levels (see Appendix 3).

The above focus and commitment allowed ASD to exceed our service level resolving over 91% of appeals within 6 months versus the 80% target.

The percentage of decisions released within 30 days of assignment to the ARO (or from oral hearing date) was slightly below target due to 2022 ARO recruitment cohorts but performance in this category should return to target level or above once the ARO trainees have gained further experience. The average decision overturn rate in 2022 was 30%.

In January 2022, we worked with our partners in Eligibility to introduce an appeals intake and triage process where a dedicated group of AROs review and triage incoming appeal referrals to ensure they are appeals ready. In October 2022 we expanded this process to include six additional business areas and we anticipate including all remaining business areas by early 2023. We are also continuing the new initiatives of bundling appealable issues on same or related claims and returning new information received during the appeals process to front-line decision-makers for an opportunity to reconsider their decisions without delaying the appeals process if it's still required afterwards.

The 2021 value-for-money-audit (conducted through 2022) focused on the dispute resolution and appeals process. The ASD welcomes it's recommendations and has received approval at the BoD and the Ministry on the audit findings and recommendations. We look forward to immediately starting on implementation initiatives.

3 ASD Quarterly Metrics Report - Q4 2022

* For simplicity, the historical average of previous quarters is unweighted

wsib ONTARIO

6. 92% of appeals are resolved within six (6) months of appeal registration, which is an achievement twelve (12) percentage points above the 80% target.

7. Moreover, the inventory as at December 31, 2022 was 1,580. This is an impressive 920 below the 2,500 target, or 37% better than planned.

D. Contrasting the March 2010 KPMG VFMA with the November 2022 KPMG VFMA

2.1 Summary Audit Opinion

The Appeals Program is delivering value-for-money for the WSIB. In particular:

- The Program creates value-for-money for the WSIB by providing workers and employers with a cost effective and flexible process to present their objections to WSIB adjudicative decisions by:
  - Providing an effective, quasi-independent and quasi-judicial dispute resolution mechanism that addresses worker and employer objections in a flexible, timely and fair manner;
  - Managing and resolving the most complex and difficult WSIB adjudication cases; and
  - Providing a range of dispute resolution processes, including expedited review (60-Day Option), review, enquiry and oral hearing.
- The Program processes deliver Program objectives economically.
  - In particular, the Program has sound planning, budgeting, monitoring and continuous improvement processes.
- The Program processes provide for the efficient resolution of appeals in a manner consistent with Program objectives.
  - The Program has clearly defined accountabilities, appeals procedural guidance, sufficient resources and continuous improvement to enhance Program management and stakeholder responsiveness; and
  - *Program efficiency could be enhanced by strengthening criteria around some Program procedures, timelines and exceptions.*
- The Program processes effectively support Program objectives according to the principles of fairness and transparency.
  - Program processes provide transparency, accessibility and procedural fairness consistent with the mission of rendering final resolutions to objections that are timely, fair and comprehensive; and
  - *Program effectiveness could be enhanced by continuing to work with Operations to improve the management of files that are withdrawn from the Branch or returned to Operations.*
- The Program has mature performance management including a wide variety of performance objectives and related indicators.
  - These indicators are closely tied to Program objectives and provide a balanced variety of performance related information; and
  - *Performance measurement indicators could be enhanced in conjunction with the implementation of recommendations noted in the Report.*

KPMG

7

Workplace Safety and Insurance Board – Value for Money Audit of the Dispute Resolution and Appeals Process

Executive Summary: Background and Overview

Value for Money Conclusions

Through our review of the WSIB's Dispute Resolution and Appeals Process, we have concluded that the process currently demonstrates "low" value for money[1]. Currently, decision making timelines are too long and impede effective rehabilitation and return to work leading practices. Our rating is a reflection of research and leading rehabilitation and return to work practices we noted during our jurisdictional scan which were notably more timely. There is an opportunity for the WSIB to reassess its current appeals operational design including practices and policies to ensure the doctrine of fairness is upheld and dispute resolution and appeals are carried out in an efficient and effective manner with due consideration of defined timelines.

Our rating is also based on the fact that there are weaknesses which may have a significant impact preventing achievement of strategic objectives. While performance metrics have shown improvement over the past years, there remain a number of significant challenges that continue to impede the efficiency and effectiveness of the process. These include:

- Fragmentation of appeals so that workplace party issues are not dealt with holistically, which leads to multiple appeals with slow resolution and added cost and decision making delays for the workplace party.
- Unnecessary administrative delays in terms of assigning the appeal to the Appeals Resolution Officer which prolongs the appeals process.
- Lack of timelines in place to register an appeal and lack of enforcement of appeal implementation timelines, which do not support effective rehabilitation and return to work practices. This is further evidenced by the fact that the average appeal timeline for 2021 was in excess of 200 days.
- Lack of an effective and accountable quality assurance processes across dispute resolution and appeals decision making. Current quality assurance processes do not set rigorous standards for determining whether cases should move into the formal appeals process, proceed straight to the WSIAT, or return to the front line for further reconsideration.
- The litigious nature and the decision-making delays associated with the process are contrary to the WSIB's strategic objective of "Meeting Our Customers Needs and Expectations", and do not support leading practice rehabilitation and return-to-work principles. Processes can be improved to support WSIB objectives focused on accessible and personalized customer service, and timely, quality and fair decision making.

[1]The significant impact on injured workers lives as a result of decision delays was chronicled in "Red Flags, Green Lights, A Guide to Identifying and Solving Return-to-Work Problems" by Ellen MacEachen, PhD, Lori Chambers, MSW, Agnieszka Kosny, PhD and Kiera Keown, MSc. The guide was published by the Institute for Work & Health, 2009.

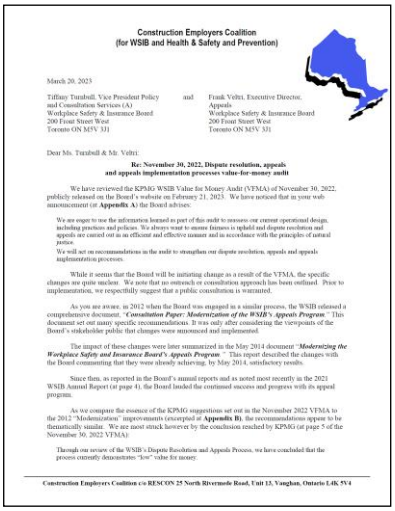
(continued overleaf)

KPMG

5

1. What is puzzling is this: In 2009 value-for-money existed and in 2022 it did not. This is in spite of enhancements *after* the 2009 VFMA, all of which, by the Board's own account, improved the appeals process.

2. This very point was raised by the **Construction Employers Coalition (for WSIB and Health & Safety and Prevention)** ("CEC"), a coalition with which I am involved, in a letter to the Board of March 20, 2023:



Construction Employers Coalition
(for WSIB and Health & Safety and Prevention)

March 20, 2023

Tiffany Turnbull, Vice President Policy and Consultation Services (A)
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

and Frank Veltri, Executive Director, Appeals
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Turnbull & Mr. Veltri:

Re: November 30, 2022, Dispute resolution, appeals and appeals implementation processes value-for-money audit

We have reviewed the KPMG WSIB Value for Money Audit (VFMA) of November 30, 2022, publicly released on the Board's website on February 21, 2023. We have noticed that in your web announcement (at **Appendix A**) the Board advises:

> We are eager to see the information learned as part of this audit to measure our current operational design, including practices and policies. We always want to ensure fairness is upheld and dispute resolution and appeals are carried out in an efficient and effective manner and in accordance with the principles of natural justice.
> We will act on recommendations in the audit to strengthen our dispute resolution, appeals and appeals implementation processes.

While it seems that the Board will be initiating change as a result of the VFMA, the specific changes are quite unclear. We note that no outreach or consultation approach has been outlined. Prior to implementation, we respectfully suggest that a public consultation is warranted.

As you are aware, in 2012 when the Board was engaged in a similar process, the WSIB released a comprehensive document, "***Consultation Paper: Modernization of the WSIB's Appeals Program***." This document set out many specific recommendations. It was only after considering the viewpoints of the Board's stakeholder public that changes were announced and implemented.

The impact of these changes were later summarized in the May 2014 document "***Modernizing the Workplace Safety and Insurance Board's Appeals Program***." This report described the changes with the Board commenting that they were already achieving, by May 2014, satisfactory results.

Since then, as reported in the Board's annual reports and as noted most recently in the 2021 WSIB Annual Report (at page 4), the Board lauded the continued success and progress with its appeal program.

As we compare the essence of the KPMG suggestions set out in the November 2022 VFMA to the 2012 "Modernization" improvements (excerpted at **Appendix B**), the recommendations appear to be thematically similar. We are most struck however by the conclusion reached by KPMG (at page 5 of the November 30, 2022 VFMA):

> Through our review of the WSIB's Dispute Resolution and Appeals Process, we have concluded that the process currently demonstrates "low" value for money.

Construction Employers Coalition c/o RESCON 25 North Rivermede Road, Unit 13, Vaughan, Ontario L4K 5V4

> As we compare the essence of the KPMG suggestions set out in the November 2022 VFMA to the 2012 "Modernization" improvements (excerpted at Appendix B), the recommendations appear to be thematically similar. We are most struck however by the conclusion reached by KPMG (at page 5 of the November 30, 2022 VFMA):
>
> > Through our review of the WSIB's Dispute Resolution and Appeals Process, we have concluded that the process currently demonstrates "low" value for money.
>
> The conclusion of "low value for money" is perplexing. We observe that in the 2008 Appeals VFMA, released March 10, 2009 and also facilitated by KPMG, that it was found at that time (page 7) that the WSIB Appeals program is "is delivering value for money for WSIB."
>
> In 2010 the appeals program was delivering value for money. Enhancements were developed and implemented in 2012. These enhancements were lauded by the Board right up to the most recent report of 2022. Now, the same auditing firm has concluded there is now only "low" value for money. In our respectful view, what has not been made clear is the primary contributing reasons for this change in opinion.
>
> Respectfully, before change is initiated, we suggest that is necessary the Board clearly outline the reasons for a change in opinion of KPMG, particularity in light of the enhancements introduced after the 2008 VFMA.

3. A useful if not required exercise would be to assess the efficacy of the 2012 appeals system enhancements and ascertain why contemporary performance is not considered satisfactory. It is submitted that this may be difficult since all performance metrics seem to paint a contrary picture, and the Board itself lauded the impacts of the 2012 appeal enhancements over the years.

4. This is particularly important to clarify in the wake of very serious contentions raised by injured worker organizations that the planned appeal changes may well result in appeals suppression (as previously canvassed – see the June 28, 2028 webpage for Injured Workers Online and the June 5, 2023 letter from Ontario Legal Clinics' Workers' Compensation Network).

E. Conclusions

1. While a review and public consultation focused on improving the Board's appeal performance is never to be discouraged, using the KPMG recommendations as the primary driver for a review let alone the primary source of core recommendations, will unlikely instill confidence in the stakeholder community.

2. I repeat my suggestions that a respected independent third-party reviewer should assess the submissions received and advise the Board how to best proceed.

PART III: The June 5, 2023 Ontario Legal Clinic's letter - a direct comment

A. Introduction

1. On June 5, 2023, just prior to the commencement of the Board's consultation, Mr. John McKinnon, Co-chair of the Ontario Legal Clinics' Workers' Compensation Network, wrote to the WSIB CEO setting out a comprehensive and valuable commentary on the KMPG VFMA.

2. I have made several references to this letter previously in this document. Mr. McKinnon's letter represents the most comprehensive critique currently available. I am certain it will be joined by many others by the deadline. As WSIB policy consultation respondents are rarely able to reply to depositions from other respondents, and as it is likely the June 5, 2023 communication advances themes that will be repeated in other submissions, it may be of value to the WSIB to receive a commentary on the June 5th letter.

3. Mr. McKinnon is an experienced and well-respected advocate for injured worker interests. I do not personally know Mr. McKinnon and have no professional affiliation with him or his organization, and have met him only professionally and tangentially on occasion, dating back it would seem, to the **W.C.A.T. Decision 915 Leading Case**, in which we were both engaged as intervenor counsel for different parties.

4. The commentary which follows is not presented as a critique of Mr. McKinnon's analysis, but to reinforce support for certain elements of the analysis with which I am in agreement, as such concordance may be of some assistance to the Board. No inferences should arise by any specific absence of comment.

5. In the following sections, I will excerpt selected paragraphs of the June 5th letter followed by my personal commentary. Any highlight or emphasis has been added by myself.

B. Comment on the letter's introductory paragraphs, pages 1 and 2

> 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.

LAL Comments:

- The statutory authority, indeed annual requirement, for a VFMA is WSIA s. 168 (1):

  Value for money audit
  168 (1) The board of directors shall ensure that a review is performed each year of the cost, efficiency and effectiveness of at least one program that is provided under this Act. 1997, c. 16, Sched. A, s. 168 (1).

- VFMAs were introduced into the Ontario workers' compensation system as a result of **Bill 15, Workers' Compensation and Occupational Health and Safety Amendment Act, 1995**, which received Royal Assent December 14, 1995. Bill 15 was the first stage of a two-stage reform thrust, with the second and more comprehensive phase introduced through **Bill 99, Workers' Compensation Reform Act, 1996**. Bill 99 is essentially the current WSIA (although it has received numerous amendments over the past quarter century).

- The main opening points of the June 5, 2023 letter, if I may be so bold as to summarize, is that the appeals VFMA strayed from the usual expectations of a VFMA, with that foray delving into administrative architectural design all of which is rendered problematic by a lack of understanding of the "*basic principles of workers compensation, the administration of justice and the principles of fairness*."

- These are criticisms I share. I will add one more plank to that eloquent phrase. The VFMA does not reflect an informed sense of the contemporary history of the evolution of decision-making and decision-review processes of the WSIB which have been developed collaboratively, actively sought by the Board or otherwise, through an engaged pursuit of processes chasing the "rule of law." That pursuit is not just that of the Board's. In fact, as history knows, the Board arrived rather late to this party. It did though, arrive.

- The VFMA under active consideration, in my respectful opinion, strays beyond the reasonable parameters one would expect from an exercise of this type, with this said with full awareness that I am dreadfully lacking the requisite background and skills to assess the efficacy of VFMAs generally. However, I believe I am ably equipped to assess design missteps that are inconsistent with the best process design requirements of the workers' compensation system. This exercise, I respectfully propose, fits that concern.

- The Ontario Auditor General office succinctly describes its mandate (on the AG website) for VFMAs thusly:

  Value-for-money audits — The Auditor General examines government programs, agencies, certain public-sector organizations receiving government grants and Crown-controlled corporations to see if their administrators have spent money with due regard for economy and efficiency and have satisfactory procedures for measuring and reporting on effectiveness. In other words, he **ascertains if taxpayers have received value for the tax dollars spent** by the entities we audit. As part of these audits, the Auditor also checks that the management of the auditees being examined collected and spent money in the ways that the Legislature intended it to. (emphasis added)

- That approach seems consistent with the general expectation as inferred in the June 5, 2023 letter.

- To assess the founding intent of the inclusion of this power (and requirement) in the WSIA, it is instructive to turn to the legislative debate when Bill 15 was introduced in 1995.

- The Minister of Labour's statement to the House November 14, 1995 when Bill 15 was introduced for second reading is quite consistent with the Auditor General's explanation of the purpose of VFMAs:

> **Hon Mrs Witmer:** The legislation also establishes value-for-money audits that will ensure the board's programs and operations are efficient, effective and financially sound. Value-for-money audits are a business practice used by well-run organizations to ensure that efficiency, economy and effectiveness are achieved in the delivery of all programs.

- The opposition response, including a pointed warning, is also instructive:

> **Mr Duncan:** Finally, we'll amend section 16 of Bill 15 to provide that the Legislature will determine where value-for-money audits will be conducted. **Wouldn't it be interesting -- and I can't imagine that this government would, but some government some day may decide not to study part of the act or not to study part of the board, or do a value-for-money audit, for political purposes**. So it ought to be left to the Legislature to determine where those value-for-money audits should be conducted.
>
> If you are truly interested, if you truly believe that better financial management and accountability will result from those value-for-money audits, then I am quite certain that my friends and colleagues opposite will support our amendment, which will allow the Legislature to determine where value-for-money audits will be conducted on an annual basis. (emphasis added)

- It perhaps is unfortunate that when provided with the reins of government, Mr. Duncan did not follow through on that amendment. Perhaps as a result of this exercise, the dormant suggestion of Mr. Duncan's will acquire a new life, and be placed on a pending workers' compensation reform list. The need is arguably more acute in 2023 than in 1995.

- I present this general proposition. The potential mischief envisioned by Mr. Duncan almost 28 years ago, is cured by a strict adherence by VFMAs to the design expectations of the Auditor General and the Minister of Labour of 1995. In short, the efficacy of current programs should be assessed. Public policy design alternatives must be left to the "experts" and in the case of the Ontario workers' compensation program, it is the Board that is the expert. In short, the VFMA should "stay in its lane."

- Should a VFMA stray outside its lane, a risk arises that recommendations may be particularly unworkable such that the integrity of the entire VFMA may become suspect. I wish to highlight one such example. The June 5, 2023 letter commented on this recommendation (at p. 2):

> 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.

- This is the relevant excerpt from the VFMA (p. 37):

> The WSIB should work with the Law Society of Ontario and other relevant parties **to establish a list of qualified representatives from which workplace parties can draw upon**. This would include exploring the potential for specific competency and training requirements for the representative community in terms of workers' compensation and work place injury with the Law Society.
>
> **Based on the above, the WSIB should establish a roster of qualified representatives from which the WPP's can draw upon. The system of compensation for the representative community should be examined and tied to their level of effort throughout the decision process.** The fee structure should incent the timely and early resolution of decisions throughout the appeals process.
>
> We acknowledge that through implementation of the recommendations included in this report, the use of worker representatives may decrease in the future; in particular recommendations to resolve decisions through ADR and implementation of a Quality Assurance Function. **The WSIB should monitor the use of worker representatives in the future and work with the relevant parties to establish a roster of qualified representatives from which workplace parties can draw upon**. (emphasis added)

- This recommendation is "far off the mark" and cries out for a respectful retort.

- Perhaps the best place to start is the *Law Society Act*, R.S.O. 1990, CHAPTER L.8, which sets out the functions of the **Law Society of Ontario** ("LSO") at s. 4.1:

> **Function of the Society**
> 4.1 It is a function of the Society to ensure that,
> (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
> (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario. 2006, c. 21, Sched. C, s. 7.

- Section 4.2 sets out the principles to be applied by the LSO:

> **Principles to be applied by the Society**
> 4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
> 3. The Society has a duty to protect the public interest.
> 4. The Society has a duty to act in a timely, open and efficient manner.
> 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized. 2006, c. 21, Sched. C, s. 7.

- The LSO has established long standing Rules of Professional Conduct. **Rule 5.1-1** along with the LSO accompanying commentary is particularly helpful:

> **Rules of Professional Conduct**
>
> **5.1-1** When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.
>
> **Commentary**
>
> [1] **Role in Adversarial Proceedings -** In adversarial proceedings, **the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law**. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.
>
> 2] This rule applies to the lawyer as advocate, and therefore **extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals**, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures. (emphasis added)

- Should the WSIB somehow attempt to secure control, including fee control, over the workplace parties' ("WPP") legal representation, the core of the lawyer's independence is struck down, absolutely and completely, to the point that even should a WPP secure representation under those conditions, the WPP could and likely would, question the independence of counsel.

- The independence of legal counsel is so vital to fair judicial and quasi-judicial process that nothing less than the rule of law would be fatally compromised by such an approach envisioned by the VFMA.

- I respectfully and strongly suggest that the Board and the authors of the VFMA read the legal article, "**The Independence of the Bar: An Unwritten Constitutional Principle**," by Roy Millen, widely available and found on the Canadian Bar Association website. Some short excerpts make the point:

> The independence of the bar is "one of the hallmarks of a free society." An independent bar provides citizens with access to justice. It is also critical to the independence of the judiciary, the proper functioning of the administration of justice and the maintenance of the rule of law. It is one of the unwritten constitutional principles that create the conditions for the protection of our rights and freedoms. (at p. 107)
>
> . . . . . .
>
> Put simply, the maintenance of our constitutional values and freedoms requires a bar that is independent from the state (at p. 130)

- Should the Board or the government proceed to codify the VFMA suggestion, I suspect a hurricane of constitutional litigation would be unleashed.

- Notwithstanding that the Board has politely rejected this suggestion of the VFMA (at page 37), the concern of any reasonable reader is this: *Is the rest of the report reliable?*

- This need not be a death knell to the idea of reviewing the WSIB appeals process. Far from it. In fact, the June 5, 2023 letter seems to welcome a differently structured review. In the concluding paragraph the letter says, "*Stakeholders would welcome the opportunity to have an honest conversation about the shortcomings of the WSIB's appeals process*." I would urge the Board to set aside the VFMA and consider a different more far-reaching consultation that embraces the idea of "*an honest conversation.*" I would support such an exercise.

- Perhaps the simplest and best way to start is to simply ask of the critics of the Board's proposals, "*how do you recommend proceeding?*" If the response is reasonable, why would not the Board accept?

C. Comment on the interpretation of the auditor's qualifications to assess matters of administrative law, pages 2 and 3

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 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, <u>and often changed on appeal</u>: 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. <u>This is incorrect</u>. 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.

<u>LAL Comments</u>:

- I addressed my views of the role of a VFMA as directed by WSIA s. 168 (1). The June 5, 2023 letter advances many other critiques that warrant unpacking.

- With respect to the time limit element, the June 5, 2023 letter asserts that:

> "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."

- In the WSIB consultation document, published one day after the June 5, 2023 letter, the Board addresses the issue in this manner:

> **Recommendation 1.2:** We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

- Based on commentary publicly available at the time of this writing, the argument against this proposition is fairly clear – one year is generally too short and an insufficient amount of time.

- The Board would rely on its powers pursuant to WSIA, s. 131 to establish its "practice and procedure":

> **Practice and procedure**
>
> **131** (1) The Board shall determine its own practice and procedure in relation to applications, proceedings and mediation With the approval of the Lieutenant Governor in Council, the Board may make rules governing its practice and procedure.
>
> **Same, Appeals Tribunal**
>
> (2) Subsection (1) applies with necessary modifications with respect to the Appeals Tribunal.
>
> **Non-application**
>
> (3) The *Statutory Powers Procedure Act* does not apply with respect to decisions and proceedings of the Board or the Appeals Tribunal.

- The Board should be mindful to ensure its administrative rules or policies do not exceed its statutory authority and thereby risk being held *ultra vires*. Regard should be had for the principles set out in the Nova Scotia Court of Appeal decision, ***Surette v. Nova Scotia (Workers' Compensation Board)*, 2017 NSCA A 81**, which held that Board policies are "*in substance subordinate legislation*" (para. 18), that "*an additional limitation period not contemplated by the Act*," is "*inconsistent with the Act*" (para. 33). After the release of *Surette* the Nova Scotia WCB revamped the policy in question to conform with the Court of Appeal decision.

- I do not know what would become of a judicial quarrel over the Board's power to set a secondary limitation period as contemplated by **Recommendation 1.2**. I do know however that a judicial squabble is unnecessary if the Board sets acceptable and reasonable limits in policy, open for broad discretionary application.

- The WSIAT follows similar limitation periods (WSIA, s. 125 (2) and has the same powers as does the Board to "*determine its own practice and procedure*" (WSIA, s. 131 (2)):

> **Appeal**
>
> **125** (1) A worker, employer, survivor, parent or other person acting in the role of a parent under subsection 48 (20) or beneficiary designated by the worker under subsection 45 (9) may appeal a final decision of the Board to the Appeals Tribunal. 1997, c. 16, Sched. A, s. 125 (1); 2021, c. 4, Sched. 11, s. 42 (7).

Notice of appeal

(2) **The person shall file a notice of appeal with the Appeals Tribunal within six months after the decision or within such longer period as the tribunal may permit. The notice of appeal must be in writing and must indicate why the decision is incorrect or why it should be changed.** 1997, c. 16, Sched. A, s. 125 (2).

- To administer the statutory time limitations and to ensure the efficient administrative operation of the WSIAT, the WSIAT has adopted certain time limits. These are set out in the WSIAT's Practice Directions, notably, **Practice Direction "Inactive Appeals"** and **Practice Direction "Closing Appeals by the Tribunal."**

- To assess the application of these Practice Directions, the Board should examine the WSIAT's actual applications through its decisions. While there are a few decisions available (using the search terms "Practice Direction" and "Closing Appeals" with the CanLII search engine, 139 cases are identified), it becomes clear that closing appeals at the WSIAT is clearly a last resort and put in motion only after an extraordinary effort is made to allow an appellant to proceed with the appeal. This is as it should be. I draw the Board's attention to two decisions in particular which reflect that approach, ***Decision No. 902/09*** **(May 7, 2009)** and ***Decision No. 1061/22E*** **(August 19, 2022)**.

- Interestingly, in my experience, and to my knowledge, the approach of the WSIAT with respect to similar considerations has not attracted any significant, if any, push back or opposition from stakeholders and/or advocates. From this I believe two propositions may well emerge. *First*, stakeholders and advocates are likely of the view that the WSIAT's approach is reasonable. *Second*, stakeholders and advocates are likely of the view that the Tribunal's exercise of adjudication discretion in cases such as this is generally trusted.

- It is perhaps the element of trust or more precisely, the absence of trust, that leaps out of the commentary so far publicly available. It is not, I believe overstatement to suggest that groups that have responded so far do not trust the proposed changes or the Board for proposing them. This should be very concerning to the Board. If the VFMA and the proposed policy responses are fomenting distrust, stakeholder acceptance is effectively impossible.

- The Board would be well advised to simply mirror, in words and in practice, the precise approach of the WSIAT as reflected in the aforementioned Practice Directions and as applied in actual cases.

- With respect to the "standardized calculations" appeals, I am in full agreement with the positions advanced in the June 5, 2023 letter. The letter correctly notes the mandatory direction of WSIA, s. 119 (3):

Principle of decisions
119 (1) The Board shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent.
Same
(2) If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits.
Hearing
(3) The Board shall give an opportunity for a hearing.
Hearings
(4) The Board may conduct hearings orally, electronically or in writing.

- Regardless of the level the Board chooses to be the "final decision" (and I contend that it is within the Board's discretionary authority to make that determination as a matter of process), it is a rather moot point overall, since the Board "*shall give an opportunity for a hearing*." The Board's discretion is whether the hearing is in writing, orally or electronically. The Board has no discretion not to hold a hearing.

- The June 5, 2023 letter asserts that "*24% of NEL decisions were allowed or allowed in part by Appeals Resolution Officers in 2021*." If this assertion is true, that is all the evidence needed to powerfully discredit this recommendation once and for all, not that "access to justice" should be determined in any sense by some mathematically established likelihood of success.

- The Board recommends:

  > **Recommendation 4.2:** We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

- Such a recommendation only serves one clear purpose – to reduce the appeal caseload inventory of the WSIB. It does nothing to further justice. Moreover, it does nothing to reduce the administrative responsibilities required of the Ontario workers' compensation system. It simply uploads what would be WSIB appeals directly to the WSIAT, with the WSIAT effectively becoming the first and final appeal arbiter.

- This recommendation is a *de facto* declaration that the Board seeks to offload certain appeal and review responsibilities with the only rationale being efficiency gains, with efficiency very narrowly construed. The Board would be well-advised to assess its role and mandate in the context of justice. This is a Pandora's box, which, once opened, may well allow for a fast and steep slide right back to the structural inequities of the pre-1970s, and may I remind of the implications of that.

D. Comment on the assertion that the "auditor's proposals will reduce WSIB benefit expenditures and not protect injured workers' legal rights," pages 3 and 4.

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.**

. . . . . .

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:

> 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.
>
> 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.

LAL Comments:

- I agree entirely that the objective record establishes that the WSIB appeals program has exceeded all important targets. Objectively, there is no basis for change, based on performance. Performance is improving not degrading. As canvassed earlier, the Board itself was, until 2022, rather proud of its program on appeals administration.

- I support the June 5, 2023 letter's assertion that "*the recommendations in the report are unnecessary*."

- Respectfully, what ought to attract the attention of the Board is the assertion, if correct, that 65-68% of worker appeals were denied by the ARO whereas only 27-35% of worker appeals were denied by the WSIAT. The citing of this statistic cannot be read to conclude that the 27-35% WSIAT performance relates to the same bundle of cases. It likely does not. We do not know how many of the 65-68% of worker cases denied at the Board proceeded to the WSIAT. If all did, then arguably the comparison is quite powerful.

- Nonetheless, the broad point being made seems to be this – the WSIAT and the WSIB while operating with the same statute and the same policies, reach very different results, with the implication being that the standard of justice of the WSIAT exceeds that of the WSIB. If this is in fact the overall point, the Board should openly turn its attention to that criticism.

E. Comment on the assertion that the KPMG recommendations "making it harder for Workers," pages 4 – 8.

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 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: **(10 specific outcomes are listed and discussed)**

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.

LAL Comments:

- The June 5, 2023 letter very ably advances the points and little comment is necessary. I agree entirely, as previously outlined, that the VFMA should "stay in its lane" and not become engaged in the legislative process, in any manner of speaking.

- The Board's relationship with the government is governed by the WSIB and Minister Memorandum of Understanding, which sets out clear protocols for the Board's role in regulatory reform.

- The ten (10) paragraphs on pages 5 and 6 should be carefully considered by the Board, and particularly the allegation that the proposals "*will result in appeals suppression*." The Board's appeals process should be perfectly fair and suitable for the unrepresented appellant.

- I agree with the concerns of the proposed enhanced reliance on mediation and address this in more depth later in this response.

- I agree entirely with the problem of "incentives" (June 5, 2023 letter, page 7; VFMA page 18). Workers' compensation benefits are provided as a matter of right. Period. I am surprised that the WSIB administration agreed with this proposition (VFMA p. 18). The Board should clearly and categorically "go on the record" and dismiss that the idea of incentives to resolve disputes will be considered in any form or fashion.

F. Comment on "Time to Reflect on the Role of the VFMA," page 8

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.**

LAL Comments:

- As canvassed earlier, I agree that the WSIB must use VFMAs as originally intended, not as a vehicle for broad policy or administrative review.

PART IV: A response to some of the specific proposals set out in the Appeals Consultation Document

A. Introduction

1. I will not be presenting additional comment on all of the questions posed by the Appeals Consultation. Comment has been presented respecting time limits and the so-called "standardized calculations" appeals. Strong arguments against both proposals have been advanced.

2. This section will focus on the alternative dispute resolution ("ADR") proposals and in-person versus on-line hearings.

B. Overall, what is the objective being sought?

1. One of the objectives of the VFMA appears be to reduce the number of appeals progressing to the final decision-making level, the Appeals Resolution Officer ("ARO").

2. The VFMA at page 18 when introducing the suggestion of "incentives," notes the objective "*to resolve disputes early through ADR and reduce the number of cases going through the costly and time consuming appeals process*."

3. I have commented earlier on the problem with "incentives" and will not repeat those comments.

4. However, the point to be made here is that there may be an overlooked risk to the proposals overall. The goal to reduce the number of cases going through the appeals process may (and likely would) influence resource allocations. A shift in resource allocations may result in no improvement, or perhaps may even diminish, the Board's delivery of substantive justice. "*Substantive justice is the first aspect of justice that procedure should deliver*."[2]

5. Efficiency gains realized through an emphasis on ADR and re-routing cases back to first level decision-makers could inadvertently result in a diminishing level of substantive justice. It must be remembered that the Ontario workers' compensation system is itself an ADR mechanism from top to bottom. While perhaps imperfect in some respects, overall, between the WSIB and (especially) the WSIAT, a high standard of substantive justice is delivered rather effectively and rather efficiently.

6. The capacity for incremental improvement is always available <u>providing the primary goal being sought is *increasing* substantive justice</u>. If the primary goal is to make the system quicker and easier to use, while there may be "more access" there likely would be "less justice."[3]

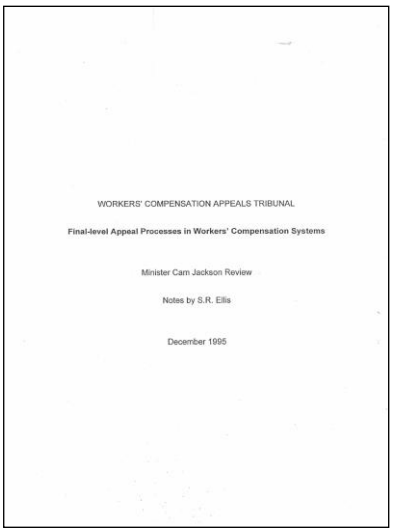
7. To better explain this point, I turn to a December 20, 1995 paper authored by S. R. Ellis, then W.C.A.T. Chair and which was presented to the Hon. Cam Jackson, Minister Responsible for Workers' Compensation Reform as Minister Jackson was about to embark on his review of the

[2] Noel Semple, "Better Access to Better Justice: The Potential of Procedural Reform" (2022) Vol 100 The Canadian Bar Review 124, at 139 (available on the CBR website here).
[3] *Ibid*., at p. 157

Ontario WCB.[4] The paper is entitled, "**Workers' Compensation Appeals Tribunal, Final-level Appeal Processes in Workers' Compensation Systems**," **Notes by S.R. Ellis**.[5]

8. I add that Dr. Ellis, other than being the inaugural Chair of the Appeals Tribunal, continues his extraordinary career pursuing administrative justice in Canada and is the author of "**Unjust by Design, Canada's Administrative Justice System**,"[6] a book which I suggest is essential reading for anyone engaged in the design of an administrative justice process.[7]

9. From the December 20, 1995 paper (pp. 19 and 20) (emphasis added):


WORKERS' COMPENSATION APPEALS TRIBUNAL

Final-level Appeal Processes in Workers' Compensation Systems

Minister Cam Jackson Review

Notes by S.R. Ellis

December 1995

> 79. It may be important to ask why an appeal structure is necessary to achieve justice or to be seen to achieve justice in individual cases. Why, for instance, can this not be effectively accomplished with only on level of decision making? **In the worker's compensation system, why should the claims adjudicators' decisions- making process not be itself a sufficient process from a justice perspective?**
>
> 80. In any event, why, in the workers' compensation system, has justice been apparently thought to require three levels of "appeal" beyond the initial adjudication? In the judicial justice system, for example, there is commonly only one level of appeal as of right and even in that appeal, factual findings of the first-level decision maker are rarely reviewed.
>
> 81. It is very important to appreciate, however, that **in the workers' compensation system, the first two levels of decision-making - the claims adjudication level, and the paper review in the decision review branch - were not primarily dictated by considerations of fairness and justice. They were required for reasons of efficient management of a system that must be understood as most importantly a system of mass adjudication.** (LAL Note: The Decision Review Branch no longer exists.)
>
> 82. Every year the Ontario WCB opens in round figures about 400,000 new claim files. Of this, approximately, 200,000 arise out of lost time accidents. Approximately 85% of these claims are not contentious in any way.
>
> 83. To provide at the first level - the claims adjudicative level - the trappings and quality of an adjudication process that from a justice perspective would be necessary and appropriate for adjudicating contentious issues of fact, medicine and law would be uneconomic and inefficient. What is required at the first level of adjudication in workers' compensation system is a highly efficient screening process that will very quickly recognize and pay the 85% of claims in which there is no significant dispute.
>
> 84. So, at that level, one must locate a large number of adjudicators with high caseloads who must in their decision-making operate within narrow limits of discretion and judgment. The Board has

[4] Minister Jackson released "New Directions For Workers' Compensation Reform: A Discussion Paper," in January 1996 and his final report, "New Directions For Workers' Compensation," in June 1996.
[5] This paper is not likely widely available. I received a copy in 1995 as a member of the W.C.A.T. Advisory Committee. I will be placing a copy on my website shortly following the release of this paper.
[6] S. R. Ellis, Unjust by Design, Canada's Administrative Justice System, (Vancouver: UBC Press, 2013).
[7] On a personal note, I consider Dr. Ellis as one of very few true heroes of the modern workers' compensation program. With that potential personal bias noted, his words quoted ring true due to their thoughtfulness and endurance almost 28 years later.

developed extensive policy guidelines to assist these front-line decision makers in handling cases quickly and as consistently as possible.

85. The paper review at the Decision Review Branch level was simply a refinement of that initial screening process. It allowed more experienced adjudicators to pick up and deal with obvious mistakes in the initial screening.

86. **Thus, in effect, for cases involving issues that were disputed, the hearings officer level was the system's first level of adjudication that approximated what is appropriate for dealing with disputed issues from a justice perspective. The Hearings Officer process is analogous, therefore, to the trial court in the civil justice system.**

87. Accordingly, while the initial levels of Board decision-making were called levels of "adjudication", in effect, there were two levels of a screening process and only one level of adjudication.

88. **In my view, those who have from time to time suggested reducing the levels of adjudication in the system by improving the quality of the initial adjudication have not taken into account the indispensable role of a rough and ready initial screening process in the efficient management of a system of mass adjudication.**

89. That justice requires one level of appeal above the trial court level is a principle which has always been accepted in Canadian judicial systems and usually in its administrative justice systems as well. The number of levels varies from subject matter to subject matter but the need for at least one level of appeal has been by and large accepted. Prior to 1985, that role was played in the workers' compensation system by the WCB's own "Appeal Board". Subsequently, it has been played by the Tribunal.

10. The structural efficiencies of a mass adjudication system are permissible if overlaid with a procedurally fair appeal process that delivers a high standard of substantive justice. If the WSIB is attempting to replicate, at the operating level, the standard of justice received at the ARO or even the WSIAT, respectfully, that pursuit may be a quixotic dream.

11. Of course, improvement should be sought. Always. The VFMA recommendations pertaining to the establishment of enhanced "**Quality Assurance**" is an excellent recommendation that, once implemented, should begin to deliver better results throughout the Board's decision-review apparatus and ultimately deliver a higher standard of substantive justice. That improvement would be primarily achieved through better training, enhanced resource development and superior skill development.

C. The ADR Recommendation 1.1

1. As set out by the **Government of Canada Dispute Resolution Reference Guide**, mediation is:

> Simply put, mediation is negotiation between disputing parties, **assisted by a neutral**. While the **mediator is not empowered to impose a settlement**, the mediator's presence alters the dynamics of the negotiation and often helps shape the final settlement. The Canadian Bar Association defines mediation as "the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no decision making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."
>
> Successful mediations result in a signed agreement or contract which prescribes the future behaviour of the parties; this is often called a memorandum of understanding. Such an agreement has the force of a contract and, when signed, becomes binding. (emphasis added)

2. According to the same source, mediation is "*non-coercive: the mediator does not decide for the parties, but helps them make their own decision.*"

3. The **Human Rights Tribunal of Ontario** "Guide to Mediation" advances two essential principles: i) the agreement of both parties is required; and, ii) the mediator is not the decision-maker.

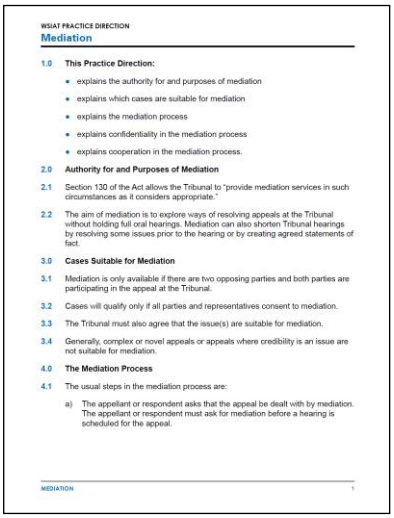
4. The WSIB is proposing an entirely different approach in the Appeals Consultation. The Board is proposing, "*a mediator helps the parties reach an agreement for settlement, and if the parties are unable to reach an agreement, the mediator then acts as an arbitrator and makes a binding decision, similar to what an Appeals Resolution Officer does today*."

5. Respectfully, this model is unsuitable. The Board should accept the immutable principles set out earlier – both parties must agree to the mediation and the mediator under no circumstances assumes the role of decision-maker.

6. It is perplexing why the Board is attempting to develop a new model of mediation in the workers' compensation scheme, when a perfectly viable and tried and true process already exists as designed and practiced by the WSIAT.

7. The WSIAT Mediation Practice Direction is established and well-known to the stakeholder and advocacy communities. It is perfectly and easily adaptable to the WSIB and complies with the basic understandings of mediation as practiced by most administrative tribunals.

8. While there may be some administrative distinctions between the WSIB and the WSIAT as a matter of structural necessity, where there is room for commonality, there is no reason not to pursue administrative similarities.



WSIAT PRACTICE DIRECTION

Mediation

1.0 This Practice Direction:

- explains the authority for and purposes of mediation
- explains which cases are suitable for mediation
- explains the mediation process
- explains confidentiality in the mediation process
- explains cooperation in the mediation process.

2.0 Authority for and Purposes of Mediation

2.1 Section 130 of the Act allows the Tribunal to "provide mediation services in such circumstances as it considers appropriate."

2.2 The aim of mediation is to explore ways of resolving appeals at the Tribunal without holding full oral hearings. Mediation can also shorten Tribunal hearings by resolving some issues prior to the hearing or by creating agreed statements of fact.

3.0 Cases Suitable for Mediation

3.1 Mediation is only available if there are two opposing parties and both parties are participating in the appeal at the Tribunal.

3.2 Cases will qualify only if all parties and representatives consent to mediation.

3.3 The Tribunal must also agree that the issue(s) are suitable for mediation.

3.4 Generally, complex or novel appeals or appeals where credibility is an issue are not suitable for mediation.

4.0 The Mediation Process

4.1 The usual steps in the mediation process are:

a) The appellant or respondent asks that the appeal be dealt with by mediation. The appellant or respondent must ask for mediation before a hearing is scheduled for the appeal.

MEDIATION 1

9. Similar mediation protocol is perhaps the best example where this is possible.

D. In-person versus on-line hearings, Recommendation 2.3

1. The swift and massive switch to virtual hearings as a result of the pandemic was a remarkable development. While many judicial schemes world-wide made this transformation with many maintaining at least some elements of this approach, the implications with respect to the delivery of substantive justice are not as yet fully understood.

2. The **Office of the Commissioner for Federal Judicial Affairs Canada, Action Committee on Court Operations in Response to COVID-19** published an interesting document, "**Virtual Hearings: Operational Considerations – Benefits and Challenges**," which likely mirrors the assessment and experiences of many judicial and quasi-judicial institutions including the WSIB.

3. In an accompanying document, "**Virtual Hearings: Areas for Further Study**," the Action Committee sets out the need for further study and lists several areas that warrant attention, excerpts of which appear below:

Areas For Further Study

Over the past two years, courts across Canada, and around the world, have held virtual hearings in a wide range of circumstances. As the Action Committee has highlighted in its publications outlining Orienting Principles and Operational Considerations for virtual hearings, consensus is beginning to emerge about many of the questions that a court must ask itself when determining the mode of proceeding. To that end, various features of virtual or in-person hearings are now recognized as either a benefit or a challenge for access to justice. However, there are still areas that remain relatively unexplored, or for which no consensus has yet emerged. To that end, the Action Committee has identified the following subjects on which further study may be warranted, as Canadian courts continue to determine the role that virtual hearings will play in their future operations.

1. Evidentiary issues in virtual proceedings

Further study may be warranted into the challenges and benefits associated with managing evidence of all kinds in virtual hearings, including:

- → Physical evidence, such as documents, photographs, and exhibits
- → Testimonial evidence, including the ability of the court to assess reliability and credibility; the ability or willingness of individuals to testify; and the differential impacts of the mode of hearing on different types of testimony (e.g. lay witnesses versus expert witnesses, narrative versus material testimony)

2. Oral advocacy in the virtual context

There are diverging views on whether counsel can effectively advocate for their clients in the virtual context. It would be useful to collect further data to develop an evidence-based picture of how, and the extent to which, effective oral advocacy can be conducted on a virtual platform, particularly in the context of hybrid hearings, in which one party may be appearing in person while the other is remote.

3. The outcome of virtual versus in-person proceedings

While some studies are beginning to emerge in countries that have used virtual hearings for longer than Canada, such as the United Kingdom, further study could be conducted on the comparative outcomes and impacts of virtual, hybrid and in-person hearings for various types of matters and proceedings. This could include, for example:

- → Monitoring comparative settlement rates and associated timelines for virtual or in-person judicial dispute resolution (JDR) in different types of matters – anecdotally, some jurisdictions have reported similar or increased settlement rates in virtual settings while others noted decreased rates compared with in-person JDR
- → Monitoring comparative case progression timelines and disposition rates overall and at various stages of judicial proceedings
- → Monitoring comparative outcomes of trials and other substantive hearings

4. Effects of virtual hearings on specific groups of hearing participants

Anecdotal information to date reveals that the relative attractiveness and efficacy of in-person versus virtual hearings for groups such as self-represented litigants, victims of crime, accused persons, and families and children, can vary greatly. In addition, Indigenous persons, newcomers from different cultural backgrounds, or those from a range of different lived experiences may experience virtually courts differently. Further monitoring of the effects of virtual hearings on these different groups, as well as on the effectiveness of mitigation measures put in place to address some of the challenges that may arise in the virtual context, is warranted.

5. Effects on rural and remote communities

Further research on the effects of centralization of court hearings and services would help to reveal whether the increased use of remote technologies to deliver justice has had a net positive or negative effect on rural and remote communities.

. . . . . .

8. Effects of virtual hearings on participants with interpretation needs

Further monitoring of the comparative outcomes of cases in which interpretation is used either in person or remotely would assist in understanding a number of factors, including:

- → The impact of available technology on the quality of interpretation
- → Whether available technology enables simultaneous and/or consecutive interpretation, and the impact of the mode of interpretation on the participants and the process
- → The relative impact on interpretation of seeing the speaker in person versus onscreen

4. Of course, even though the technology for virtual hearings existed before the pandemic, virtual hearings were rather rare. Circumstances intervened and available technology was adapted to "keep the wheels of justice turning" if not the wheels of the world. It is perhaps telling that this technology was implemented as a matter of necessity and that administrative policy choice pre-pandemic did not result in wide-spread application.

5. One could presume that at least intuitively there may have been some pre-pandemic misgivings, alleviated somewhat perhaps as comfort with this technology became wide-spread.

6. I urge the WSIB in the immediate wake of the pandemic not to engineer permanent change until the "jury is in." Certainly, explore the benefits of this technology but be wary of the potential downsides as well. The Board would be wise to initiate its own parallel studies as those proposed by **Federal Judicial Affairs Canada, Action Committee on Court Operations**.

7. It may be valuable for the WSIAT and the WSIB to share experiences and collaboratively analyse matching experiences. Such an exercise can be enabled in my view without compromising the independence of either institution.

E. Problem: Vocabulary and terms

1. With respect to vocabulary, I have observed the introduction of imprecise terms in the Appeals Consultation and the **Appeals Services Division Practices and Procedures document DRAFT 1** ("Appeals Draft P&P") which was sent out for limited comment last month. I responded to that limited consultation on June 21, 2023. My response can be found on our website. The vocabulary requires revision to ensure consistency with the WSIA and to ensure common terms have common meaning.

2. I will set out essentially the same commentary I presented to the Appeals Draft P&P.

3. The Appeals Draft P&P and the Appeals Consultation utilize similar but not identical language to refer to the same "person." The Appeals P&P uses the term "**injured/ill person**" throughout whereas Appeals Consultation uses the term "**person with an injury**." Both documents are referring to the same "person."

4. I will explain why neither term should be deployed in either document or any similar WSIB document. I will set out what the proper terminology should be and strongly urge the Board to **purge those terms in both documents and replace them with more suitable descriptors**, a list of which I will present.

5. In a legal context and in legal writings, the term "injured person" has specific meanings. This is especially the case when dealing with matters under the WSIA as "injury" sustained in employment is a predicate condition for entitlement.

6. In the context of a document which is setting out the practices and procedures for an appeal under the auspices of the WSIA, quite often the very matter under consideration is whether or not the individual is in fact an "injured/ill person" or a "person with an injury." The entire proceeding will not be about whether or not the individual is a "person" of course, but may very well be, **and quite often is**, about whether or not there is an illness or an injury (WSIA, ss. 13 and 15).

7. One need not be an established "injured/ill person" or a "person with an injury" to submit a claim to the WSIB, or pursue an appeal within the WSIB, as that is a finding of fact to be determined by the Board itself.

8. As mentioned, the very nature of the proceeding may well be whether or not the individual is in fact an "injured or ill person" or a "person with an injury." As is common, often the determination of the Board may well be that the person is not, in fact, an "injured/ill person" or a "person with an injury." The Appeals Consultation and Draft P&P use of these terms actually permits the construction of this absurd sentence, "*The injured/ill person (or person with an injury) who submitted the appeal was found after due consideration of all of the evidence not to be an injured/ill person (or person with an injury).*" This playfully constructed sentence illustrates the absurdity.

9. Neither term "injured/ill person" or "person with an injury" appears within the WSIA. However, the WSIA does set out and define relevant and legally important terms that actually describe the same "person" attempted by the Draft P&P and the Appeals Consultation.

10. The WSIA defines the terms worker, dependant, employer, guardian, learner, spouse, student, all of whom may possess claim and appeal rights, with some ironically excluded by the term "injured/ill person" or "person with an injury."

11. For the intended purposes of the Draft P&P and Appeals Consultation, the Board should limit itself to the terms "appellant" and "respondent" or "party" or collectively "parties."

12. I encourage the Board to seek guidance from the WSIAT webpage "Terms We Use" which defines the terms as follows:

> **Appellant:** An appellant is the person who makes the appeal to the WSIAT.
>
> **Party:** A party is worker or employer who has decided to become involved in an appeal. Usually, only people who may be affected by how the appeal is decided can become involved. No one has to take part in an appeal if they do not want to, but the WSIAT can still decide the appeal.
>
> **Respondent:** A person who starts an appeal at the WSIAT is called the appellant. The other person or people involved in the appeal are called respondents. For example, when a worker starts an appeal, the employer is usually the respondent. When an employer starts an appeal, the worker is usually the respondent.

13. While not a part of this immediate exercise, if it is the case that these terms have permeated beyond the two documents referenced and appear in other WSIB policy and procedure documents, my recommendation applies equally to those documents.

All of Which is Respectfully Submitted,

L.A. Liversidge
July 20, 2023

Endnote: In this submission I have referenced several letters publicly available, some of which were addressed to the WSIB. It is my understanding that the Board has likely responded to some or all of these communications. I have not been made aware of or read any specific WSIB response. Should these responses appear on the public record, I will offer future comment as and if warranted. LAL

VIA email to appealsfeedback@wsib.on.ca

July 21, 2023

Workplace Safety and Insurance Board
200 Front Street West
Toronto, Ontario
M5V 3J1

To Whom It May Concern:

Re: Dispute resolution and appeals process value-for-money audit consultation

TELUS Health represent a significant number of employers in Ontario across many diverse sectors and industries. We have clients in both Schedule 1 and Schedule 2. These employers contribute and pay a significant amount in WSIB premiums each year and have a vested interest in the proposed changes that are outlined in the "Dispute Resolution and Appeals Process Value-for-Money Audit Consultation."

We have had the opportunity to review the KPMG Report in tandem with the consultation recommendations, and 6 points published on the WSIB website. Thank you for inviting stakeholder feedback by Jul 21, 2023**.**

By participating in this consultation, we hope to assist in guiding the approach to improving the dispute resolution and appeals processes so that the needs and expectations of workplace parties can be met.

Below you will find the proposed recommendations and our feedback.

Recommendation 1.1: We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals.

The WSIA (**sec 122(1)**) allows the WSIB to offer mediation services when deemed to be appropriate. Considering this recommendation, the WSIB is evaluating a mediation-arbitration model of alternative dispute resolution for certain appeal scenarios, like the model used in family law cases in Ontario. Mediation-arbitration is a hybrid dispute resolution process that combines the features of both mediation and arbitration. In this process, a mediator helps the parties reach an agreement for settlement, and if the parties are unable to reach an agreement, the mediator then acts as an arbitrator and makes a binding decision, like what an Appeals Resolution Officer does today.

We agree that in order for a case to be eligible for mediation-arbitration, that both parties must agree to the process and sign a mediation-arbitration agreement as outlined in the WSIA(**sec 122(3)**). This agreement should include the terms and conditions of the

process, including the scope of the mediator's authority and the specific steps that will be taken within specified timelines if the parties are unable to reach an agreement.
We agree that certain issues related to medical compatibility or initial entitlement are not appropriate for mediation-arbitration. Issues related to cooperation or re-employment are more suitable.

We have outlined factors and concerns that should be considered when implementing this alternative dispute resolution model.

We are concerned with the proposed flow of Workplace Party ("WPP") disputes. Most attention for improvements should occur at the objection intake level where current issues on efficiency reside. This is an opportunity for an Objection Intake Officer to ensure all matters are heard together, with possibility of mediation at this point.

At present, the flow is the submission of the Intent to Object (ITO) > possible reconsideration> and then referral to Appeals Services Division ("ASD"). This current process flow is presenting significant delays with no oversight on whether an appeal is moving forward.

A proposed solution would be to have potential for mediation/reconsideration once an Appeals Readiness Form (ARF) is filed only, as this would give a holistic approach and review.

ADR should be involved after an Appeals Readiness Form (ARF) is filed and not an ITO. This would ensure new evidence is identified and on file for ADR review.

WPPs are not in receipt of file access until after an ITO is filed. This significantly prejudices the WPP position without having complete access to information. We cannot comment on mediation, without full disclosure of file access.

There should be a designated list of issues that are ADR suitable, like the Hearing Method list outlined in the Appeals Practice and Procedures.

Issues that may be suitable for ADR should be straightforward and non-complex such as:

- NEL quantum
- Entitlement to medication or treatment modality (chiro, physio, acupuncture, massage, mobile assisted devices, glasses, etc) treatment extension
- LOE beyond the age of 65
- LOE within the acute phase (12 weeks)
- LOE recalculation
- Post 72-month LOE reviews

ADR mediators/arbitrators must have significant expertise in dispute resolution/arbitration. This should be through a specific designation/accreditation and/ or work experience. It is imperative that there must be knowledge of WSIB operational policies, *WSIA* and WSIAT case law.

An arbitrator should be able to make a recommendation agreed to by WPPs (like WSIATs process)

In situations where one party is not agreeable to the proposed solution, this should automatically go to an appeal at the Appeals Services Division at WSIB. If one party does not agree to ADR, the matter should not proceed through this stream.

Recommendation 1.1: Our alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

The WSIA(**sec 120(2)**), outlines that the workplace parties must indicate in writing why the decision is incorrect or why it should be changed. Understanding that and what each party wants (i.e., the proposed remedy) is foundational to both formal and informal methods of resolving disputes in a timely and quality manner.

We agree that while this is already asked on appeal forms, it should be mandatory to provide complete information through the current processes or through alternative dispute resolution.

We reiterate that ADR should only start once an ARF is filed.

The ITO should not be changed, nor should there be a requirement to list more details regarding the issue in dispute until the access file has been received. It is premature to require WPPs to confirm this without having complete access to information contained within the access file.

The ARF should be the appropriate and required opportunity for WPPs to provide reasons for appeal, proposed outcome, and new evidence. This ensures that WPP's have file access to holistically review and prepare for providing the reasons for appeal and proposed outcome.

Recommendation 1.1: We should adopt set timeframes for the reconsideration process.

The audit recommends adopting a 30-calendar-day time limit through legislative change. We understand that the WSIB will review the proposal for legislative changes with the Ministry of Labour, Immigration and Training and Skills Development. Ultimately, the Government of Ontario has jurisdiction over changes to the WSIA.

We understand that the WSIB can implement timeframes that apply after the WSIB receives an Intent to Object form.

The KPMG Report and proposed changes outlined on the WSIB website, include implementing a timeline from the date of the decision, ITO submission and ARF to be submitted.

The KPMG report notes the following.

"*The timeframes for any actions performed prior to the submission of the ARF (i.e. submitting an ITO within 30 days of the decision, submitting any supplemental information within 30 days of the ITO and completing the ADR and reconsideration process within 30 days from receipt of any supplemental information) should be included within the overall one year timeframe from the initial decision to the ARF being submitted, therefore allowing a maximum of nine months for the ARF to be submitted following the ADR, reconsideration process and communicating the decision back to the worker*"

We strongly submit that there should not be a legislative change to amend the timeframe to submit the ITO. Legislatively, it is presently 6 months, and the proposed recommendation is to reduce to 30 days.

We disagree as this is an unreasonable turnaround time for correspondence communication of decisions, consulting with clients, workplace parties obtaining representation, WSIB Claim cost updates, and obtaining new evidence.

There should be a formal process for a decision reconsideration process. This should allow workplace parties to have the opportunity to provide new information and provide submissions for consideration. This should be permittable as per Section 121 of WSIA and can occur at any time.

Once a reconsideration is requested, this should be mandatory to complete the decision within 30 days of the new information received and a formal decision issued. This new reconsideration decision should be subject to new appeal timeframes, even if the original decision is upheld.

We recognize the importance of changing the existing appeals process to improve appeals intake and triage function. A proposed Quality Assurance (QA) function should be set up within the Appeals Services Division where there is active monitoring of timelines. This should also include the reconsideration process to ensure the 30-day decision timelines are met by front line decision makers. Presently, there are systemic issues within the WSIB that are resulting in delayed decision making.

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

The KPMG report notes the following:

"The WSIB should implement a timeline of one year following the initial decision for ARF's to be submitted and move to an electronic form submission method with mandated fields in order to improve data quality".

Digital submissions of appeal documents are most welcome, and would ensure efficiency, completeness, and adaptation to an ever-changing digital world.
We agree that mandatory fields should be required, such as: resolution method, scope of the dispute, outcome sought etc.

Workplace parties should have the right to view appellants ARFs to understand the issues in dispute.

Hearing in Writing (HIW) method should be changed to include a disclosure of WPP respective submissions. This would allow WPPs to view the opposing arguments and submissions, inclusive of new evidence that may have been filed with the written submission.

Any issues that are not within the jurisdiction of the current issue should be defined at the ARF stage and not wait until appeal stage. This includes any missing evidence/documents.

The KPMG report suggested an appeal portal, where appeal forms would be viewable. This would be beneficial to WPP's to have access to appeal forms, access file, due dates, and for HIW should allow for disclosure of submissions and evidence. This could be added to the newly implemented appeal tracker. This should include reminders/notifications when you have new mail.

This will reduce protracted decision timelines, resolve outstanding issues quicker and reinforce procedural fairness. We would welcome a review of the Review Division digital process in place with WorkSafeBC, as they currently utilize a technology-based process for appeal which, in our opinion, works quite well.

We must take into consideration the current process and wait times that have process issues. Such as, submitting the ITO which is presently not monitored and in many cases being left unactioned by the case manager assigned. This creates a delay in the referral over to ASD to action and send out the access file. The QA role should have oversight into all ITO's submitted to ensure that they are actioned within a specified turnaround time, and not left to the discretion of the decision maker's desk.

The access file is imperative to review and determine merits to appeal. The injured worker currently has 21 days to object to the release of access. Improvements should be made to communication to injured workers to understand the process on objections and release of information.

We are also proposing a shortened period for worker review and quicker turnaround time for the release of the file to the employer.

While we appreciate the need for timely adjudication, there are only certain situations where a 30-day time limit would be appropriate. That should be limited to active RTW disputes such as:

- RTW suitability and RTW when an injured worker is off work and disputes the offer.
- Loss of earnings – short term basis

The proposed 30-day time limit to object to a decision hinders and prejudices WPP's rights in other areas of entitlement such as:

- Cost relief
- Allowance of initial entitlement – as often medical progresses when further diagnostics obtained, the compatibility of diagnosis with mechanism of injury could not be apparent within 30 days of the allowance of the claim.
- Secondary diagnosis
- Psycho-traumatic disability

If new information becomes available after the time the original decision was rendered, it should automatically provide for a reconsideration decision to be issued with a new appeal timeline. Presently, we are seeing new information come to file after the 6-month appeal period has ended.

We have requested reconsideration based on new information and have at times been met with the "you did not meet the appeal timeline to appeal the original decision". This is incorrect and in direct contravention to Section 121 and corresponding WSIB policy on Reconsiderations. The policy allows for reconsiderations be performed at any time with new information. There should be a guaranteed right to reconsideration as any new information becomes available to ensure procedural fairness to WPPs.

Schedule 1 employers manage their costs by operating within the experience rating window. By removing the employer's right to appeal/ submit the ARF within that window would seriously hinder the employer's ability to manage their WSIB premium costs, it is unfair and unjust.

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

We appreciate the improvements in accommodation of determining the method of resolution for appeals. Since the start of the pandemic in 2020, there has been major advancements with working directly with the parties to best accommodate their needs either online, in person, or in a hybrid manner for oral hearings.

We understand that WSIB conducted a survey in 2022 on online oral hearings and it showed that they were positively received and that the WSIB should continue to offer them. As noted, current oral hearings are online. The WSIB makes exceptions for in-person oral hearings in unique cases impacted by things like accessibility needs or technological challenges.

If WSIB proceeds to move the hearing method determination process from the Appeals Registrar to the QA Function, it is our position that the QA person should be required to have significant prior appeals knowledge. We contend that it is important to retain knowledge and expertise when rendering these decisions.

Identification of evidentiary issues and/or downside risk should only occur after the appellant has filed their Appeal Readiness Form, so that parties are not dissuaded from their appeal rights or abandon issues prematurely.
A final decision regarding the method of hearing should be rendered after the receipt of the Appeal Readiness Form and Respondent Form.

Should the appellant or the respondent disagree with the proposed method of hearing, there should be a requirement to indicate how their proposed method of hearing meets the changed criteria pursuant to the *Appeals Services Division's Practices and Procedures*. Generic reasons, such as *"The worker will testify"* or *"issue is complex,"* should not be considered sufficient in rebutting the proposed method of hearing. It is our position that the current guidelines for choosing hearings in writing vs. oral hearings are sufficient but it is important to note that some questions that are posed in oral hearings may be adequately addressed in written submissions. Thus, we contend that an oral hearing should be chosen when one of the following applies:

- A question of credibility or conflict in the evidence that can only be addressed through testimony.
- Significant factual dispute
- Requirement for clarification of witness statements through testimony
- A party is unrepresented and has major barriers to writing submissions (i.e., significant language barrier requiring assistance of a translator, cognitive difficulties, etc.)

With respect to in-person hearings, it is our position that access to justice has benefited from the availability of technology and the default method for oral hearings should be videoconference, as is the case with WSIAT. We contend that an oral hearing without credibility issues and where the worker cannot access the internet can proceed by teleconference. The Tribunal has cited the 2021 Ontario Superior Court of Justice decision of *Worsoff v MTCC* (2021 ONSC 6493) wherein Justice Myers held the following:

> *"Efficiency, affordability, and enhanced access to justice trump counsels' comfort and presumptions every time. With the current pace of change, everyone has to keep learning technology. Counsel and the court alike have a duty of technological competency in my respectful view…Technological change affects everyone…I do not accept that in person is just "better". It can be in some cases. But if counsel just prefers it because he or she is more comfortable with it, ought we to reject the printer because I liked my Gestetner (and Word Perfect for that matter)? The balance of convenience favours easier and more convenient processes with accompanying cost savings."*

We recommend adopting the following in-person hearing criteria that the Tribunal currently has in place:

- Whether a party is unable to participate in a videoconference or teleconference hearing due to technology barriers that cannot be addressed by reasonable means.
- Whether there is a request for an accommodation for a *Human Rights Code* related need that cannot be met through videoconference or teleconference formats.
- Whether a party is unable to participate in a videoconference or teleconference hearing due to health issues.
- Whether there is a suitable hearing room available in the location where the in-person hearing would take place.

Recommendation 3.1: We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

The WSIB has an expedited appeal process for return-to-work decisions. Currently, the following decision types have a 30-calendar-day time limit to appeal and are considered for an expedited appeal:

- job suitability decisions where functional abilities or level of impairment are not in dispute.
- lack of cooperation on a return-to-work plan from the person with the injury or business or during a training program
- suitable occupation and/or training plan decisions
- re-employment decisions

The WSIB does not use the expedited process if there are decisions involving other issues coupled with the above (i.e., those with a six-month time limit).

A proposed recommendation is that the WSIB is considering adhering to the 30-calendar-day time limit and expedited process when there are multiple issues (i.e., both those within the 30-calendar-day and the six-month time limits). This would mean that the return-to-work issue would be expedited through the appeals process independently regardless of whether it is coupled with other issues or not.

While we agree with expediting return to work decisions through the appeals process, it is our position that the expedited process should apply if there are decisions involving other issues that are coupled with return-to-work decisions.

For example, a decision regarding an adjustment to loss of earnings in accordance with a previous decision determining suitable occupation would be inextricably intertwined. As one of the challenges identified in the report was fragmentation of appeals that do not result in a holistic approach and cause slow resolution and delays, we contend that all issues coupled with a return-to-work decision on an Intent to Object form should follow the expedited process.

If the appellant wishes to bifurcate issues, they can do so when filing the Appeal Readiness Form and provide reasons as to why they wish to proceed with certain issues but not others at that time. We would also recommend that Intent to Object forms should

be reviewed holistically by the departments that made those decisions, not just the claim owners.

Example: This is often the case for SIEF appeals. If two departments (i.e., case manager and return to work specialist) were responsible for adjudicating the decisions listed on the ITO, we recommend that both departments can review the decisions for reconsideration and a cohesive referral to access can be made.

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.

Case Managers have 30 calendar days to implement appeals decisions from the Appeals Services Division or WSIAT. Decision implementation timeframes depend on how much of the required information is available on the claim file. If the Case Manager needs more information from the workplace parties, implementation may take longer than 30 calendar days.

Currently, the Appeals Resolution Officers' decisions sometimes lack instructions and the information required to implement their decision.

The WSIB is proposing to review the way Appeals Resolution Officers' decisions are written to make sure they include directions for their decision to be implemented including any supplementary information needed. The decisions will also address the issue and entitlements requested by the parties as identified on the Appeal Readiness Form or the benefits that flow from the decision as part of the parties' proposed resolution to the appeal.

For decisions stemming from the Appeals Services Division, there should be clear written instructions pertaining to what information needs to be submitted. In the past we have seen memorandums drafted by Appeals Resolution Officers. These should be used on a more frequent basis. Furthermore, it may be beneficial for a minor checklist to be filled out by an Appeals Resolution Officers decisions so that case managers are clear what is required for implementation. For example, this may include:

- Referral memo to the cost rating department
- Clarifying and obtaining copies of any modified duties that may have been provided.
- Determining actual lost time vs. what has been topped up by the employer.

Having a checklist and/or memorandum to accompany the decision will ensure that everyone is on the same page for what needs to be done.

What is even more important in this case is that this information could be provided to the Appeals Resolution Officer, prior to a decision being made. This could create a better efficiency, as there would be a clearer understanding of what is being granted. For example, if a current Appeals Resolution Officer decision may allow for lost time for a block of time, yet when the implementation is being conducted, the employer may have submitted evidence to support that suitable modified duties are offered. If there was a checklist that was completed prior to, all this information could be readily available to the

Appeals Resolution Officer and thereby included in the decision. This would reduce the burden on the implementation officer and create less of a cumbersome task post hearing.

The Board may wish to review the roles of both Objection Intake Officers and Appeals Implementation to ensure that both roles are collaborating.

As far as decisions from the Workplace Safety and Insurance Appeals Tribunal, it may be beneficial to have case managers assigned to WSIB appeals and one dedicated to WSIAT appeals. Implementation decisions should be categorized by issue (i.e., cost relief, ongoing entitlement, NEL awards). Lastly, the WSIB should consider establishing a direct relationship with a specific party at WSIAT to whom questions can be directed regarding decisions made by vice-chairs.

Where an appeal decision meets the criteria for a retroactive NEER adjustment, these should be done automatically by experience rating rather than upon request.

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

The WSIB has outlined that they are assessing examples of decisions that rely on standardized calculations to determine if they should be excluded from the internal appeals process. This might include certain permanent impairment rating (quantum) decisions, and their non-economic loss monetary award calculations; certain loss-of-earnings benefits calculations and decisions; and certain personal care allowance decisions.

There should not be any decisions that should be excluded. There should always be a two-step appeals process, one at the WSIB and one at WSIAT. This will ensure that a proper review is done at the WSIB level prior to appeal at WSIAT. To exclude and "skip" the Appeals Services Division is discrediting the purpose of the first level of appeal. As an alternative, may we suggest that a dedicated Appeals Resolution Officer's be assigned to these types of claims, or these types appeals proceed via the ADR mediation stream.

In review of the KPMG report dated November 23, 2022, the rationale for circumventing the Appeals Services Division stage is that it *"results in unnecessary delays since the ARO relies on the on the calculation by the initial decision maker. The initial entitlement calculation and the appeal review are effectively redundant."*

We question this rationale, as the "skipping" will further perpetuate that problem onto the Tribunal. Furthermore, we question what happens if the worker has evidence that a non-economic loss award was incorrectly calculated. Would this worker then be subject to a long wait at the Tribunal, as the Board no longer deals with these types of appeals due "redundancy"?

Again, we question why this issue is not dealt with directly, either by a specialized Appeals Resolution Officer or by a Dispute Resolution Officer. It is our position that simply forwarding this onto the Tribunal is not the answer.

We suggest that the calculation should be done in more simplified terms, so every individual has full transparency and understanding of the calculation. We also have significant concerns about which types of decisions will be streamlined to the WSIAT and how this will be decided.

In close, we appreciate the opportunity to provide feedback for the proposed recommendations as outlined in the KPMG report. It is imperative to consider stakeholder feedback.

Respectfully submitted,

The Telus Health Workers' Compensation Services team

- Marc Pannunzio, Paralegal, Client Experience Director
- Tonia Greco, Paralegal, Appeals Specialist
- Monica Basso, Paralegal, Appeals Specialist
- Tanja Webster, Paralegal, Appeals Specialist
- Nicole Shaver, Paralegal, Appeals Specialist

In partnership with:

- Karen Parn- Starbucks Canada
- Norma D'Errico- Walmart Canada

LISE VAUGEOIS

MPP Thunder Bay—Superior North
Députée provinciale de Thunder Bay—Supérieur Nord
ᘁᐋᐢ ᐳᐧᔕ ᑅᑭᑑᐧᐃᓂᐧᑫᐧᐃ ᐱᓀᐦᔫᐧᐋᔔᐣᐠ — ᑭᒋᑲᒥ ᑅᐧᐁᑎᓈᐣᐠ

appealsfeedback@wsib.on.ca;
Corporate_SecretarysOffice@wsib.on.ca;
monte.mcnaughtonco@pc.ola.org;
Minister.MLTSD@ontario.ca

July 13, 2023

Re: KPMG proposed changes to the WSIB

Good Morning,

I am the MPP for Thunder Bay-Superior North and am very concerned about the WSIB consultation process and the eventual loss of appeal rights for injured workers.

The WSIB is not able to complete its own fact-finding processes within the deadline being proposed for injured workers so it is very clear that workers will also not be able to meet the requirements of the proposed deadlines.

We all know that accessing a Primary Care Provider and subsequent specialists can take many months – and sometimes over a year – so it will be impossible for injured workers to access the documentation required within the punitively short time frame KPMG has recommended. We also know that those providing legal supports for injured workers seeking to appeal their claims will not be able to respond within the proposed shorted time frames.

Clearly, the goal of the KPMG report is to find ways to cut workers off from access to the compensation they need and are entitled to. This forces workers, and their families, into poverty with ODSP as the only source of support - pushing the responsibility for workplace injuries onto the public. This is a nasty sleight of hand suggesting that the WSIB has no interest in fulfilling its original mandate to make sure that those with workplace injuries do not become a burden on the public.

As a reminder, I site one of the original Meredith principles here: “Compensation for as long as disability lasts**:** Workers can depend on security of benefits based on lost wages and promptly paid. The injured worker is not to become a financial burden on their family or the community.” This is the opposite of how the WSIB has been treating workers since the 90s when the name of the program was changed from the Workers Compensation Board to the WSIB. The proposed changes will complete the transfer of responsibility for the consequences of workplace injuries from employers to the public. This is a crime against workers and against the public.

COMMUNITY OFFICE
272 Park Ave.
Thunder Bay, ON P7B 1C5
807-345-3647 • 1-833-690-2016 (toll free)
LVaugeois-CO@ndp.on.ca

QUEEN'S PARK
Room 203, North Wing, Main Legislative Building
Queen's Park, Toronto, ON M7A 1A5
416-325-0069 • 416-325-0067
LVaugeois-QP@ndp.on.ca

I am also concerned that the period for feedback on the proposed changes is far too short and is taking place during the summertime – when many people are off work and on vacation. This is also unacceptable.

I am requesting the following:

1. Reject the changes proposed in the KPMG report;
2. Failing this, extend the deadline to make submissions for 6 months so that unions and the public have time to respond thoroughly to the proposed changes;
3. Consultations must occur in a public setting and should be led by experienced workers' compensation advocates;
4. All injured workers must be notified of the consultation and have the opportunity to respond.

The radical changes proposed in the KPMG report will impact tens of thousands of injured workers, most of whom have no idea about this consultation. That is wrong and, frankly, it makes it look like the WSIB is trying to sneak through dramatic changes without public oversight.

The proposed changes are very much against the best interests of injured workers and should be withdrawn immediately. Failing that, the deadline must be extended and the changes must be debated in a public forum with all potentially affected workers able to be represented.

Sincerely,

Lise Vaugeois
MPP Thunder Bay-Superior North

SUBMISSION TO THE WSIB

PUBLIC CONSULTATION ON THE KPMG – WSIB

VALUE FOR MONEY AUDIT (VFMA)

DISPUTE RESOLUTION AND APPEALS PROCESS

PREPARED AND SUBMITTED BY:

JASON MANDLOWITZ, PRESIDENT

MANDLOWITZ CONSULTING AND PARALEGAL SERVICES (MCPS)
AND
MANDLOWITZ TRAINING INC. (MTI)

JULY 11, 2023

WSIB CONSULTATION – VFMA

DISPUTE RESOLUTION AND APPEALS PROCESS

TABLE OF CONTENTS

SUBMISSION TO THE WSIB

DISPUTE RESOLUTION AND APPEALS PROCESS

VALUE-FOR-MONEY CONSULTATION

July 12, 2023

E-mail: appealsfeedback@wsib.on.ca

Thank you for the opportunity to participate in the WSIB consultation: “Dispute resolution and appeals process value-for-money consultation”.

Please be advised that our written submission should be taken to reflect the opinion of Jason Mandlowitz, Mandlowitz Consulting and Paralegal Services, alone, and does not reflect the views of our clients or contacts.

A. Background – Jason Mandlowitz, Mandlowitz Consulting and Paralegal Services and Mandlowitz Training Inc.

Jason Mandlowitz is President of Mandlowitz Consulting and Paralegal Services (MCPS) and Mandlowitz Training Inc. (MTI) with locations in Toronto and London, Ontario. Mr. Mandlowitz brings over 40 years of experience in the fields of workplace safety and insurance, occupational health and safety, return to work, absence and disability management, and employment/legal issues management. MCPS provides employers with comprehensive WSIB/WSIAT services and representation. MCPS assists employers starting at the time of the accident/injury to issue resolution. MTI offers a 6-module on-line WSIB education program entitled WSIB PRO.

From 1981 to 1984 Mr. Mandlowitz represented employers on WCB issues as the Ontario Director for the Canadian Federation of Independent Business. From 1984 to 1989 he served as the first Director of the Office of the Employer Adviser: a branch of the Ministry. From 1989 to 1993 he worked in a number of Senior management positions at the WCB including policy implementation and consultation. Since 1993 he has provided consulting services to private and public sector employers while working for a number of professional organizations including Hicks Morley Hamilton Stewart Storie LLP. Jason is a well known presenter at WSIB conferences and provides education/training programs across the province.

Mr. Mandlowitz is a certified Paralegal by the Law Society of Ontario and also holds certificates in First Aid, CPR, and Mental Health First Aid.

Further information is available at the MCPS and/or MTI website.

B. Chief Concern

The KPMG value-for-money audit focuses on a number of important issues pertaining to the current and a possible future WSIB dispute resolution and appeal process and, as per the report mandate, offers recommendations.

The failure of the audit report, however, is there is no indication, calculation or quantitative assessment to guide a response to the questions:

> "What is the quantitative improvement to be expected or anticipated if the audit report recommendations are adopted"?
>
> "What organizational and staffing changes would be required, in which locations at the WSIB, and at what additional staffing costs in terms of compensation and benefits?"

Further, the WSIB consultation document focuses on a very small number of recommendations compared to the more numerous recommendations put forward by the value-for-money audit report. There is no explanation as to why these recommendations and questions were selected and why the WSIB was not inviting responses from stakeholders on the entire KPMG audit report.

In summary, the chief concern is the consultation document fails to provide any guidance on how the process changes and/or stakeholder recommendations would restore a favorable value for money approach.

It is recommended that a comprehensive and more "typical" consultation is in order starging with a Board of Directors approved White Paper or Green Paper: particularly as change would impact and require amendment to the Workplace Safety and Insurance Act 1997.

Our opinion and responses to the consultation document are provided herein.

The starting point for any public policy inquiry is the articulation of the key principles to serve as the overall context for consultation on dispute resolution and the appeal process.

C. Key Principles

It is recommended that the WSIB establish "key principles" to guide the work to be undertaken "over the next two years" to improve "our" dispute resolution and appeals processes.

1. Legislation

WSIB policies and practices must be consistent with the Workplace Safety and Insurance Act, 1997, and recent amendments. Changes to the dispute resolution and appeals processes recommended by the PMG value for money audit can only occur if and when permitted by legislation and applicable regulations.

2. WSIB Relationship with Stakeholders

The WSIB must be guided by the principle that the workplace safety and insurance system is a joint undertaking by involving a number of stakeholders including the Government of Ontario, the WSIB, the WSIAT, and most importantly workers, employers, and the medical community.

The WSIB consultation paper states in the Introduction:

> "Over the next two years, we'll be making changes to improve our dispute resolution and appeals processes."

In this undertaking the WSIB must recognize that the opinions and recommendations from key stakeholders (e.g. workers, employers) should take primacy as these are the parties who will be most impacted by any changes to the dispute resolution and appeals processes.

The WSIB must recognize that changes are not being made to "our dispute resolution and appeals processes, but to a system that impacts the WSIB and stakeholders.

3. Consultation

The WSIB has established a lengthy history of reasonable consultation with stakeholders to the system. This started in 1910 with the Meredith review of workmens' compensation and has been applied to many legislative and regulatory reviews.

Sufficient time must be allocated when considering possible changes to parts of the WSIB system. For example, when considering a change to the premium setting and experience rating systems a consultation process began in 2010 and resulted in implementation staring in 2020: some 10 years in total.

We have also learned from past reviews that piecemeal changes are not the most effective way to improve the workplace safety and insurance system.

This places in question the short time frame adopted by the WSIB with respect to the value for money audit report.

4. WSIB must be able to deliver

The proposed changes in the value-for-money audit are significant. Implementation will require a balancing of new approaches, policies, procedures, staffing, training, etc. The WSIB must be fully able to implement workable changes to the system from the date they become effective. There is no time to experiment. Of particular concern is the impact of change on internal WSIB staff who have already taken the public position that work loads are excessive and negatively impact decision making.

Unfortunately, these concerns appear to have been largely neglected by the value-for-money audit.

5. Application of the changes

Changes to the dispute resolution and appeals process must apply equally to workers and employers.

Changes must be symmetrical and apply to worker entitlement claims as well as employer revenue/financial matters.

To a certain degree, the WSIB has paid significantly more attention to the worker claims regime as compared to the employer revenue/financial regime so care must be exercised in ensuring the consistent application of dispute resolution and the appeals process.

6. Levels of Appeal and Reconsideration

The current workplace safety and insurance scheme allows for at least nine (9) levels of adjudication and reconsideration. These include: eligibility adjudication and reconsideration, case manager/initial decision maker review of Intent to Object submissions and reconsideration, referral to the Appeal Services Division for ARO decisions and reconsideration, appeal to the WSIAT and reconsideration, court challenges and, finally, requests to the Ombudsman. If these are not enough, the workplace safety and insurance scheme now allows access to the Fair Practices Commission and provincial Members of the Legislature which are part of the current WSIB/WSIAT appeal process.

The changes to the WSIB dispute resolution and appeals process should address rationalizing the multiple levels of appeal while ensuring consistency in rendered decisions. One method available to the WSIB is to introduce more restrictive reconsideration policies. One practice that must be eliminated is using a reconsideration application as a way to meet and/or extend an objection/appeal time frame. The WSIB is well aware that in cases where the appeal time frame has not been met representatives have been known to request a reconsideration in order to establish a new decision date from which the “clock” for an objection/appeal process can be applied anew.

It is recommended that the objection/appeal time frame should commence from the original date of the WSIB decision and not from the date of the reconsideration decision, unless specified and unusual circumstances exist.

7. Consistency

In the development of a new dispute resolution and appeals process the WSIB should be guided by the policies and procedures already adopted by the WSIAT and the courts.

In particular, the WSIAT has instituted a dispute resolution protocol which, in my opinion, has been effective in both expediting decision making and reducing the number of subsequent hearings. As the WSIB moves to change the dispute resolution and appeals process over the next two years it is recommended that the next step in an expanded consultation process should be for the WSIB to include in a Discussion Paper an analysis comparing the WSIB, WSIAT, and court practices and procedures and solicit opinion from external stakeholders on how utilize the best features of each regime.

8. Timeliness, Completeness and Decision Communication

The value for money audit report states that there are delays in the appeal implementation process noting that Case Managers have 30 days to implement a decision by the ASD or the WSIAT. The issue is not simply timeliness it is also a paucity of communication with the workplace parties. Our records indicate that on WSIB claims we received written correspondence pertaining to appeal implementation on less than 1% of our cases. Along with timeliness of decisions comes the requirement for timeliness and completeness of WSIB appeal implementation decisions. Currently, to learn of the WSIB implementation decision our resource is the monthly Accident Cost Statement which is one (1) month delayed from the date of a WSIB decision.

D. WSIB Consultation Document

D.1 Recommendation 1.1

Recommendation 1.1 considers establishing expertise in ADR within front-line decision-makers and the ASD to provide early resolution and reduce the volume of cases going to appeals.

Response:

The recommendation for enhancing the WSIB role in ADR is supportable in principle. However, it is my opinion that a mediation-arbitration model is inconsistent with the Workplace Safety and Insurance Act.

The ADR model adopted at the WSIAT may serve as a more appropriate model for the WSIB insofar as it focuses on mediation. The WSIAT process is more consistent with the value for money audit report recommendations. At the WSIAT, a dedicated ADO is involved in cases pursuant to WSIAT guidelines. If a mediated settlement occurs the ADO prepares a settlement document which is jointly signed by the workplace parties and forwarded for consideration and confirmation by a Vice Chair.

It is recommended that the WSIB adopt the WSIAT process which is largely identified in the consultation paper (page 2, recommendation 1.1, paragraph 1-2).

It is recommended that given the professional requirements for mediation that a separate WSIB operating area should be established for this purpose. Current front-line eligibility and claims managers should not be tasked with a mediation role.

We agree with the value for money audit report recommendations that dedicated mediation staff at the WSIB should be provided with ADR training and accreditation with requirements for continuing professional education.

In keeping with our recommendation that the WSIB adopt the WSIAT mediation process, we oppose the recommendation from the value for money audit report which states that if the parties are unable to reach an agreement then the mediator becomes the arbitrator and can issue a binding decision. It is recommended that if a mediated settlement cannot occur, as with the WSIAT process, then the matter should be referred to the ASD and decision making would follow established WSIB appeal practices and procedures.

While a mediation model would appear well suited to issues where the workplace parties disagree on entitlement and benefit issues, the WSIB must list those issues for which mediation does and does not apply. We can envision mediation applying to claims entitlement, health care, non-economic loss, and return to work. It is less likely that mediation should apply to employer revenue/financial issues where the parties to an issue in dispute are the employer and the WSIB.

We agree with Recommendation 1.1 which states that ADR and appeals should only start once the workplace parties have clearly documented the reasons for an objection, why a WSIB decision should be changed and the proposed remedy.

With respect to appeals, the value for money audit report recommended an electronic form submission method which only allow forms with complete data fields to be submitted. This recommendation is correct to the extent that it identified the need for better and more complete information from the parties. However, the issue is not solely completing the fields of the form. Rather the WSIB must ensure that the appellant provides full and complete information and not allow the appellant to merely submit a form to meet the minimum requirements of the appeals system and to enter the appeals "queue". When this occurs, insufficient information is provided to justify an appeal. The purpose by the appellant is to merely register an appeal and not to proceed with an appeal.

The completion of an appeal form which does not provide full and complete information should be rejected and returned to the appellant with a fixed and final time frame of 30 calendar days with which the appellant must comply for the appeal to be accepted and processed by the WSIB.

Legislative processes do not guarantee that an appeal will be automatically accepted. Rather, the Act provides for a right to appeal. The value for money audit report failed to address this issue. The WSIB has traditionally not exercised the authority to reject an appeal due to the incompleteness of a ARF. The WSIB has, we note, rejected an appeal where the appeal time frame is not met.

It is recommended that as part of the changes being considered for the dispute resolution and appeal process that the WSIB consult with the Ministry on the issue of "right to appeal" and seek consistency with the practices of the Ontario Human Rights Commission and the courts who do not automatically accept this matter in law.

We agree with Recommendation 1.1 which states the WSIB should adopt set time frames for the reconsideration process.

The consultation paper has identified that the reconsideration process starts with contact between the WSIB and the appellant after an initial decision has been rendered. As a positive customer service initiative decision letters invite the workplace parties to contact the WSIB decision maker for discussion, explanation, etc. It is recommended that this is a vital component of the WSIB adjudicative system and should continue.

However, it may be prudent to include in the initial decision making letter, which typically states the next appeal time frame and provides a WSIB envelope, with a stated time frame of 30 days during which the parties are invited to contact the initial decision maker.

With respect to the current legislative time frames of 30-days for RTW and 6 months for other issues in dispute, we do not recommend any changes and certainly do not recommend shortening these time frames. The WSIB has received numerous stakeholder responses in this regard which caution against changes based on the realities and pressures facing the workplace parties and their representatives. We understand the public position taken by worker representatives and especially those from the legal aid community. If the WSIB proceeds to shorten the time frames for appeal then, obviously, amendments to the Act must proceed these changes. The WSIB must also address concerns from the worker/labour/union community taking the position that the value for money audit report would negatively impact their constituency.

The Ontario Federation of Labour in "Give Workers A Chance for Rightful Compensation" stated:

> "Here are just three examples of how it could impact workers and their representatives:
> Introduces three time limits for injured workers within a 90 day period
> Cuts the time limit from six months to one month to object to a WSIB decision
> Reduces the amount of time for injured and ill workers to secure legal representation."

In our opinion, these concerns equally reflect issues for the employer community.

D.2 Recommendation 1.2

Recommendation 1.2 suggests a one-year time limit after the initial decision date for ARF forms to be submitted with the parties providing appropriate information to facilitate moving ahead in a timely fashion. The consultation paper states that currently there is no time limit for submitting the ARF.

Response:

As an employer representative I am party to significant time delays in the ARF process. The purpose of our response is not to identify the source of this delay but to emphasize that a more timely and final appeal process would benefit the parties.

Any action to reduce the time frame allowed for the submission of the ADR form is to be supported.

The one-year time frame appears to be reasonable.

It is recommended that the starting date for this change, unless prohibited by legislation, should commence at a time when the WSIB can implement the change after having amended current policy, obtained Board of Directors approval, and communicated with the parties which we submit would be well into 2024.

The consultation paper proposes a change as of January 1, 2024.

Regardless of whether the WSIB is considering applying changes in the time frame to new and/or existing appeals it is our opinion that January 1, 2024, may be too ambitious.

It is recommended that a change occur no earlier than January 1, 2025, which would apply to all appeals submitted on or after January 1, 2025.

It is further recommended that appeals in the system prior to January 1, 2025, would continue to proceed under the system in place at the time.

In so doing, the WSIB could avoid dealing with appeals already in process and thereby overwhelming a new system.

D.3 Recommendation 2.3

Recommendation 2.3 considers establishing criteria for types of hearings.

Response:

It is recommended that the ARF form may need to be changed to solicit information on the hearing preferences of the parties for an in-person, electronic, or written hearing.

The distinction between an in-person and electronic hearing would obviously be the location for the scheduled hearing: at a WSIB office or electronically from any location.

It is recommended that the parties should continue to be given the opportunity to offer a preference for the type of hearing as part of the ARF. The WSIB must retain the authority to determine the type of hearing to be convened. We have experienced no difficulties with the current WSIB determinations as to the type of hearing and have not been involved in a single instance where the parties so disagreed with the WSIB determination that a procedural matter needed to be addressed.

To be consistent with the WSIAT procedures it is further recommended that the WSIB review the approach taken at the WSIAT and, wherever possible, adopt the same criteria for types of hearings.

D.4 Recommendation 3.1

Recommendation 3.1 considers making a RTW decision within a 30-calendar day time limit should be prioritized and expedited through the appeals process.

Response:

The consultation paper explains the current approach adopted by the WSIB.

It is recommended that the WSIB continue to adopt an expedited approach if the sole issue in dispute is RTW.

The WSIB is now considering adopting a 30-day expedited approach where there are RTW and multiple issues in dispute. In our opinion, while the intention of this change may be to expedite decision making for all issues in dispute it is problematic for a variety of reasons.

Non-RTW issues may be complex or complicated and require additional time for the parties to acquire new information and make further submissions (e.g. additional medical opinion).

The WSIB does not control the number of issues which may be appealed by the appellant.

The danger in combining appeals may be possible unintended delay of a RTW decision where an appellant continues to establish new issues in dispute thereby pushing issue resolution forward in time and delaying the RTW portion of the issues(s) in dispute. If this occurs it could place the worker in financial hardship and the employer in the difficult position of experiencing productivity challenges if the position must remain open but unoccupied pending the WSIB decision.

Where non-RTW issues do not impact the RTW issue(s) in dispute then we recommend no combination of issues. The RTW issue should alone be adjudicated as quickly as possible.

D.5 Recommendation 4.2

Recommendation 4.2 considers excluding decisions based on standardized calculations from the WSIB internal appeal process and should be appealed directly to the WSIAT.

Response:

Any change in this regard must be consistent with the application of the Workplace Safety and Insurance Act.

In our opinion the current legislative regime governing decision making and the appeals process should apply to all decisions of the WSIB which when rendered in written form and in a timely manner would only then be appealable to the WSIAT.

E. KPMG Value-For-Money Audit

The Executive Summary to this report starts by stating:

> "Through our review of the WSIB's Dispute Resolution and Appeals Process, we have concluded that the process currently demonstrates "low" value for money."

The report focuses on fragmentation of appeals, unnecessary administrative delays, lack of timeliness, lack of effective and accountable quality assurance processes and the litigious nature of decision making. Most notable is the finding that the average appeal time line for 2021 was in excess of 200 days.

Our chief concern is that neither the value for money audit report nor the WSIB consultation document provide guidance nor addresses quantitatively how the proposed changes would result in a more favorable value for money evaluation.

E.1 The relationship between the audit findings and the WSIB consultation document

The WSIB has chosen to consult on a narrow set of recommendations from the audit report. It is recommended that the WSIB broaden the substance and timing of the consultation process currently under way to allow stakeholders to raise additional areas of concern and to provide recommendations for change.

For example, the audit report (page 7) stated:

> "Our executive summary and main body of this report refers to the need to implement a Quality Assurance (QA) Function within ASD."

This recommendation is so central to any system changes that it is hard to understand why it was excluded from the consultation document.

The value for money audit report provided many key recommendations of which only a small number were included in the WSIB consultation document.

E.2 Failure of the value for money audit and WSIB consultation document

There is no indication in either the value for money audit report nor the WSIB consultation document as to how and in what measure the various proposals for change would address the audit report conclusions and negative findings.

There is no guidance from KPMG regarding the extent of the organizational changes required to implement their recommendations.

There is no guidance from KPMG regarding the extent of the costs for implementation of their recommendations.

There is no guidance from KPMG regarding the metrics which should be established to be able to evaluate the benefits of change.

While the value for money audit report made public by the WSIB includes responses from the Board, stakeholders are never provided with an evaluation of the effectiveness of a prior KPMG value for money audit to instill confidence that their findings and recommendations pursuant to dispute resolution and the appeals process have merit.

E.3 The need for delay and ongoing/future consultation

It is recommended that the current consultation document be considered the "start" of a change management initiative for dispute resolution and the appeal process.

It is recommended that what is now required is, with Board of Directors approval, engagement in a more "standard" consultation process based on a White or Green Paper which, at a minimum, addresses the concerns provided in our response along with those issued from other stakeholders.

Stakeholders should not be asked to address a small number of WSIB-focused questions in the absence of a holistic review of the dispute resolution and appeals process. We note that a core recommendation of the value-for-money audit is the need for a holistic approach.

E.4 Value-for-money audit failures

Given our opinion that the value for money audit report failed in many respects, it is recommended that the WSIB conduct a review of the value for money audit provisions now contained in the Act.

The question to be addressed is "Is there a need for a program specific value-for-money audit?

Would the workplace safety and insurance system not be better served by a statutory requirement for periodic system-wide audits by the Auditor General of Ontario?

If it is determined that value-for-money audits are to continue it is recommended that the legislation and WSIB both ensure that future value for money audits meet the single most important criterion: what are the metrics by which to judge whether the value-for-money audit has resulted in a qualitatively and quantitatively improvement of the system and the time is appropriate to apply this condition to the current KPMG dispute resolution and appeal process value-for-money audit.

It is recommended that the WSIB engage with the Ministry with a view to considering deleting Section 168 from the Act.

A further failure of the value for money audit methodology is the absence of a comparison between the WSIB and WSIAT. This type of review would have greatly assisted in providing the WSIB and stakeholders (including the Board of Directors and Minister) with well considered process recommendations. It should be noted that the value for money audit report has a section entitled "Jurisdictional Scan – Key Discoveries" which focuses on a small number of select jurisdictions but does not consider Appeal Tribunals other than Tribunals Ontario (Social Benefits Tribunal).

Why this limited review? Why not a review of independent workers' compensation tribunals?

More to the point, the question to be addressed must be "what has been gained by the external value-for-money audit which would not have been served by a WSIB stakeholder consultation process?"

E.5 Cost of the KPMG Value for money audit

Given the concerns forwarded in our written submission, we are requesting the WSIB provide full and complete disclosure of the consulting costs and all fees, expenses, disbursements, etc. for the KPMG value for money audit of dispute resolution and appeals process.

From: Janice Martell

Sent on: Friday, July 21, 2023 3:44:21 AM

To: appealsfeedback

Subject: KPMG recommendations to reduce appeal time limits for WSIB claimants from 6 months to 30 days

---

I am writing as the founder of the McIntyre Powder Project and as the daughter of an underground miner who died as a result of occupational disease that took 9 years and the moving of mountains for WSIB to formally recognize.

There are 637 McIntyre Powder-exposed mine workers on my McIntyre Powder Project's voluntary registry to date. 287 of them have email addresses. 350 do not. Of those 287 with email addresses, a tiny fraction have access to a printer or scanner, and several do not have reliable internet service. Many have told me that they do not know how to open or download email attachments, use passwords, remember their passwords, forward documents, upload documents, attach documents, register for online services, or otherwise navigate online.

They rely on hard copy papers and Canada Post mail services as a bare minimum to allow them to have meaningful access to the WSIB claims and appeals processes.

It takes longer than 30 days for them to receive by mail, fill out, and mail back Intent to Object forms, and that assumes that the WSIB denial letter is actually mailed out on the date of the WSIB decision.

Particularly since the re-routing of mail service through a massive sorting facility in southern Ontario, mail service to northern Ontario communities has been slowed considerably, especially to some of the smaller, remote communities. At times it has taken two weeks or more for mail to travel one-way between northern Ontario communities, for example, from Sudbury to Timmins or vice-versa. Simply on that logistical basis alone, 30 days is nowhere near adequate for elderly, health-compromised workers, their exhausted caregivers or grieving widows to receive, complete, and return paperwork within 30 days. They also need help to fill out the appeal forms, and accessing that help requires far longer than the proposed 30-day appeal time would allow.

The current six-month appeal time is appropriate and must remain in place in order to provide workers or their surviving next-of-kin the opportunity to meet the time limits for appeals.

The purported rationale of the KPMG recommendations to reduce the current appeal time limit from six months to 30 days is that doing so will reduce appeal backlogs and wait times. Admittedly, functionally barring workers and their dependents from proceeding with appeals because of an unreasonable time limit for the appeal will reduce the number of claims that proceed to appeals, and to that end, it will reduce the appeals backlog – on the backs of those workers and their families. If the WSIB wishes to alter their processes to meet their stated goal of reducing appeal backlogs and wait times, I respectfully suggest that they utterly reject the KPMG recommendation to reduce appeal time limits from six months to 30 days, and instead turn their focus to making claim decisions that do not result in the need for appeals.

Respectfully submitted,
Janice Martell

Northumberland Community Legal Centre

(Funded by Legal Aid Ontario)
The Fleming Building, Suite 301
1005 Elgin Street West
Cobourg, Ontario K9A 5J4
Phone (905) 373-4464 Fax (905) 373-4467
1-800-850-7882

Lois Cromarty, Executive Director
Peter Vance, Community Legal Worker
Sharee Bhaduri, Precarious Employment Outreach/Lawyer

Sarah Cooling, Staff Lawyer
Marisa Conlin, Community Legal Worker
Jordan Tilley, Community Legal Worker

July 10, 2023

Grant Walsh, Chair
Workplace Safety and Insurance Board
200 Front Street West
Toronto, Ontario
M5V 3J1

By email: Corporate_SecretarysOffice@wsib.on.ca

Dear Grant Walsh:
Re: Dispute resolution and appeals process value-for-money audit consultation

I work for a community legal clinic that provides legal services to low-income and vulnerable members of our community, including injured workers with WSIB claims. I have represented low-income injured workers since 1986. I am certified as a specialist in Workplace Safety and Insurance law by the Law Society of Ontario. I am also a co-chair of the Ontario Legal Clinics Provincial Worker's Compensation Network (the "Network").

The Network has already made a submission to the WSIB on the KPMG Value for Money audit of the appeals process. I endorse the requests made in that submission and those made by other injured worker advocates in the community legal clinic system.

To say that we, collectively as injured worker advocates, have serious concerns about the findings and recommendations of the value-for-money audit and the proposed changes in the WSIB appeal process is a massive understatement. Further, the need for the KPMG-proposed "solutions" is not borne out by the facts. The proposals to drastically reduce the time for workers to file objections and appeals and to submit medical or other evidence are not required as it is not the injured workers who are causing delays in the appeals system. Rather, it is the WSIB adjudication and decision-making system that lies at the heart of any delays and inefficiencies in the appeals process. This is clearly explained in the Network submission and borne out by the WSIB statistics themselves.

One has to ask: what serious problem in benefits administration is being addressed by the proposed tighter deadlines for appeals and the submission of evidence? Who will benefit from such changes, and who will bear the costs?

In my opinion, it will be injured workers who are on the losing end of the implementation of the proposed "solutions". The reality is that it is not possible to get a request for additional medical evidence out to a treating physician and to get a response back within 30 days. That means that appeals from injured workers will be adjudicated without the benefit of

supporting medical evidence. How would this be fair? Changes to administrative procedures cannot come at the expense of the fair and just adjudication of workers' claims.

The proposed changes, if implemented, would have a sweeping impact on the WSIB appeal process and should be the subject of a robust public consultation process. However the consultation period is very short, announced on June 9 and ending on July 21, 2023.

Those most affected by the proposed changes, i.e. injured workers, do not know about the audit, the proposed changes or how it will affect them and/or will not be able to participate meaningfully in a consultation that is being conducted online by written submissions only.

We are writing to seek the following:-

1. **Time**: Extend the public consultation period by at least 6 months
2. **Public** meetings: Hold in-person public meetings across the province with workers
3. **Notice**: Notify all Injured Workers of the proposed changes and consultation opportunities.

In view of the very short timeline for public consultation, we request your response well before the deadline of July 21, 2023. In particular, please confirm in writing whether the public consultation period will be extended by no later than **July 14, 2023**.

Yours truly,

Lois Cromarty (NCLC)
Barrister and Solicitor
Executive Director

Cc:

- Hon. Monte McNaughton, Minister of Labour, Immigration, Training and Skills Development, 400 University Ave., 14th Floor, Toronto, ON M7A 1T7
  Email to: Monte.McNaughtonco@pc.ola.org

- appealsfeedback@wsib.on.ca

From: Sue James
Sent on: Friday, July 21, 2023 4:43:47 PM
To: appealsfeedback
Subject: Submission to KPMG audit on Appeals

OCCUPATIONAL DISEASE REFORM ALLIANCE SUBMISSION

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

I am a member and chair of the Occupational Disease Reform Alliance (ODRA).

ODRA is a province wide alliance of occupational disease victims, family members, widows/widowers, trade unionists, and health & safety advocates and representatives who have been advocating for much needed reforms to our current broken WSIB system which is far from what was originally conceived by the Meredith Report (1913). Workers gave up the right to sue their employer for the right to a fair and just compensation system.

ODRA along with many of our partners in the injured workers community are concerned about the most recent recommendations set out by the KPMG- Dispute resolution and Appeals process audit and seemingly widely accepted by the Board. I also would note that there was a list of “External Stakeholders” who were questioned by KPMG and asked to submit their concerns and recommendations but it would appear that the voices of said stakeholders were largely ignored in that I do not see their voices reflected in any of the recommendations. For years now workers have borne the burden of long wait times, claims information lost within the WSIB processes/policies, multiple adjudicators, delays in getting medical support and more. Most suffering from an occupational disease will die before their cases are resolved due to the complexities at issue. I find it troubling that the WSIB has embraced the KPMG audit which has not addressed the moral and integral issue, but rather the Value for Money Methodology, Approach and Rating Scales: See below

Our approach defines a value for money audit as “an independent, objective and systematic review of a program, activity or function designed to assess the extent to which the pre-determined goals of the program, activity or function are being achieved and the economy, efficiency and effectiveness of the processes and activities through which the organization attempts to achieve these goals.” Three principles underlying our value-for-money audit approach are:

- Economy: This principle relates to the minimization of the cost of resources used for the processes and activities used to achieve objectives taking into account the quality of the goods or services delivered. In addition, this principle focuses on the soundness of the administration and management of these resources and the extent to which such administration and management is consistent with relevant corporate policies and procedures and legal and/or regulatory requirements and constraints

- Efficient: This principle relates to relationship between the goods and services produced or delivered and the resources used to produce them. The efficient organization produces the maximum output from any given set of inputs, without sacrificing the quality of that output

- Effective: This principle relates to the extent to which the organization achieves its pre-determined objectives and the extent to which the actual impact of the program or activities in question is consistent with the intended impact

The KPMG guiding principles of Economy, Efficiency and Effectiveness would work well to bring a product to market, however they do not address the problem of the Appeals Process. Restrictive timelines for appeals and adjudication in the name of efficiency only puts more pressure and burden on the worker and their representatives to effectively address and submit their claims objections at a time when they are at their most vulnerable.

In the interest of fairness and equal justice under the law, ODRA supports and adopts the numerous comprehensive commentaries/submissions put forth by advocates for workers in the injured and ill community and would respectfully request that WSIB strongly reject the proposed recommendations to the dispute resolution and appeals process contained in the KPMG audit(VFMA).

Sincerely,
Sue James
ODRA Chair and Member

July 20, 2023

WSIB Appeals Services Division
appealsfeedback@wsib.on.ca

Dear WSIB Appeals Services Division,

Re: Dispute resolution and appeals process value-for-money audit consultation

The Office of the Employer Adviser (OEA) appreciates the opportunity to provide feedback on this WSIB consultation regarding the Board's dispute resolution and appeals process.

Recommendation 1.1 questions

The OEA supports the use of mediation in appropriate cases to resolve issues as early as possible in the process. Employers generally prefer to have a more timely and efficient resolution of the issue(s), which can be one of the benefits of mediation.

The OEA suggests that cases that are most appropriate for mediation are those where there is a clear opportunity for the parties to compromise. For example, certain return to work issues would be well suited to mediation if the parties are willing to actively engage in the process. Additionally, circumstances where both parties have issues in dispute may also be well suited to mediation if there is the potential that each party may agree to drop their objection (or objections) if the other party does the same.

Another suggestion the WSIB may wish to consider is offering a case conference prior to the hearing. This may be an opportunity to make the appeals process more efficient in situations where mediation is not appropriate for the issue(s) in dispute or where the parties do not wish to participate in mediation.

If mediation does not resolve the issue(s), it is suggested that deciding whether an oral hearing or a hearing in writing should be used is something that should be determined based on the type of issue(s); in other words, whichever hearing method (written on oral) would normally be used for that type of issue should generally be the guiding factor to determine the appropriate hearing method if the mediation is not successful.

With respect to the timeframe for mediation, it is suggested that 45 calendar days from the time that both parties receive access to the file would be appropriate. Both parties to an appeal will need to have obtained access to the file and had an opportunity to review the file to participate

in mediation, and sometimes there are delays in parties receiving access. Also, given that some files can be large and complex with multiple issues, it is suggested that 45 days from the time that both parties receive access would be a more reasonable timeframe than 30 days to give parties a bit more time to obtain representation if they wish to do so and give those representatives sufficient time to review the file so that both parties can meaningfully participate in the process.

It is suggested that if the WSIB is using alternative dispute resolution to resolve disputes, this should be done by a specialized and dedicated team that has received significant training in alternative dispute resolution.

The OEA supports the recommendation that the alternative dispute resolution and appeals processes should only start once the objecting party has clearly documented the reasons for their objection (why the decision is incorrect or should be changed) and what outcome they are seeking. We suggest the Board consider providing a resource or point of contact for parties who have questions about how to fill out the forms correctly.

Recommendation 1.2 questions

The OEA suggests that if the WSIB implements a new one-year time limit from the date of the decision to submit an appeals readiness form (ARF), appeals that were filed prior to the introduction of this new time limit should have one year from the date that the time limit is introduced to submit an ARF.

In addition, the OEA suggests that this time limit to submit an ARF should be extended by the WSIB in appropriate cases. Parties should be given an opportunity to indicate that they are not ready to proceed, the reason(s) why they are not ready to proceed, and how much additional time they will need to be ready. For example, in addition to the current criteria considered by the WSIB for time extensions, we suggest that the appellant may need more than 1 year from the decision date to be ready to proceed with their appeal if:

- there was a delay in receiving the WSIB decision that is being objected to;
- there was a delay in receiving access to the file;
- there is a reasonable delay in obtaining medical information that is relevant to the appeal;
- the parties are awaiting another decision from the WSIB's operating area regarding the same claim, and it would be beneficial to have both issues heard together on appeal so the claim can be considered more holistically; or
- a party is pursuing issues related to the same claim in another legal proceeding (e.g., at the Human Rights Tribunal of Ontario).

The OEA suggests that January 2024 is likely too soon for a start date. We suggest the start date should be at least 6 months from the day on which the WSIB communicates this change to workers, employers, and the broader stakeholder community. An appropriate start date would be one that would give sufficient opportunity for the Board to notify parties of this change in process and give parties sufficient time to obtain the information they will need and retain legal representation if they wish; legal representatives will also need sufficient time to prepare their cases.

We are wondering how the Board intends to notify parties who filed an Intent to Object Form or Objection Form (ITO) in the past but never submitted an ARF that there is a new time limit that will apply? Many appellants would have received advice from representatives in the past that there was no time limit to proceed.

In addition, we would suggest that if the appellant filed their ITO when there was no time limit to submit an ARF, and the appellant did not have notice that this new time limit was being introduced, this should be a relevant factor weighing in favour of extending the time limit to file an ARF in cases where this new time limit was not met.

Recommendation 2.3 question

The OEA suggests that in addition to situations where accessibility or technological challenges may support the need for an in-person oral hearing, in cases where both parties agree that the oral hearing should be held in person (or in the case of a single-party appeal, if the appellant requests it) the WSIB should strongly consider providing an in-person hearing when that is the wish of the affected parties.

Recommendation 3.1 question

The OEA suggests that if there are multiple issues in an appeal and the return-to-work issue(s) is/are being expedited, that any other issue(s) that are ready to proceed (i.e., an ARF has been filed for the other issue(s)) should be included in the expedited process as this would likely be more efficient and effective for both the WSIB and the parties.

Recommendation 4.2 questions

The OEA supports the option for a party to request that the WSIB exclude a decision (or decisions) from the Board's internal appeals process to pursue the holistic resolution of the issues for the person or business at the Workplace Safety and Insurance Appeals Tribunal (WSIAT).

The OEA also supports excluding a decision (or decisions) from the Board's internal appeals process where both parties (or the appellant in a single-party appeal) wish to have the operating-area decision treated as the final decision of the Board so they may pursue an appeal at the WSIAT more quickly.

We hope the WSIB will find the above comments helpful. Please let us know if you wish to discuss.

Best regards,

S Adams

Susan Adams
Director, Office of the Employer Adviser

Cc. Robin Senzilet, General Counsel

WSIB Dispute Resolution and Appeals Process Value-For-Money Audit Consultation

Submissions of the Office of the Worker Adviser

July 21, 2023

Office of the Worker Adviser
123 Edward Street, Suite 1300
Toronto, ON M5G 1E2
Tel. 416-325-8570 / 800-435-8980

Office of the Worker Adviser

Submissions of the
Office of the Worker Adviser

I. Introduction

This submission is the Office of the Worker Adviser's response to WSIB's invitation to answer questions regarding the implementation of recommendations made by KPMG in the recent value for money audit of the internal appeals system (VFMA report). We appreciate the invitation to provide feedback.

The Office of the Worker Adviser (OWA) is an operational service agency of the Ministry of Labour. The OWA's statutory mandate is to "educate, advise and represent workers who are not members of a trade union and their survivors."[1] Since its inception in 1985, the OWA has and continues to represent more injured workers and survivors in their WSIB claims than any other organization in the province.

We are concerned that the consultation document has invited comments on a narrow set of questions concerning how the KPMG-recommended changes will be implemented rather than on whether the changes are advisable at all. Our submission goes beyond the questions posed by the consultation document to address the proposed fundamental changes to the appeals system. We welcome further dialogue with the WSIB about these issues.

II. Overall Concerns about the VFMA Report and the WSIB's response

VFMAs vs. consultations

Over time, the results of value for money audits (VFMAs) have taken on a larger role in our workers' compensation system, supplanting the role of public consultations. In our view, this is wrong-headed and unfortunate.

VFMAs are neither public nor transparent. They are not conducted by experts, lack detail and rigour and lack legitimacy in the eyes of stakeholders. KPMG's report on the internal appeals system reveals a misunderstanding of basic concepts, including the duty of fairness required in administrative justice systems.

Public consultations formerly played a larger role in the WSIB's changes to policy and procedure. Consultations are an effective tool: they are public and transparent, involve knowledgeable participants, and offer concrete proposals. As a result, stakeholders have greater confidence and an increased sense of the legitimacy of the exercise. The consultation

[1] *Workplace Safety and Insurance Act, 1997,* SO 1997, c 16, Sch A, s 176(1) [WSIA].

process is a better process for our complex workers' compensation system as it affects peoples' rights and entitlements.

In contrast to the VFMA process, the last time that the WSIB undertook an overhaul of the internal appeals system was in 2012 with the Appeals Modernization public consultation. The consultation paper was available in June 2012 and submissions were due in October 2012, giving those who wished to make submissions about four months to consider and respond to the proposals. Submissions were invited on all aspects of the proposed changes. In contrast, this time, the consultation was announced in early June, giving those interested just over a month to respond and the invitation was limited to questions about implementation of changes.

KPMG is a consulting firm, not subject-matter experts. In our view, the WSIB should take a more critical view of their recommendations. While the *WSIA* requires the WSIB to conduct yearly value for money audits, there is no requirement that the WSIB implement the changes that are recommended by the auditors. We recommend that the WSIB reconsider implementing the report's proposed changes as they are not the solutions to the problems identified with appeals.

Issues and solutions identified by the VFMA report

The VFMA report says that the main problem with the internal appeals system is that it takes too long. It identifies fragmentation of appeals, lack of timelines for registering an appeal and the litigious nature of the appeals process as impeding the efficiency of the system.

Their most significant recommendation—that a one-year time limit be instituted for the ARF—would dramatically speed up the timeline for many appeals. Ultimately, this would make the appeals system less efficient. In most cases it would render the internal appeals system a useless step as parties would be forced to proceed even though they did not have time to adequately prepare. At worst, it will lead injured workers to abandon their appeals out of frustration at the unfairness and complexity of the process. In the long run, it will speed cases along to the Tribunal prematurely, where workers will face longer waits for hearings as the Tribunal's backlog of appeals dramatically increases.

Appeals often take a long time due to fragmentation. Appeals are fragmented because decision-making at the operating level is fragmented: different decision-makers issue separate decisions on multiple issues and at different times. Extensive delays in the medical system also hold up the obtaining of evidence necessary for full and fair adjudication of issues, such as accurate diagnoses or medical reports. A rigid approach to time limits and restriction of the AROs' jurisdiction means that cases cannot be decided holistically as issues are excluded.

Artificially accelerating appeals system timelines will exacerbate fragmentation in appeals by pushing individual issues before related issues are decided. The overall resolution of a case will still take substantial time as it will require more hearings, not fewer.

The WSIB's stated goals for internal appeals

The VFMA report includes the following comment from the WSIB about their goals for the internal appeals process:

> The WSIB is committed to continually streamlining ASD's processes and services to
>
> a. improve and simplify overall accessibility, including access to justice;
> b. provide personalized service and an enhanced customer experience;
> c. provide quality services in an accessible, convenient and timely manner; and
> d. ensure decisions are fair, transparent, evidence-based and based on a holistic approach that promotes decision finality.[2]

We agree that these are desirable goals.

The WSIB proposes to adopt a number of the VFMA report's recommendations:

- Adding a mediation-arbitration process;
- Imposing a one-year time limit on the ARF;
- Creating criteria for in-person or online hearings;
- Expediting 30-day return to work decisions;
- Enforcing the 30-day decision implementation expectation; and
- Excluding certain types of decisions from the appeals process

None of these recommendations will meet the WSIB's goals of improving access to justice, quality of service and quality of decision-making. A mediation-arbitration-type process would only work in a small number of cases. The one-year time limit on the ARF will force parties to start the appeals process sooner, but it will result in poorer quality of decision-making at the ARO level as cases that are not ready for hearing will be forced ahead, leading to more appeals to the Tribunal. Expediting return to work decisions will continue fragmentation of decision-making. Enforcing the 30-day decision implementation guideline may improve one aspect of quality of service (speed) but will not ensure correct implementation. Excluding some decisions from the appeals process eliminates access to justice altogether.

[2] VFMA report, p. 30

III. Our recommendations for improvement to the system

The Board should use its investigative powers

In the past, the Board would exercise its investigative powers by interviewing witnesses and requesting additional medical information from healthcare providers. Over the past 15 years, the Board has, to a large extent, stopped investigating claims. The burden and cost of gathering evidence has been shifted onto workers.

If the Board returned to its role in gathering evidence, quality decision-making would occur earlier in the life of a claim. Often the relevant evidence is not obtained until a worker retains a representative and the representative identifies the additional information required.

Improve the quality of operating-level decision-making

The biggest driver of the number of appeals is the poor quality of decision-making at the operating level. In 2021, 35% of workers' appeals were allowed or allowed in part by the ASD and upwards of 70% of workers' appeals were allowed or allowed in part by the WSIAT.[3] Making correct decisions at the first instance will decrease the number of appeals.

Decision-making could be improved by ensuring more complete evidence is on file (as described in the point above). In addition, it is our experience that operating level decision-makers tend to ignore or reject the opinions of treating doctors over those of Board medical consultants. Training decision-makers to properly assess the opinions of treating doctors and do a more critical review of the medical consultant's opinion would also improve front-line decisions.

When a worker claims unemployability, we have come to expect that we will have to take the appeal to the Tribunal. Unemployability is close to impossible to win at the Board, even when clearly supported by medical opinion. As we understand it, operating level decision-makers face substantial disincentives to allowing full LOE benefits. Making decisions based on cost, rather than the evidence, leads to incorrect decisions. Decision-makers should be given the discretion to make the decisions the evidence supports.

Finally, if Board decision-makers followed the Tribunal's interpretation of the legislation and policy, there would also be fewer appeals. In our system, the Tribunal is the authority on the interpretation of the law and the Board ought to adopt the same interpretations. This would result in fewer appeals to the Tribunal and improve the overall efficiency of the system.

[3] These numbers are from "Decision Outcomes for Worker Appeals, 2000 – 2021," a document produced in response to a FOI request, attached.

The role and powers of the ARO

Our appeals system was conceived as an inquisitorial rather than adversarial system. To this end, the ARO should take a more active role in an appeal. AROs should talk to the parties before the scheduled hearing to identify and solve problems in advance. For example, if the ARO notes that evidence on a point is missing, the party would then have a chance to obtain that evidence prior to the hearing. In two-party appeals, this could happen in a case conference in order to preserve the integrity and transparency of the process. In the past, this was a common practice.

AROs should also explore opportunities to narrow the issues in dispute by talking to the parties in advance. The ARO then would have a good understanding of the whole file and the issues and would be best placed to decide whether the hearing should proceed in writing, by an in-person oral hearing or an online oral hearing. Again, this used to be done.

AROs should take a broader view of their jurisdiction[4] in order to fairly decide the issue in the appeal before them. An example provided in the draft ASD P&P is that if the worker has appealed the reduction of their LOE benefit following the closure of work transition, but not the original SO decision, the ARO may take jurisdiction over the issue of the suitability of the SO. This will decrease the number of appeals as workers will not have to place appeals on hold while they request time extensions. It will allow system resources (representatives and decision-makers at the Board and Tribunal) to focus on the substantive issues in claims and shorten the timeframe for resolution.

Previously, the ASD P&P specifically allowed AROs to consider the benefits flowing from their decisions. This aspect of the AROs jurisdiction is not in the 2020 version of the ASD P&P. AROs should have the authority to decide the "benefits flowing" from their decision in order to avoid the ping-ponging of the claim between the ASD and the operating level. So long as there is sufficient evidence in the claim file to make the further decision, the ARO should do so. This will make appeals more efficient as the file will not then have to return to the operating level for another decision but will instead proceed to implementation.

Allowing a right of reply in the written hearing process

Currently, when an appeal is heard in writing, the parties do not have a right of reply to the other party's submissions. This makes for an unfair and inefficient process that does not match the process in an oral hearing.

Allowing a formal right of reply allows for focused arguments and the efficient use of resources. It ensures fairness by making sure parties can address evidence and arguments raised by the

[4] This is a complicated issue that will be discussed more fully in the OWA's submissions to the ASD P&P consultation. Taking an overly broad view of jurisdiction has the potential to create unfairness.

other side and does not force a party to anticipate the other side's arguments. This is standard practice at the Tribunal.

Streamlining the reconsideration process

Currently, whenever a party submits an ITO or a new piece of evidence, the case is reconsidered at the operating level. This process often delays scheduling a hearing at the ASD and places a burden on the WSIB's operating level staff to repeatedly review decisions. It does make sense to reconsider a decision when an unrepresented worker submits new evidence. In cases of represented workers, we recommend that reconsiderations at the operating level be done at the request of a party rather than automatically.

This is not an exhaustive list. We welcome further consultation on ways to improve the internal appeals system.

IV. Group 1 Questions: Alternative Dispute Resolution

The Report recommends using mediation and mediation-arbitration at both the operating level and at the ASD and uses the Alberta WCB system as an example. The consultation document suggests that the Board is considering the mediation-arbitration model used in family law cases in Ontario. The Alberta WCB process and the Ontario family law mediation are quite different models.

Ontario's family law mediation-arbitration model recommends that both parties have legal representation throughout the process. A neutral third party is chosen by the opposing parties as the mediator. At the outset, the parties decide whether the mediation will be "open" (what is said in mediation can form part of the record) or "closed" (contents of the mediation remain confidential) and whether they will proceed to arbitration or to trial if mediation fails.[5]

Family law-style mediation-arbitration does not map onto our system. The central premise that the opposing parties are choosing a mediator they both trust would be absent; the worker and employer do not get to choose a neutral third party to mediate their dispute. With a Board decision-maker acting as mediator, there is no option to keep what is said in mediation confidential. Given the proposed expedited timelines, it is unlikely that most workers would obtain representation. The key components of mediation in the family law context are missing in the workers' compensation context.

Caution must be used when including mediation as part of dispute resolution. Mediation is open to abuse as the weaker party may be pressured into accepting something against their interest. In Ontario's family law mediation program, the mediator is to meet with the parties prior to ensure that the parties have equal negotiating power. Given the proposed expedited

[5]https://www.ontario.ca/page/family-mediation

timelines for re-employment issues, most workers would be unrepresented and the resulting power imbalance would create an unfair process with unfair outcomes.

The VFMA Report refers to the practices at WCB Alberta as an example of mediation and early dispute resolution. This is a mischaracterization of the Alberta approach. Alberta WCB staff at both the operating level and at the review level do not engage in what is considered "mediation" in the legal sense. It is better described as an "inquisitorial" model of decision-making.

To commence a "review" in Alberta (the "review" level is the internal appeals process), the worker may fill out an online form or write to the Board identifying the decision they want reviewed. The form asks for the date of the decision, the issue, why the decision should be changed and the desired result. But using the form is not mandatory nor do they appear to have mandatory contents for the request letter other than identifying the decision. On receiving the review request, the operating level will contact the party to explain the reasons for the decision and discuss the reasons for objecting. The worker is referred to the worker advisor office for legal advice. The wait time for service from the advisory office is three to four weeks. If the worker or worker advisor identifies gaps in evidence, they point it out to either the operating level or the Resolution Specialist (equivalent to our Appeals Resolution Officer) and the WCB will investigate, by talking to witnesses or requesting more information from healthcare providers. If the worker is waiting for a specialist appointment or report, the request for review is put on hold. The Resolution Specialist will follow up every six months about the status of the additional evidence.[6]

If the matter is not resolved, there is a hearing conducted by a Resolution Specialist. The hearing may be in-person, by video conference or by writing. The hearing is informal, beginning with the appellant's presentation, followed by the respondent. The Resolution Specialist will then ask questions of the parties and their representatives. The hearing, while informal, is not a mediation or a mediation-arbitration; there is no negotiation.

Alberta's Resolution Specialists are trained in alternative dispute resolution. "Active listening" is a key component of that training and they bring that skill to hearings.[7]

There are strengths to the Alberta example: the operating level assists the worker in identifying the issue in dispute by explaining the decision and the reasons for it and, if there is missing evidence, the Board will take steps to obtain it. The Resolution Specialist seems to take the role of inquisitor at hearings rather than mediator.

The type of "mediation" used in the Alberta system could help the WSIB's internal appeals system run more smoothly as the operating level seems to offer some assistance to the

[6] https://www.wcb.ab.ca/claims/question_claim.asp. We also spoke with a worker advisor from Alberta's Worker Advisor Office to gain a better understanding of the process.
[7] From discussion with an Alberta worker advisor.

workplace parties in articulating their objection and in obtaining evidence. The type of mediation used in Ontario family law would be applicable in a small number of appeals, where there are two opposing parties, both parties are represented and both agree to mediation.

1. What appealable issues do you think are appropriate for this mediation-arbitration model?

The consultation document identifies re-employment and co-operation issues as amenable to mediation. We can see that a type of mediation might be useful in cases where the issue is whether there is suitable work for the worker with the injury employer. We already have Return to Work Specialists setting up return-to-work meetings for that purpose. Perhaps training RTWS in alternative dispute resolution techniques, rather than setting up a separate "med-arb" process that would only be useful in a small number of appeals would be the best use of resources.

2. What principles should guide the mediation-arbitration approach? What else should we consider?

A mediation-arbitration process should be voluntary. If it is not voluntary, it is not really mediation; rather, it is merely an informal hearing without the safeguards of a proper hearing.

The worker should always have the opportunity to seek legal presentation and not be forced, unrepresented, into a dispute resolution process on an arbitrary timeline.

3. If mediation does not resolve the issue, what factors should be considered to determine whether an oral hearing or a hearing in writing should be used for the arbitration component by the Appeals Resolution Officer?

The factors used to decide whether a hearing should be oral or in writing should be the same as for other appeals at the ASD as set out in the current Practice and Procedure document. For example, if the issue is about whether the job offered by the employer is suitable and there is a factual dispute about job suitability, the hearing should be oral.

The parties should not have their right to a hearing abridged due to an informal ADR process. "Evidence" provided by a representative is not the same as testimony under oath and should not be treated as such. In addition, losing the right to an oral hearing would discourage parties from agreeing to mediation.

The concept of "fairness" is the guiding principle in determining the type of hearing that is appropriate in administrative law. When an issue can only be fairly decided through an oral hearing, an oral hearing should be granted. This decision should always be made on its own merits and not on arbitrary criteria.

4. To ensure expediency, what would be a reasonable timeframe for the mediation component? Is 30 calendar days reasonable?

The mediation process should be voluntary. If a worker chooses mediation, the worker should be told that they have a right to legal advice and/or representation if they are unrepresented. If the worker has a representative and the representative has a copy of the worker's claim file, 30 days may be adequate.

There needs to be flexibility if the worker is unable to secure representation within 30 days. In addition, if there is a need for additional medical evidence, for example regarding restrictions, the mediation component should be postponed until the evidence is obtained. Representatives also need time to prepare for a proceeding, whether it is a formal hearing or ADR, and they should be allowed that time.

5. How might alternative dispute resolution be used by front-line decision-makers? If there is a dedicated team of front-line operational experts delivering alternative dispute resolution, how much should other front-line decision-makers be trained in the approach?

The operating staff could assist parties in gaining a better understanding of the decision and reasons as is done at the Alberta WCB. The person best placed to do this would be the person who made the decision.

As explained above, the Alberta process is neither true mediation nor alternative dispute resolution. It is better described as an inquisitorial or investigative model and has more in common with the WSIB's historical approach to handling claims than ADR. The operating staff should listen, ask questions, explain decisions and obtain missing evidence. Decision-makers could be trained in this approach and encouraged to exercise the WSIB's investigative mandate.

Return to Work Specialists, who organize return to work meetings with workers and employers, may benefit from training in alternative dispute resolution.

6. What factors should we consider in making the above information mandatory to initiate the dispute resolution and appeals process?

There should be a difference between what information is necessary to register an objection and what information is necessary to initiate a dispute resolution process (i.e., commence formal appeal proceedings). To maintain access to justice and avoid a legalistic system, a minimal amount of information should be required on the intent to object form.

Our workers' compensation system is complicated. Injured workers are generally not sufficiently knowledgeable about the Act and Board policy to specifically identify or articulate all the issues in dispute. Many issues are only spotted on review of a claim file by an experienced advocate. It should be enough that the worker identifies the decision that is

disputed and perhaps why they think it is incorrect in ordinary layperson's terms. It should not be something as formal as identifying issues and the requested remedy.

To require that an ITO identify the legal issues in dispute and the legal remedy requested would add a procedural burden that could later operate to prevent the fair adjudication of the worker's claim. If the Board makes it mandatory to identify all of the issues, it suggests that, if a worker failed to identify an important issue on the ITO, the issue could not be appealed. For example, if a decision dealt with the date of injury and the amount of LOE benefits payable, the worker might only identify LOE benefits as the issue in dispute. The date of injury decision might be key to the worker's level of LOE. If the worker is barred from appealing the date of injury because of missing this issue on the ITO, it would lead to a waste of resources as the worker pursued the missed time limit.

There should not be any expectation that the worker has to know the magic words or legal jargon to describe issues or their reasons for disagreement. The Board could develop an on-line ITO that includes drop-down boxes with options to choose the main issues. The Alberta WCB has such a form and its list of issues are: temporary total benefits, medical aid, wage loss, NELP, re-employment benefits and other (please specify). The Board could develop a form that allowed people to pick LOE, NEL, health care, return to work. It should also include a checkbox for "all issues in the decisions" as the Tribunal's current NOA does.

Mandatory fields for the ITO should be minimal to avoid turning an on-line ITO, which could be a tool to make objecting accessible, into a barrier. The more there are mandatory fields, the more likely that an attempt to file an ITO will fail.

An online ITO should not be the only way to register an objection to an appeal. Many workers do not have access to the technology or the ability to navigate it. To ensure accessibility, both oral objections and written objections, (which may be sent through the mail), should remain options.

7. What factors should we consider when implementing 30-calendar-day timeframes for each step in the above reconsideration process?

This question is unclear. We think that the WSIB is proposing the following:

- after an ITO is submitted, the operating level has 30 days to make a reconsideration decision;
- if supplemental information is required, the operating level would have 60 days instead of 30 days to issue a reconsideration decision;
- following the reconsideration decision, the parties have 30 days to complete ADR; and
- 30 days after ADR, the operating level has another 30 days to issue another reconsideration decision.

This would seem to be a lot of reconsiderations. In our experience, absent submissions from a representative and/or additional evidence, the operating level is unlikely to change a decision on reconsideration. With tight timeframes, it is unlikely that a worker would be able to obtain a copy of their file, a representative and additional medical that would all be necessary to make the reconsideration process useful.

Because this question is so unclear, we do not think that the Board can rely on the responses to the question. If the Board does plan to rely on these responses, the question should be asked again in a clearer fashion.

Reconsiderations should be done when new information is submitted or when a party requests a reconsideration. Speeding up reconsideration decisions by imposing 30-day timelines will not improve the quality of decision-making at the operating level if the worker is unrepresented and has not obtained the relevant evidence. Indeed, such aa reconsideration step would just add an additional 30 days to the process with no added value.

8. 30-day time limits on all decisions

The consultation document does not ask about whether amending the Act to replace 6-month time limits with 30-day time limits is advisable even though the VFMA report made this recommendation. We strongly oppose moving to 30-day time limits.

The VFMA report says that its jurisdictional scan supports a 30-day time limit to appeal. This is somewhat inaccurate; according to the jurisdictional scan appended to the report, only the Newfoundland WCB and the social benefits system (ODSP and OW) have 30-day time limits. Alberta has a one-year time limit and British Columbia has a 90-day time limit. New South Wales' State Insurance Regulatory Authority appeals system has no time limits.[8] The report does not mention that Manitoba[9] and Saskatchewan WCBs,[10] like New South Wales SIRA, have no time limits. In our view, a jurisdictional scan does not support shortening the time limit to appeal.

Currently, many injured workers and their survivors have difficulty meeting the six-month time limit. One of the reasons for prolonged litigation is that the worker has missed a time limit. In such cases, we, along with the Board and the Tribunal, must divert scarce resources to resolving the time limit issue instead of the worker's real, substantive issues. System resources are better spent on adjudicating the underlying merits of the case than on whether a time limit is met or ought to be extended.

[8] VFMA report, pp. 41 to 44
[9] Government of Manitoba website at: https://www.gov.mb.ca/labour/wao/appealing.html
[10] Saskatchewan WCB website at: https://www.wcbsask.com/appealing-decision-your-workers-injury-claim#:~:text=There%20is%20no%20time%20limit,to%20WCB%20benefits%20and%20compensation.

Shortening the time limit will decrease access to justice, make the system more difficult for workers and increase the length and complexity of appeals.

V. Group 2 Questions: One year time limit on the ARF

Whether there should be a one-year time limit on the ARF

The OWA strongly opposes placing a one-year time limit on the ARF.

Implementing a one-year time limit for the appeals readiness form is a bad idea for the following reasons:

- Appeals won't be "ready" as the worker is forced to file an ARF within one year;
- It creates a second time limit that unnecessarily complicates the system, even for experienced representatives;
- The Alberta example does not support a one-year ARF deadline on top of our current deadline to object.

The ARF process was introduced as part of the "appeals modernization" in 2012-2013. Its purpose was to prevent cases that were not "ready"—i.e., the worker did not have a representative, the file needed more medical information—from proceeding to a hearing. Imposing an artificial deadline on the ARF will not cause doctors to provide information faster or shorten wait lists for legal representation; that is, it will not ensure that cases are "ready" when they are scheduled for hearing. Instead, it will just force cases to proceed to hearing when they are not ready.

A one-year time limit from the date of the original decision is too short a timeline for getting a file appeal-ready. The worker needs to obtain a representative and then the representative needs a copy of the claim file, time to review the file, and time to gather additional evidence.

At the OWA, workers are waitlisted for up to six months. After we submit an authorization to obtain a copy of the file, we receive it in about a week. For other representatives, the process can take weeks or months. We then review the file, interview the worker and make a decision as to whether to offer representation. Frequently, there is inadequate medical information on file and we must write to doctors or other healthcare providers for more information. It is not unusual for it to take three or four months to get copies of a doctor's chart notes and longer to get a medical opinion on causation. If a specialist report is needed, that will take even longer. Often there is a lengthy delay just getting to see a specialist, let alone obtaining a report.

By the time the worker retains a representative, a significant portion, if not all, of the one year period following the date of the decision has passed. If the worker does have a representative, it can then take weeks or months to get a copy of the file. It takes further time to prepare for hearing.

Occupational disease cases have special challenges. These cases often require both occupational hygiene reports and medical opinions regarding causation. Family doctors do not have the knowledge or expertise to provide opinions on causation and workers have few options to obtain the necessary reports. One option is to retain a private expert, but that is beyond the means of most workers. OHCOW is the best resource for workers, but they have waiting lists and it is not unusual for it to take a year or two to obtain OHCOW reports.

Outcomes of a time limit on the ARF: poorer decision-making, more litigation, more abandonment of meritorious appeals

For the most part, a time limit on the ARF will have one of two undesirable outcomes:

- workers will miss the time limit;
- cases with insufficient evidence and/or no legal representation will be scheduled for hearing.

When a worker misses a time limit, the fair adjudication of their claim will be delayed while the worker appeals the missed time limit. Because the WSIAT applies broader criteria for extending time limits, the worker would appeal the missed time limit to the Tribunal if it was not extended by the WSIB. Adjudicating a missed time limit may add a year or more to the appeal. If the worker is unrepresented or was unable to obtain the relevant evidence, the decision will be based on incomplete evidence and argument and will likely be appealed to the WSIAT. The usual two outcomes will prolong litigation, reduce the quality of decision-making at the ASD and likely increase appeals to the WSIAT.

Of course, appeals to the WSIAT may not necessarily increase. Instead, workers who are discouraged by these procedural barriers and inability to have a fair hearing may abandon their appeals. This would lead to an increased burden on other benefits systems like the Ontario Disability Support Program or Ontario Works.

Alberta Example

The VFMA report points to the Alberta example as evidence that a one-year deadline for an ARF is workable. However, the Alberta process is completely different, rendering it a poor analogy. In Alberta, a workplace party has one year from the date of decision to request a review by filing a form identifying the decision, stating the reason for requesting a review and what they want changed. Filing this form starts the review process. Either party may ask that the review be put in "postpone" status if more time is required to obtain evidence.[11]

More importantly, at any point in time after a decision, if a party submits "new evidence," the Board will make a new decision and the time limit starts again. The new time limit is provided

[11] A worker advisor with the Alberta WCB worker advisory told us about the "postpone status"

to the workplace party whether the Alberta WCB changes their original decision or not. The "new evidence" rule that restarts the clock also includes changes to "appeal findings" and "review findings". This means that a party can review and appeal a decision about one topic (such as secondary entitlement), and if successful, all the other decisions regarding loss of earnings or return to work are then reconsidered. The workplace parties then have new time limits to launch a review/appeal.[12]

Alberta's one-year deadline from the date of the decision is more similar to our 6-month deadline to file an ITO. It is not at all like the filing of an ARF.

Other structural changes to the appeals system are needed should a time limit on the ARF be introduced

The introduction of a time limit on the ARF would effectively cancel bookmarking of appeals. Bookmarking allowed a wait and see approach as to whether it would be necessary to pursue the appeal at all. Removing bookmarking would eliminate a fundamental aspect of how the appeals system is set up. This system has been a central aspect of the appeals system since 1998. Many bookmarked appeals never go ahead and thus do not place any burden on the system. Implementing an ARF time limit without other structural changes would unreasonably force workers to appeal or push them out of the system and onto ODSP and OW.

If the Board does adopt a one-year time limit, it would require other structural changes to the appeals system, namely:

- If new evidence is submitted after the deadline, the operating level must make a new decision that includes the right to object and a new time limit (as reconsideration decisions were done in the past by the WSIB); and
- Other decisions that are affected by this new decision would also need to be reviewed, decided and include a new time limit.

What follows are answers to the questions in the consultation document.

1. If we were to implement a new one-year time limit from the decision date to submit an appeals readiness form on January 1, 2024, how should we manage appeals from before this date where an ARF has not yet been submitted?

a. Should appeals from before this date be exempt from the requirement to send an appeal readiness form within one year?

[12] Alverta WCB Policies & Information, Policy 01-08 Part II
https://www.wcb.ab.ca/assets/pdfs/public/policy/manual/printable_pdfs/0108_2_app1.pdf

Yes. It would be unfair to apply the one-year time limit retroactively. Those who filed ITOs prior to the transition date may never have received notice of the one- year time limit.

b. If we were to make appeals from before this date exempt from the requirement to send an appeal readiness form within one year, what would a reasonable time limit be? Would one year from the new effective date be reasonable?

No. Appeals from before the effective date should be forever exempt from the requirement to send an appeal readiness form within one year as there is no way to ensure that everyone who ever filed an ITO had notice of the one-year deadline. Notice of new time limits is fundamental to procedural fairness.

2. Under what extenuating circumstances should we consider extending the one-year time limit for submitting the ARF?

An administrative justice body like the WSIB should not terminate injured workers' appeal rights lightly. If a one-year time limit for the ARF is introduced on top of the existing deadline to file an intent to object, there must be mechanisms for both asking for a postponement of the deadline to file an ARF as well as asking for an extension if the ARF deadline is missed. Reasons for granting more time in advance of the time limit should include:

- The party needs more time to gather evidence
- The party is unrepresented and is seeking a representative
- The party has been placed on a wait list for representation

Reasons for granting a time extension to a party who missed the time limit to file an ARF should include all of the reasons set out in the ASD's Practice and Procedure document, including that the party demonstrated intent to file within the time limit. The "intent within the time limit" reason should be expanded to include evidence of intent beyond documentation in the claim file.

In addition to these criteria, extensions should be granted whenever the party relied on someone else to file the form. This last criterion is accepted by the Alberta WCB as a reason to extend time limits. The Alberta allows extensions of time when there is a "justifiable reason":

> Examples of a justifiable reason for an extension of the time period might include, but are not limited to:
>
> - There was a lack of proper notice that left you unaware of the decision and you took reasonable and timely steps to file the request for review once you became aware of the decision
> - You relied on someone else that you trusted to file the request for review on your behalf, it was reasonable for you to rely on that person and, once you became aware

that the person had failed to file the request for review, you took reasonable and timely action to file

- You were unable to request a review due to diagnosed mental or physical incapacity or you were prevented from doing so because of some other valid reason[13]

To bring WSIB decision-making in line with that of the WSIAT, the Board ought to adopt more expansive criteria for granting time extensions. The WSIAT has followed Ontario Court of Appeal decisions and applies the "justice of the case" principle—a balancing of the reasons and length of the delay, evidence of intent within the time limit and the merits of the appeal--in deciding time extensions. We recommend that the WSIB follow the Tribunal's caselaw on extending time limits.

3. Is January 1, 2024 a reasonable start date for the new one year time limit? How much time would you need to make sure you have enough notice for a start date?

We continue to disagree with adding another time limit to our current system. January 1, 2024 is not reasonable date to commence such a fundamental change to the entire system. It will affect how waiting lists are managed, when retainers may be offered and how representatives work on their files.

We propose postponing consideration of an ARF deadline to evaluate if other changes at the ASD effectively streamline the appeals system. In particular, the ASD's proposals (as set out in the draft P & P) that AROs bundle issues, take a broad view of their jurisdiction and deal with benefits flowing from their decisions are likely to improve the efficiency of the system and the quality of decisions, resulting in fewer appeals to the WSIAT.

Over the past two years, we have dealt with changing over to a primarily digital environment for dealing with claim files and hearings. In the next year, the workplace parties and their representatives are facing substantial procedural changes at the WSIAT. At the OWA, we are undergoing a replacement of our electronic case management system that will have impacts on many internal procedures and how we do our work. All of the changes disrupt how we do our work and it takes time to adjust.

[13] https://www.wcb.ab.ca/assets/pdfs/public/policy/manual/printable_pdfs/G2.pdf, p. 4

VI. Group 3 Questions: In-person or Online Hearings

1. What other factors should we consider in determining whether the oral hearing should be offered in person or online?

The overall consideration is whether an in-person hearing is necessary for a fair hearing of the case. The following factors, most of which are found in the Tribunal's criteria for in-person/online hearings,[14] should be considered:

- Whether a party has the technology and the ability to use it;
- Whether the internet speed available to a party is sufficient for a video hearing;
- Whether a party requires a Human Rights Code related accommodation that cannot be met through a video hearing;
- Whether a party is able to participate in a video hearing due to health issues;
- Whether there is a language barrier that is best overcome with an in-person hearing;
- Whether, due to the complexity of the issues or the evidence, an in-person hearing is preferable;
- Any other reason that would affect a party's ability to fully participate

Accommodation needs are highly individual and should be tailored to the individual's circumstances. For example, some people with hearing loss may prefer an on-line hearing as it allows them to hear the proceedings with greater ease. Another person with hearing loss, who uses a sign-language interpreter, may be able to better understand the proceedings if conducted as an in-person hearing.

The consultation document includes "geographical location" as a factor and it is unclear why it should be. As we understand it, an online hearing is the default and an in-person hearing will be granted only if the worker has reason to need an in-person hearing. For example, if the worker who uses a sign-language interpreter requests an oral hearing, it should not be denied on the basis that the worker lives outside of a major urban area. The worker has a disability that requires accommodation and the travel expenses of either the worker or the decision-maker should not trump the duty to accommodate.

VII. Group 4 Questions: Expedite RTW Decisions & Appeals

The Board has agreed to implement the VFMA report's Recommendation 3.1:

> We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

[14] WSIAT Interim Guideline on Resumption of In-person hearings found at https://www.wsiat.on.ca/en/publications/Interim%20Guideline%20In-Person%20Hearings.pdf

A voluntary expedited process on return-to-work decisions is welcome. If the parties have determined that they are ready to proceed, that is, they have obtained a representative and the relevant evidence, then a speedy hearing would be helpful to the system.

Proceeding with return-to-work decisions when the parties are not ready is a waste of time and resources and will lead to poor decisions that will then be appealed. Instead of a timely and fair resolution of a case, the matter will just be moved along to the WSIAT.

1. What factors should we consider in expediting return-to-work issues when there are multiple issues in an appeal?

The main factor to consider is whether the appeal is ready to proceed: does the worker have a representative, does the representative have a copy of the file, has the relevant evidence been collected and has the representative had time to prepare for the hearing.

Currently, return-to-work decisions often occur early in the life of the claim. These are often provisional decisions and ongoing medical investigation or treatment often results in further return to work meetings and decisions. Suggesting that a RTW mediation will result in cases being finalized more quickly does not reflect the complexity of the process. Return to work is a process and the resources of the legal representative as well as Board staff are potentially significant if there is a requirement to meet tight timeframes.

The proposal to expedite RTW issues is only reasonable if the parties are ready to proceed. If there are multiple issues in an appeal, expediting return to work issues would lead to fragmented decision-making.

VIII. Group 5 Questions: Appeals Implementation

1. What factors should we consider in reinforcing the 30-calendar-day timeline for appeal implementation.

We agree that appeals decisions should be implemented promptly by the WSIB, preferably within a few weeks of the decision. However, it is more important in the long run that implementation be correct than it be completed quickly. Incorrect implementation creates headaches—and ultimately greater delay—for everyone involved.

We object to delays in implementation when the only reason for the delay is because implementation means a substantial retroactive payment to the worker. We have seen cases in which it took more than six months for the worker to receive payment and the only discernible reason for the delay was the size of the payment. We have been told that payments were delayed because it required the sign-off of a director or vice-president. This process should be strictly limited to 30 days as it is not an adjudicative function but a file review.

It is important that standard timeframes are known and published for all workplace parties and representatives to know what to expect. If the standard timeframes cannot be met, the reasons for delay and expected timeframe for completion should be communicated in writing to the workplace parties. This allows for time needed for more complex adjudication and for transparency.

Sometimes there is a delay in implementation because the operating level is waiting for documents that the worker must obtain from third parties. The time could be shortened if the worker were advised in advance of the decision about the documents that would be required. To facilitate this, it would be helpful if the Board would include an information sheet on its website about what documents are needed to implement a favourable initial entitlement, LOE or personal care decision.

We suggest that the WSIB consult with the staff responsible for implementation to identify the factors that affect their ability to quickly and accurately implement decisions.

IX. Group 6 Questions: Excluding decisions from Appeals

1. If we were to exclude decisions that rely on standardized calculations from our internal appeals process, what are some factors we should consider?

Our position is that no decisions should be excluded from the internal appeals process. The parties should have the option of requesting that a decision be excluded from internal appeals and proceed directly to the WSIAT, but not be forced to do so.

It would appear that this recommendation is aimed at excluding what amount to be pure arithmetic problems from the appeals process. However, it is rarely the case that NEL, LOE or personal care decisions are disagreements about math.

In our experience, most NEL appeals are not about challenging standard calculations, but are about missed diagnoses, missed ROM deficits and, when the AMA Guides provide a range, rating the worker at the bottom of the range. NEL appeals are not about standardized calculations but about what was left out of the calculation. For some NEL calculations, it is about challenging the NEL Clinical Specialist's judgement on where in a range the extent of the worker's impairment lands.

To improve quality of decision-making and expedite NEL internal appeals, the Board should consider assigning NEL decisions to AROs who specialize in NEL appeals rather than eliminating the right to an internal appeal.

It is unclear what LOE "calculations and decisions" the Board might be considering for direct appeal to the WSIAT. LOE decisions are usually complicated, involving issues of earnings' basis, whether the SO is suitable and available, or whether suitable work was offered to the worker.

LOE annual review decisions, after the first review that reduces LOE, is sometimes just a math calculation. That decision is never a standalone decision. To streamline the appeals process, it makes sense to bundle the appeal of the annual LOE review decision with the appeal of LOE decisions coming before and after.

It is also unclear what personal care allowance decisions the Board might consider as falling into the category of "standardized calculations" as most of those decisions are about the number of hours of care per week that a worker is entitled to. A determination is needed about whether the evidence on file supports the number of hours awarded by the WSIB. That is a substantive issue, not one of standardized calculations.

Trying to exclude decisions that are solely based on standardized calculations would be difficult to implement in practice. A decision that may appear to be based on standardized calculations may actually involve substantive issues as described in the above examples.

2. Are there other decision types that we should exclude from our internal appeals process?

No. The workplace parties have a right, under the Act, to object to decisions. Looking at the appeals system as a whole, excluding the internal appeals process would push more appeals onto the Tribunal and would not improve the overall efficiency of the system.

3. Sometimes in different claims for the same person, an issue in dispute may be active with WSIAT while another issue is active with us. Should there be options to request for us to exclude some decisions from our internal appeals process to pursue the holistic resolution of the issues for the person or business at the WSIAT? Under what circumstances would this be best? What else should we consider?

Yes. There should be a process, set out in the P&P, where a party can ask that an operating decision be made a final decision of the Board. Such a process would promote holistic resolution of the issues by moving that issue to the WSIAT. For example, if the worker has appealed an LOE review decision to the Tribunal and the final LOE review decision is waiting for an ARO hearing, the worker should have the option of having the final review sent directly to the Tribunal.

The process should not be automatic but done only at the request of a party. Under the Act, the workplace parties have a right to object to Board decisions and a right to a hearing. The duty of fairness in the exercise of the powers of a statutory delegate require that the objecting party receives a fair hearing. The Board should not eliminate the right to be heard simply to accelerate the appeals process.

While this process is currently in place at the ASD, most parties and representatives are unaware of it. If the process is described in the P & P, a publicly available document, more representatives are likely to use it.

X. Conclusion

We urge the WSIB to reconsider adopting the changes recommended by the VFMA report without further consultation and reflection on how such changes will affect the appeals process and those who use it.

The Office of the Worker Adviser is committed to working with the WSIB, system partners and stakeholders to improve dispute resolution in the workers' compensation system. In these submissions, we have raised a number of serious concerns regarding the proposed changes. We have recommended alternative solutions that we believe will ameliorate the weaknesses in the system identified by the auditors. We look forward to working with the WSIB in the future to address the challenges facing the appeals system.

We would like to thank the WSIB for considering our submissions and look forward to the results of the consultation.

Submitted on behalf of the
OFFICE OF THE WORKER ADVISER,

Margaret Keys
Legislative Interpretation Specialist
Margaret.Keys@ontario.ca

July 21, 2023

Decision Outcomes for Worker Appeals - 2000 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all appeal decisions between January 1, 2000 and December 31, 2021 where the objection origin was the worker, the worker representative or a dual objection.
Excludes appeals that were returned or withdrawn.
Excludes appeals where the objection origin was the employer or employer representative.
Virtual Hearings are oral hearings where the hearing location is "teleconference" or videoconference".

Data Source:

Appeals Branch Tracking System as of April 12, 2017 for appeals decisions between 2000 and 2016.
InfoCenter as of March 31, 2022 for appeals decisions between 2017 and 2021.

Decision Outcomes for Worker Appeals

Decision Outcome	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
# of Worker Appeal Decisions	**6,800**	**6,203**	**6,002**	**6,084**	**5,984**	**6,048**	**5,774**	**5,620**	**5,288**	**5,539**	**5,603**	**6,392**	**7,864**	**9,096**	**7,570**	**6,792**	**5,550**	**4,106**	**3,530**	**3,329**	**3,319**	**4,305**
% Allowed	29%	30%	28%	29%	27%	27%	28%	27%	28%	26%	23%	21%	19%	18%	17%	18%	19%	18%	18%	20%	20%	19%
% Allowed in Part	19%	18%	18%	17%	17%	17%	17%	18%	17%	17%	16%	15%	16%	17%	16%	14%	15%	14%	14%	14%	15%	16%
% Denied	52%	51%	53%	54%	55%	56%	56%	55%	55%	58%	61%	64%	65%	65%	67%	68%	66%	68%	68%	67%	66%	65%

Decision Outcomes for Worker Appeals by Method of Resolution

Method of Resolution/Decision Outcome	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Oral Hearing	**2,372**	**2,255**	**2,414**	**2,456**	**2,357**	**2,326**	**2,299**	**2,334**	**2,052**	**2,198**	**2,028**	**1,834**	**1,510**	**1,814**	**1,480**	**1,298**	**1,012**	**819**	**709**	**689**	**271**	**586**
% Allowed	33%	33%	32%	30%	30%	31%	31%	31%	33%	31%	28%	26%	26%	25%	26%	27%	29%	29%	31%	29%	28%	26%
% Allowed in Part	27%	26%	23%	24%	23%	23%	23%	25%	25%	23%	24%	22%	24%	29%	28%	22%	25%	21%	20%	19%	22%	22%
% Denied	40%	40%	45%	46%	47%	46%	45%	44%	42%	46%	48%	52%	50%	46%	46%	51%	46%	50%	50%	53%	51%	52%
Hearing in Writing	**4,428**	**3,948**	**3,588**	**3,628**	**3,627**	**3,722**	**3,475**	**3,286**	**3,236**	**3,341**	**3,575**	**4,558**	**6,354**	**7,282**	**6,090**	**5,494**	**4,538**	**3,287**	**2,821**	**2,640**	**3,047**	**3,719**
% Allowed	27%	29%	26%	28%	25%	25%	25%	24%	25%	22%	21%	19%	17%	17%	15%	15%	16%	15%	15%	17%	19%	18%
% Allowed in Part	14%	13%	15%	12%	14%	13%	12%	13%	11%	13%	11%	12%	14%	14%	13%	13%	13%	12%	13%	12%	14%	15%
% Denied	58%	58%	59%	60%	61%	62%	63%	63%	63%	65%	68%	69%	69%	69%	72%	72%	70%	72%	72%	70%	67%	67%

Decision Outcomes for Worker Appeals with Virtual Hearings

-Prior to 2019 there were less than 5 virtual hearings per year therefore results have been summarized for 2000-2018.

Method of Resolution/Decision Outcome	2000-2018	2019	2020	2021
Virtual Hearings	**40**	**6**	**67**	**330**
% Allowed	33%	0%	34%	25%
% Allowed in Part	18%	17%	22%	21%
% Denied	50%	83%	43%	55%

Outcomes by Issue Category for Worker Appeals - 2000 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all appeal issue decisions between January 1, 2000 and December 31, 2021 where the objection origin was the worker, the worker representative or a dual objection.
Excludes appeals that were returned or withdrawn.
Excludes appeals where the objection origin was the employer or employer representative.
Appeal issues are not mutually exclusive to an appeals decision as an appeal can have multiple objection issues.

Data Source:

Appeals Branch Tracking System as of April 12, 2017 for appeals decisions between 2000 and 2016.
InfoCenter as of March 31, 2022 for appeals decisions between 2017 and 2021.

Outcomes by Issue Category for Worker Appeals

Issue Category/Issue Outcome	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Loss of Earnings	**291**	**579**	**861**	**1,065**	**1,298**	**1,556**	**1,709**	**1,776**	**1,827**	**1,907**	**2,127**	**2,546**	**3,348**	**4,401**	**3,266**	**2,922**	**2,525**	**1,722**	**1,522**	**1,453**	**1,517**	**1,967**
Allowed	106	210	310	390	479	546	600	640	726	661	654	668	787	1,007	757	656	590	407	350	372	394	527
Allowed in Part	37	100	136	179	201	281	284	325	326	348	359	416	561	687	521	433	371	229	193	194	227	261
Denied	148	269	415	496	618	729	825	811	775	898	1,114	1,462	2,000	2,707	1,988	1,833	1,564	1,086	979	887	896	1,179
Other	**5,404**	**4,225**	**4,021**	**3,704**	**3,303**	**3,011**	**2,692**	**2,455**	**1,984**	**2,061**	**1,879**	**1,721**	**1,982**	**2,231**	**1,975**	**1,643**	**1,361**	**1,023**	**822**	**817**	**786**	**1,005**
Allowed	1,806	1,403	1,245	1,194	1,039	901	838	765	611	575	461	348	386	436	386	316	287	210	140	156	163	238
Allowed in Part	619	525	469	426	386	318	276	261	182	191	162	139	165	182	147	131	116	84	63	55	57	60
Denied	2,979	2,297	2,307	2,084	1,878	1,792	1,578	1,429	1,191	1,295	1,256	1,234	1,431	1,613	1,442	1,196	958	729	619	606	566	707
Non-Economic Loss (NEL)	**1,141**	**970**	**1,009**	**1,084**	**1,168**	**1,103**	**1,051**	**1,085**	**1,105**	**1,071**	**1,140**	**1,301**	**1,804**	**2,357**	**1,943**	**1,610**	**1,223**	**978**	**787**	**625**	**831**	**1,209**
Allowed	381	328	276	258	310	282	288	305	287	290	258	235	364	507	320	247	215	143	122	94	130	209
Allowed in Part	47	38	47	44	60	56	43	50	51	57	48	52	87	169	123	107	78	73	46	34	37	78
Denied	713	604	686	782	798	765	720	730	767	724	834	1,014	1,353	1,681	1,500	1,256	930	762	619	497	664	922
Initial Entitlement	**1,406**	**1,344**	**1,272**	**1,201**	**1,147**	**1,218**	**1,146**	**1,142**	**1,005**	**1,159**	**1,070**	**1,271**	**1,422**	**1,684**	**1,364**	**1,300**	**1,137**	**966**	**860**	**907**	**713**	**1,032**
Allowed	525	543	482	472	398	420	401	367	344	354	325	373	351	412	322	331	283	246	228	217	190	236
Allowed in Part	71	76	57	51	58	52	47	42	38	33	28	46	49	54	48	36	37	40	41	28	28	48
Denied	810	725	733	678	691	746	698	733	623	772	717	852	1,022	1,218	994	933	817	680	591	662	495	748
New Condition	**719**	**634**	**606**	**634**	**677**	**635**	**620**	**584**	**551**	**618**	**555**	**677**	**754**	**982**	**859**	**875**	**825**	**636**	**419**	**393**	**420**	**520**
Allowed	190	169	123	143	164	121	150	154	133	135	107	112	110	140	146	136	131	99	68	70	73	98
Allowed in Part	44	26	37	28	34	38	28	33	24	34	28	29	33	38	37	43	36	28	14	17	15	24
Denied	485	439	446	463	479	476	442	397	394	449	420	536	611	804	676	696	658	509	337	306	332	398
Recurrence	**821**	**674**	**614**	**529**	**515**	**504**	**520**	**399**	**396**	**398**	**389**	**443**	**610**	**691**	**624**	**517**	**417**	**372**	**277**	**233**	**239**	**283**
Allowed	300	233	225	198	177	175	191	158	148	150	116	108	133	167	138	111	107	71	65	73	57	83
Allowed in Part	60	66	45	27	32	28	33	24	25	20	20	23	27	26	35	24	16	18	14	7	9	12
Denied	461	375	344	304	306	301	296	217	223	228	253	312	450	498	451	382	294	283	198	153	173	188
Health Care	**280**	**298**	**277**	**289**	**241**	**272**	**266**	**243**	**294**	**334**	**329**	**391**	**485**	**712**	**643**	**536**	**447**	**274**	**217**	**211**	**193**	**282**
Allowed	100	132	86	92	85	71	79	75	90	93	76	76	86	134	109	87	77	49	27	45	27	53
Allowed in Part	37	26	31	32	25	31	22	31	19	27	33	31	42	48	52	42	34	12	10	9	17	15
Denied	143	140	160	165	131	170	165	137	185	214	220	284	357	530	482	407	336	213	180	157	149	214
Psychotraumatic	**207**	**227**	**213**	**218**	**216**	**314**	**344**	**303**	**269**	**307**	**414**	**542**	**737**	**755**	**516**	**488**	**353**	**255**	**193**	**179**	**198**	**368**
Allowed	47	49	62	48	56	74	81	76	76	68	108	108	152	153	92	88	70	44	37	39	42	101
Allowed in Part	5	6	<5	<5	<5	13	7	10	9	11	18	25	30	29	18	14	12	10	8	6	9	18
Denied	155	172	147	167	157	227	256	217	184	228	288	409	555	573	406	386	271	201	148	134	147	249
Chronic Pain	**434**	**411**	**393**	**380**	**354**	**374**	**371**	**339**	**303**	**318**	**338**	**435**	**537**	**568**	**454**	**434**	**314**	**221**	**165**	**131**	**105**	**165**
Allowed	95	103	90	71	85	76	82	70	51	52	68	52	63	61	51	48	39	34	24	25	18	36
Allowed in Part	7	<5	<5	<5	<5	5	5	<5	<5	<5	6	<5	<5	12	<5	6	<5	<5	-	-	-	<5
Denied	332	304	301	305	267	293	284	267	250	265	264	381	470	495	399	380	273	186	141	106	87	127
Traumatic Mental Stress (TMS)	**-**	**-**	**8**	**35**	**63**	**67**	**49**	**46**	**50**	**50**	**64**	**66**	**71**	**62**	**57**	**72**	**48**	**43**	**27**	**79**	**45**	**84**
Allowed	-	-	<5	-	11	20	8	5	12	8	6	9	11	7	9	7	7	12	<5	<5	7	8
Allowed in Part	-	-	-	-	<5	-	-	-	-	<5	<5	<5	<5	<5	-	-	-	-	-	-	-	-
Denied	-	-	6	35	51	47	41	41	38	39	56	56	58	54	48	65	41	31	25	75	38	76
Chronic Mental Stress	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**12**	**85**	**56**	**72**
Allowed	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	10	<5	5
Allowed in Part	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	<5	<5
Denied	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	12	75	53	65
SIEF	**69**	**62**	**68**	**61**	**50**	**57**	**48**	**49**	**62**	**41**	**20**	**21**	**25**	**26**	**8**	**8**	**<5**	**5**	**8**	**8**	**36**	**11**
Allowed	34	33	32	27	23	25	21	25	29	17	6	5	8	11	<5	<5	-	<5	<5	<5	9	5
Allowed in Part	8	9	<5	9	<5	<5	<5	<5	7	8	<5	<5	6	<5	<5	<5	-	-	<5	<5	8	<5
Denied	27	20	35	25	23	28	23	20	26	16	13	12	11	13	5	<5	<5	<5	<5	<5	19	<5

Outcomes for Worker WSIAT Decisions - 2012 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all WSIAT decisions between April 1, 2012 and December 31, 2021 where the appellant was the worker or both (referring to both the worker and the employer).
Excludes WSIAT decisions that were withdrawn, abandoned, adjourned, or interim.
Excludes WSIAT decisions where the appellant was the employer, board, other or respondent.
WSIAT decisions at the claim level so a WSIAT decision that pertains to multiple claims will be counted more than once.

Data Source:

WSIAT Database from Legal Services Division for WSIAT decisions between 2012 and 2017.
InfoCenter report 3116 WSIAT Outcome Report For Claims as of April 12, 2022 for WSIAT decisions between 2018 and 2021.

Outcomes for WSIAT Decisions

Decision Outcome	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
# of Worker Appeal Decisions	**1,691**	**2,191**	**2,272**	**2,589**	**3,130**	**3,565**	**2,320**	**2,360**	**1,398**	**1,577**
% Allowed	33%	33%	34%	35%	38%	36%	36%	34%	35%	38%
% Allowed in Part	21%	24%	24%	23%	25%	29%	29%	34%	31%	35%
% Denied	45%	43%	42%	42%	38%	35%	35%	32%	34%	27%

Outcomes for WSIAT Decisions by Method of Resolution

-Method of resolution not available prior to 2018.

Method of Resolution/Decision Outcome	2018	2019	2020	2021
Alternate Dispute Resolution (Mediation)	**59**	**83**	**96**	**197**
Allowed	24%	47%	47%	40%
Allowed in Part	76%	52%	53%	60%
Denied	0%	1%	0%	0%
File Review	**592**	**539**	**497**	**261**
Allowed	41%	42%	37%	42%
Allowed in Part	14%	20%	21%	21%
Denied	45%	38%	42%	37%
Hearing	**1,650**	**1,723**	**801**	**1,112**
Allowed	34%	31%	33%	36%
Allowed in Part	33%	37%	34%	34%
Denied	33%	32%	33%	30%

Outcomes by Issue Category for Worker WSIAT Decisions - 2018 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all WSIAT decisions between January 1, 2018 and December 31, 2021 where the appellant was the worker or both (referring to both the worker and the employer).
Excludes WSIAT decisions that were withdrawn, abandoned, adjourned, or interim.
Excludes WSIAT decisions where the appellant was the employer, board, other or respondent.
WSIAT decisions at the claim level so a WSIAT decision that pertains to multiple claims will be counted more than once.
WSIAT issues are not mutually exclusive to a WSIAT decision as they can have multiple objection issues.

Data Source:

InfoCenter report 3116 WSIAT Outcome Report For Claims as of April 12, 2022 for WSIAT decisions between 2018 and 2021.

Outcomes by Issue Category for Worker WSIAT Decisions

-Results not available prior to 2018 as only the outcome of the overall WSIAT decision was captured prior to 2018 as opposed to the decision for each individual issue.

Issue Category/Issue Outcome	2018	2019	2020	2021
Loss of Earnings	**990**	**1,054**	**568**	**788**
Allowed	432	485	261	346
Allowed In Part	245	273	159	262
Denied	313	296	148	180
Non-Economic Loss (NEL)	**592**	**653**	**385**	**487**
Allowed	276	293	163	219
Allowed In Part	47	54	31	49
Denied	269	306	191	219
Other	**555**	**518**	**438**	**447**
Allowed	264	220	189	208
Allowed In Part	58	68	51	59
Denied	233	230	198	180
Initial Entitlement	**406**	**493**	**275**	**351**
Allowed	193	215	108	168
Allowed In Part	22	30	15	30
Denied	191	248	152	153
New Condition	**329**	**317**	**217**	**252**
Allowed	124	112	72	90
Allowed In Part	24	23	16	14
Denied	181	182	129	148
Psychotraumatic Disability	**188**	**208**	**102**	**126**
Allowed	89	102	38	54
Allowed In Part	6	7	<5	7
Denied	93	99	62	65
Recurrence	**174**	**200**	**102**	**119**
Allowed	93	109	51	55
Allowed In Part	6	9	<5	9
Denied	75	82	48	55
Chronic Pain Disorder	**192**	**188**	**84**	**84**
Allowed	63	59	28	34
Allowed In Part	<5	<5	<5	0
Denied	126	128	54	50
Health Care	**129**	**171**	**110**	**124**
Allowed	65	67	52	64
Allowed In Part	13	18	7	5
Denied	51	86	51	55
Traumatic Mental Stress (TMS)	**<5**	**<5**	**12**	**15**
Allowed	<5	0	<5	<5
Denied	<5	<5	8	14
CMS-Chronic Mental Stress	**0**	**<5**	**<5**	**23**
Allowed	0	0	<5	<5
Denied	0	<5	<5	19
SIEF	**11**	**<5**	**<5**	**<5**
Allowed	6	0	<5	0
Allowed In Part	<5	0	0	<5
Denied	<5	<5	<5	<5

Paralegal Specializing in WSIB
and CPP Disability Claims

July 12, 2023

Workplace Safety and Insurance Board
200 Front Street West,
Toronto, Ontario
M5V 3J1

By: email to: appealsfeedback@wsib.on.ca

Dear Frank Veltri:

President Theodore Roosevelt once said'-- " Nobody cares how much you know until they know how much you care."

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

By way of a brief introduction my name is Olga Cardile Crimi and I am a self-employed Licensed Paralegal representing injured workers in Ontario at all levels of the Workplace Safety and Insurance Board (WSIB) and Workplace Safety and Insurance Appeals Tribunal. (WSIAT)

After completing my university education I received my first introduction to the WSIB system as a Constituency Assistant Member of Provincial Parliament and shortly after was hired by the WSIB as a Claims Adjudicator. I chose to leave the WSIB over 25 yrs. ago to legally represent and assist both unionized and non-unionized injured workers .

I wish to provide some of my experience and some context around why I am seriously concerned about the KPMG audit recommendations. I will also attempt to provide some feedback on the six audit recommendations. Given the limited time and overlapping issues these comments only skim the surface and are by no means exhaustive. I hope that the Minister of Labour shelves the KPMG recommendations.

An alternative solution is a pilot project providing formal training on dispute resolution and mediation methods but not sacrifice non-adversarial adjudication.

P.O. Box 30613, 10660 Yonge St., Richmond Hill, ON., L4C 4H0, Tel: (905) 508-7256 Fax: (905) 508-4799

The training , tools and resources should be provided to the front line staff. Nurse consultants and return to work specialists should receive training in addition to adjudicative decision-makers. The emphasis is on critical thinking and adjudication which is an enquiry based system.

Recently, I became aware of the 2022 VFMA of the dispute resolution and appeals process audit consultation. I feel compelled to respond and provide comments on what I strongly feel would be a grave mistake; that is, to ask the Minister of Labour and current government to implement some of these recommendations and more importantly implement legislative changes that reduce access to justice. I and many , many other stakeholders find the VFMA primary focus is to have rigid procedures rather than to achieve a right and fair decision in a timely manner. I am seriously troubled by the method to which the changes to dispute resolution are linked to the appeals processes. If you expect the stakeholders to "buy into" these recommendations than don't set unrealistic appeal procedures and frankly threaten injured workers who had to adopt the 1915 Meredith Report "historical tradeoff " .

More importantly the VFMA recommendation are seeking an incorrect paradigm shift by trying to combine a concept adopted by the Board policy "the Better at Work Theory" and creating unrealistic timelines likely resulting in litany and bias.

The issues regarding improving "return to –work and recovery practices " should not be disguised as a 'short of stop' gap measure by ramming down unrealistic time lines to prevent and deny fair compensation.

I a concerned about current issues which make it difficult for injured workers to access an appeal. For example, when a Case Manager (name change from Claims Adjudicator) renders a decision, such as a "reconsideration", it can only happen when there is "new information" . The WSIB has cut positions and resources including Field Investigators , Ergonomists, medical forms such as Form 26 and 41 relying heavily on Functional Abilities forms leading to a more passive role on return to work measures. I was quite surprised to see a recent letter (please see attached) which assumes an injured worker can exercise the duty to accommodate on their own . The WSIB must retain the role of facilitator before mediating and prior to the need for ADR and appeals. Let's not ignore the "red flags" and enforce some unrealistic time limits to appeal.

I am including a study from the JOEM regarding provisions on gradual return to work (GRTW) for work acquired musculoskeletal disorders (MSDs) in British Columbia. (Please see attached) It speaks of "continued engagement in work as soon as **realistic after injury.** Greater results happen with active participation , through disability management and support. Employers don't adjudicate suitability issues and concerns. The WSIB receives medical information and through policies including "justice and merit' they will help facilitate work re-integration principles and beginning with the front-line decision making.

P.O. Box 30613, 10660 Yonge St., Richmond Hill, ON., L4C 4H0, Tel: (905) 508-7256 Fax: (905) 508-4799

I distinctly recall an injured worker's traumatic crush foot injury and the Return to Work meeting that had been arranged. At the time we all felt it was premature but after meeting with all the WPP's and RTWS we all became aware there was insufficient medical treatment. The WSIB RTWS got on it quickly and as a result gained everyone's trust as they showed leadership and provided support to maximizing recovery and incorporate return to work measures . **We need this type of collaboration by using existing policies and procedures even when there isn't "new information". In other words, we shouldn't need "new information" or legislative changes when the issue is front-line decision-makers haven't always utilized information or policies already in place.**

Interestingly, KPMG conducted an audit on the appeals process in 2008-2009. It was quite complimentary and impressed with the department's transparency , approachability and accountability. The issue lies with the front-line decision makers that need to work collaboratively with the Case Manager, Return to Work Specialist, and Nurse Consultants. We certainly operate in an ever-changing environment but the WSIB was designed to provide services and support care for the well-being of injured workers. **I find the auditors approach has seriously lost sight of that objective and "value" should not be measured by some abstract accounting principles that shun the scope of the legislation and what is public policy.**

The introduction of the WSIA in 1997 states in Part 1 that the purpose of the Act is to accomplish the following in a financially responsible and accountable manner;

1. To **promote** health and safely in the workplace.
2. To **facilitate** the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.
3. To **facilitate** the re-entry into the labour market of workers and spouses of deceased workers.
4. To **provide** compensation and other benefits to workers and to the survivors of deceased workers.

The operative and highlighted words are indicative of an organization that needs to stay proactive and be more than a passive participant with the workplace parties. (WPP) Having listened to injured workers concerns they are firstly traumatized by the injury and need to feel their concerns matter and are being heard by the right people.

In order to achieve "fair compensation" the front-line decisions makers need to engage more with the WPP. Many workers I have represented have found the WSIB system difficult to navigate and intimidating. I don't find the 2022 VFMA seriously understands or accounts for the vulnerable state of an injured worker, especially, during the initial stages of an injury. The difficulties injured workers have in adjusting to the injury along with finding and engaging in medical and vocational rehabilitation

requires guidance and support. I strongly believe that the approach taken by the auditors will lead to the WSIB as an institution to shirk their responsibilities.

When front-line decision makers render multiple decisions it becomes a daunting task . A major flaw why recovery and return to work outcomes are delayed is due in part to the so called "reconsideration" process that requires "new information". Why does it have to be "new information"? During and before a claim gets to this stage better discussions and "mediation" should be implemented. Better collaboration between the WPP and the medical community is required.

Where I am going with this is the KPMG has wrongfully tied time limits and appeals with dispute resolution processes that belong first and foremost in the front-line. The approach and method offered by the auditors may lead to administrative bias even if it is unconscious. Better adjudicator will lead to better outcomes.

The 2022 VFMA references the "weaknesses which may have a significant impact preventing achievement of strategic objectives." The report goes on to list various defects . (pg 5 of 57)

The VFMA claims there is fragmentation of the appeals so that workplace parties' issues are not dealt with holistically which leads to multiple appeals with slow resolution and added cost and decision making delays for the workplace. While there is some truth to the fragmentation is started with the fact that frontline decision making has become fragmented with multiple decisions causing a less than ideal case management and less of a holistic approach. The remedy is not to shorten access to justice protocols and threatening legislative changes to appeal time limits. It is grossly unjust and against the principals of natural justice and due process.

*Further in the VFMA the report references the "litigious nature and the decision-making delays.....*If it has become more litigious how is denying fair representation a solution? As stated earlier injured workers find the WSIB system very difficult to navigate and intimidating.

Instead of forcing timelines and time limits and needing new information for reconsiderations why not seriously enter into ADR practices with the relevant parties?

The VFMA, for example, references the guide published by the Institute for Work and Health, 2009---The report references various workshops where return to work experts were a "regional mix of healthcare providers (including RTW coordinators, physicians, psychologists) workers compensation staff, employer representatives *(including employer advisors, human resources personnel, labour market re-entry providers) and worker representatives (including unions, legal representatives , injured worker.) (pg 3 of 55 "The Red Flags, Green Lights, A guide to Identifying and Solving Return to Work Problems"*

Injured workers want to keep the process minimally litigious . Frankly, the VFMA would make it more litigious. **Before any of the recommendations surrounding reinforcing the 30 day time limit for appeals implementation (3.2) or adopt a 30 calendar day time limit through legislative change the WSIB needs to get serious about being a facilitator and become a more active, collaborative participant. Start with training front-line decision makers in formal alternative dispute resolution. More importantly, act as a facilitator that sets realistic medical and vocational rehabilitation goals. Providing realistic goals leads to better outcomes. This will reduce appeals and delays in recovery and return to work and financial burdens to injured workers.**

I now turn to the information provided by the WSIB and the six categories of questions about the audit recommendations.

Recommendation 1.1 : We should establish expertise in alternative dispute resolution with front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals

Understanding these recommendations are based on when a worker or employer receive what is believed to be an adverse Case Manager written decision, specifically related to certain issues linked to "co-operation" or re-employment .

As we know co-operation is an ambiguous term and is easily misinterpreted. We have seen WSIAT decisions that have challenged and refuted the term . It has usually led to a worker's suspension of compensation benefits. The Board needs to look more closely as to why this is happening and better diffuse and address these issues . One can argue that the skill set of a problem-solver and gaining greater insight will ultimately achieve better outcomes.

Also, many written decisions are generated far too soon generating a pre-mature need to complete an Intent to Object Form in order to protect the right of appeal.

Why do ADR/ Mediation Agreements need to be signed when better equipped and experienced Return to Work Specialists could be the first and better step to diffusing some of these appeals?

If the WSIB does adopt this recommendation and if it's to implement the mediation-arbitration process then it must be conducted by a new and impartial WSIB decision-maker and not by the original decision-maker.

This recommendation is very fragmented and ambiguous and has some serious challenges if adopted. **I find the VKPMG audit needed to also recognize that far too many written decisions are causing unnecessary appeals. The audit does not address that main problem and therefore in my view the recommendation doesn't provide a good solution but actually shifts the responsibility and denies access to natural justice by imposing unrealistic and unwarranted time**

limits. This in my view is administrative bias . The WSIB needs to focus on better case management where non-adversarial adjudication is at the forefront

Recommendation: 1.2: Our alternative dispute resolution (ADR) and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to. Why should this be changed and what is the proposed remedy? Maintain impartiality by using a third party mediator.

To put it bluntly, this is absolutely not the solution. The Historic Trade-Off is a "no fault system" and non adversarial adjudication is now expecting the appellant , more importantly an injured worker to fork-over new information, "substantial information" at what cost? The burden will shift greater for injured workers who are vulnerable , and healing from an injury /disability. It is up to the Board to fairly and honourably administer the Historic Trade-Off.

While we appreciate the need to explain why we object to a decision the required time limit imposed on decisions are at times unrealistic . We also need to obtain access to the entire claim file to refute a theory and present evidence that may not yet be available . At times it should be relevant information that the front-line decision maker should have obtained or, for example, did not approve medical treatment or GRTW recommendations provided by the healthcare practitioners. The deadline needs to consider a number of scenarios.

To place unrealistic demands on "complete information" contravenes the principles of natural justice and due process.

Recommendation 1.1 : We should adopt set timeframes for the reconsideration process.

This recommendation again goes against the Meredith principals of non-adversarial adjudication. I find these recommendations onerous and insidious . The adjudication principals need to be at the forefront and then and only then can the parties be guided by the principals of mediation-arbitration. We need front-line decision makers to have realistic caseloads and resources to address complex issues.

By incorporating ADR too soon is simply going against the KPMG reports recommendation to steer away from a litigious system. This once again is the Historic Trade-Off. There are critical errors made by the auditors in their report.

The Board did not need this KPMG audit to better understand return-to work and recovery practices in Canada and certainly didn't need to link it to the appeals process.

In addition , my comments surrounding the 7 additional questions I am seriously concerned about how the WSIB will maintain impartiality within the front-line decision-

makers if the expectation is to have this method applied post a written decision and not beforehand. The flaw lies with the auditors' methods that focus on accounting principles and not enough on the scope of the WSIB *Act.*

What is needed is quality management which is an essential skill. This can be better achieved by providing training, and resources , define quality standards and criteria , implement quality tools and techniques, and encourage quality *communication and feedback.* It is up to the Board to figure out how to provide fair compensation , guidance and support to the stakeholders . The WPPS need the Board to apply its own policies and procedures in a more robust and productive way. The KPMG approach does not provide that solution.

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeals readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

In this case if an appeal is in the Appeal Branch queue ready to be assigned then a notice to confirm the issues in dispute , method of resolution and desired outcomes maybe necessary but if not ready the Appeals Branch can send notification to place the appeal in "inactive status."---time frame to be determined. Again this is to prevent claims suppression and access to justice.

Recommendation 2:3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology , and accessibility.

1. I would be more inclined to make that determination on actual need to provide oral testimony, to question and cross question witnesses, the complexity of the issues in dispute, the number of issues in dispute, need for interpreters , and not deny access to justice because Board staff doesn't go to where there is a demand . Again the approach by the auditors is causing the WSIB to shirk their responsibilities as it lacks active participating and oversight.

Recommendation 3.1: We should make sure that return-to work discussions with a 30-calendear day time lime are prioritized and expedited through the appeals process

Given my experience, the emphasis should be more on addressing the "red and green flags" , problem-solving, and overcoming the issues through informal medication-arbitration skills . Setting realistic time lines is appropriate to achieve early and safe return to work, however, the WSIB Work Re-integration Principals has tied return to work with recovery that sometimes is too rigid and unrealistic. In fact, the

overuse of "normal healing times" and exclusively applying it has often been detrimental to recovery and counterproductive.

The Guide to Identifying and Solving Return to Work Problems –Red Flags and Green Lights provide some valuable insight but stress the importance of collaboration amongst WPPS and experts.

In order to get cooperation the WPPS need complete information, understanding of what is expected and how to adjust a Return to Work Plan to achieve better outcomes and results. Again the Board is not just a passive participant or mediator but a facilitator at all levels.

Recommendation 3.2: We should reinforce the 30-calendar day time limit for appeal implementation and ensure this is measured across the organization.

Ideally, we all want timely decision-making but the main concern is who is responsible for gathering the relevant information. Do we sacrifice fairness and access to justice by again putting the onus and burden on the most vulnerable? (I.e. the injured worker who ultimately is entitled to fair compensation) Quick doesn't mean right. If we are to apply non-adversarial adjudication and a Case Manager needs more information to adjudicate a claim then these are internal mechanisms that need to be implemented and administered. How and when information is received is heavily determined by procedure rather than the right information. While I understand some of the strategies I am unclear on what the consequences will be to the objecting party that doesn't meet the time line .

1. What factors should we consider in reinforcing the 30-calendar day timeline for appeal implementation depends on what is being requested and by whom . I am unclear as to the consequences for not meeting these timelines.

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

On what basis are these recommendations being imposed? All decision rendered by the WSIB should follow the same appeal process. Why should an appellant forgo access to justice? While the stats might improve access to justice will suffer. The approach taken by the auditors is flawed on so many levels and does not help to improve the compensation systems. These recommendations place a heavy burden on injured workers and will lead to claims suppression and increase the burden to the general community.

We hope you will seriously consider our concerns regarding how the VFMA recommendations contradict the WSIB ACT mandate. Being "fiscally responsible" is not at the expense of injured workers and more importantly the responsibility lies with

the WSIB creating case management that provides fair compensation in a timely manner .

Thank you for the opportunity to share our thoughts, concerns . Please share these concerns with the Board of Directors and Minister in charge.

Respectfully,

Olga Crimi, Licensed Paralegal

Copy:
Jeffrey Lang, WSIB Chair
Minister of Labour, Immigration, Training and Skills Development
Fair Practice Commissioner

Attachments

P.O. Box 30613, 10660 Yonge St., Richmond Hill, ON., L4C 4H0, Tel: (905) 508-7256 Fax: (905) 508-4799

[redacted] | wsib.ca

May 5, 2023

Claim No.:

Worker Name:

Date of Injury/Illness:

Injury/Illness:

Dear .

Subject: Update on the status of your claim

Thank you for speaking with me about your claim.

I want to confirm a couple of things that we talked about during our telephone conversation on

As we discussed, with appropriate treatment and/or suitable accommodations, we agreed on a goal for you to return to your pre-injury job duties (the job you were doing before your workplace injury or illness) by and to fully recover from your work-related injury or illness by , based on the most recent medical information on file, dated .

If you think you may not be able to return to your full pre-injury job duties by , please talk to your employer. They may be able to offer you accommodations to help you return to your full pre-injury duties as planned. If your employer is not able to offer the accommodations you need, or if your recovery isn't progressing as expected, please let us know. We may be able to offer you additional services to help with your return to work and/or recovery.

If you don't contact us to report any changes to your return-to-work and/or recovery goals above, we will assume that you have fully recovered and returned to your full pre-injury job duties as expected. As we talked about, we won't follow up with you or your employer about your workplace injury or illness. If you have any questions, please call us at the number below.

Yours sincerely,

Case Manager
Service Delivery

Contact accessibility@wsib.on.ca if you require this communication in an alternative format.
200 Front Street West, Toronto, Ontario, M5V 3J1
Toll free: 1-800-387-0750 | **TTY:** 1-800-387-0050 | **Fax:** 1-888-313-7373

3350A

P_000647/002498-M_000157/000581-S_000001/000004

Descriptive Epidemiology of Gradual Return to Work for Workers With a Work-Acquired Musculoskeletal Disorder in British Columbia, Canada

Esther T. Maas, PhD, Mieke Koehoorn, PhD, and Christopher B. McLeod, PhD

Objective: This study investigates the injury, socio-demographic, workplace, and temporal characteristics related with gradual return to work (RTW) among workers with a work-acquired musculoskeletal disorder in British Columbia, Canada. **Methods:** Accepted workers' compensation lost-time claims were extracted between 2010 and 2015 ($n = 141{,}490$). A multivariable logistic regression model was used to analyze the determinants of Gradual RTW. **Results:** Within 1 year after injury, 41.0% of workers had at least 1 day of Gradual RTW. Serious injury severity, female sex, increasing age, wage, and firm size, longer sickness absence, and recent previous claims increased the proportion of workers being provided with Gradual RTW. **Conclusion:** Consideration of injury, socio-demographic, workplace, and temporal variability in the provision of Gradual RTW can identify inequalities in the provision and increase effective use of Gradual RTW for workers with musculoskeletal disorders.

Keywords: cohort studies, epidemiology, musculoskeletal system, return to work, workers' compensation

Musculoskeletal disorders (MSDs) are a major cause of sickness absence, work disability, reduced productivity, and early retirement. It is the most prevalent disorder of all chronic conditions in Canada, and accounts for almost $15 billion in disability costs yearly.[1,2] In British Columbia, more than 65% of all workers' compensation lost-time claims in 2013 and almost 80% of all sickness absence days between 2009 and 2013 were due to a work-acquired MSD.[1]

Many MSDs are episodic and characterized by recurrences or exacerbations.[3] Returning to work for workers with a work-acquired MSD is often a complex, dynamic multi-phase process.[4–7] Work disability management for these injured workers has shifted from recovery away from work and dependence on state disability benefits, to active work re-integration. Continued engagement in work as soon as realistic after injury is widely recognized as an important rehabilitation goal and has been shown to facilitate injury recovery,[8] as prolonged absence from the workforce can be detrimental to mental and physical health[9] and is associated with reduced likelihood of sustained return to work (RTW).[10] Re-engagement in the workforce following injury can ensure preservation of pre-injury skills, increase sense of self-efficacy and confidence, and reduce the isolation from social support networks and the work community.[11]

Gradual return to work (Gradual RTW) for workers who are on sickness absence due to an MSD is part of effective early re-engagement work disability management.[12] It provides workers with the opportunity to increase working hours and work load, and to limit or modify work tasks while recovering from an injury with the goal to gradually return to full hours and duties. At the same time, support is provided to assist the individual to regain full capacity. It is possible that pre-injury capacity may never be attained, in which case work tasks or hours may be permanently modified, or there may be a change in occupation.

Several studies have shown that Gradual RTW has beneficial health and economic effects. Krause et al[13] was the first to conclude in a systematic review published in 1998 that modified work programs facilitate RTW for temporarily and permanently disabled workers. Since 1998, three other systematic reviews have been published showing similar results. Franche et al[14] showed that work disability duration is significantly reduced by early contact with workers by the workplace, work accommodation offers, contact between healthcare provider(s) and the workplace, ergonomic work site visits, and presence of an RTW coordinator. This review was updated in 2017, and compared with 2005, showed a stronger link between gradual work activities and a reduction in lost time associated with work disability. Specifically work accommodations had a moderate level of evidence multi-domain interventions that included a focus on service coordination, work modification and improving worker health had a strong level of evidence in reducing lost time associated with musculoskeletal injuries.[15]

Gradual RTW is considered a key aspect of many RTW trajectories that lead to sustained RTW. However, there is variability in the provision of Gradual RTW to injured workers, and little is known about when and under what circumstances Gradual RTW is provided to workers with a work-acquired MSD.

The objective of this study is to investigate the injury, socio-demographic, workplace, and temporal characteristics of Gradual RTW among workers with a work-acquired MSD between 2010 and 2015 in the context of the workers' compensation system in British Columbia. Studying the descriptive epidemiology and trends over time of Gradual RTW is important to inform the targeting of current and future RTW interventions reducing inequalities in the provision of gradual RTW, and ultimately improving work disability outcomes.

METHODS

Design

Administrative claims data, collected and held by WorkSafeBC (the provincial workers' compensation system of British

From the Partnership for Work, Health and Safety, School of Population and Public Health, University of British Columbia, Vancouver, British Columbia, Canada.

Esther Maas: https://orcid.org/0000-0002-2290-9552.

Compliance with Ethical Standards: All procedures performed in studies involving human participants were in accordance with the ethical standards of the institutional and/or national research committee and with the 1964 Helsinki declaration and its later amendments or comparable ethical standards.

Clinical Significance statement: Identifying differences in the provision of gradual return to work for workers with musculoskeletal disorders can inform the targeting of current and future return to work interventions reducing inequalities in the provision of gradual return to work, and ultimately improving work disability outcomes.

Funding: The study was funded by The Canadian Institutes for Health Research (grant number MFE – 152431).

Author contributions: All authors were involved in the conceptualization of the project. C.M. and E.M. were involved in the analyses. E.M. drafted the paper. All authors edited the paper.

The authors report no conflict of interest.

Supplemental digital contents are available for this article. Direct URL citation appears in the printed text and is provided in the HTML and PDF versions of this article on the journal's Web site (www.joem.org).

Address correspondence to: Esther T. Maas, PhD, School of Population and Public Health, University of British Columbia, 2206 East Mall, Vancouver, BC V6T 1Z3, Canada (esther.maas@ubc.ca).

DOI: 10.1097/JOM.0000000000001768

Columbia), was used to select workers with an accepted work-acquired MSD lost-time claim filed between January 1, 2010 and December 31, 2015. The claim database contained information on injury and claim registration dates; and on demographic, wage, occupation, and employer variables. The claims data were linked to RTW calendar data that includes detailed RTW status information. The Behavioral Research Ethics Board at the University of British Columbia approved the study (Certificate no. H17-02019).

Jurisdictional Context

Workers who experience a recognized work-acquired injury or disease in British Columbia are provided with disability benefits, medical aid, and rehabilitation services by WorkSafeBC. WorkSafeBC, funded through employer-paid insurance premiums, provides short-term disability wage replacement to injured workers with the goal of getting workers back to work in a timely manner. Injured workers may remain on sickness absence as long as they are recovering. Workers with permanent work-acquired impairments are provided with additional vocational rehabilitation and long-term disability benefits. For the majority of workers, short-term disability payments, representing 90% of workers' pre-injury wage, are provided until workers RTW in full capacity. Workers who do not completely recover from their injury and who have a permanent impairment are eligible for vocational re-training and/or long-term disability. Workers who are permanently disabled and unable to work, or workers who are deemed fit to RTW but who have no job to return to are considered non-RTW. Over 97% of the British Columbia labor force is covered by this work disability insurance arrangement.[16]

Gradual RTW is commonly provided to injured workers by the worker's employer while receiving temporary partial disability benefits in order to facilitate full RTW.[17] Partial benefits compensate for the degree of income loss due to the disability. This is distinct from vocational rehabilitation that would be provided to workers with permanent partial work disability. When modified duties are offered and a suitable occupation is identified, the workers' compensation system will pay the worker partial wage loss benefits based on what the worker was capable of earning in the suitable occupation. A suitable occupation for Gradual RTW is identified as one which (1) does not endanger the worker's recovery or the health and safety of the worker and/or others; (2) the workers has the skills, education, and functional abilities that the occupation requires; (3) is reasonably available over the short-term in the worker's community or, where appropriate, in the province (British Columbia) at large; and (4) a worker is medically capable of performing the work as defined by an occupational physician.[17] WorkSafeBC and industry safety associations provide general guidelines for Gradual RTW. For example, WorkSafeBC has guidelines for modified work for common injuries, like low back, shoulder, knee, and wrist injuries.[18] However, these are guidelines only and are not prescribed in regulation or legislations. This means that the likelihood and nature of Gradual RTW may differ across industries and employers.

Study Cohort

This study focused on injured workers during the period in which they were provided short-term disability benefits, defined by at least 1 day off work and for which they are expected to RTW to their same job. For consistency with other literature, short-term disability is referred to as work-related sickness absence in the current paper. The cohort was restricted to the first MSD work disability claim per worker in the study period with a follow-up period of 52 weeks. Previous literature shows that the far majority of workers RTW within 1 year after injury.[7] Injured workers were excluded from the study for the following reasons (Fig. 1):

1. Exclusions based on claims with less than 1 day off work (sickness absence).

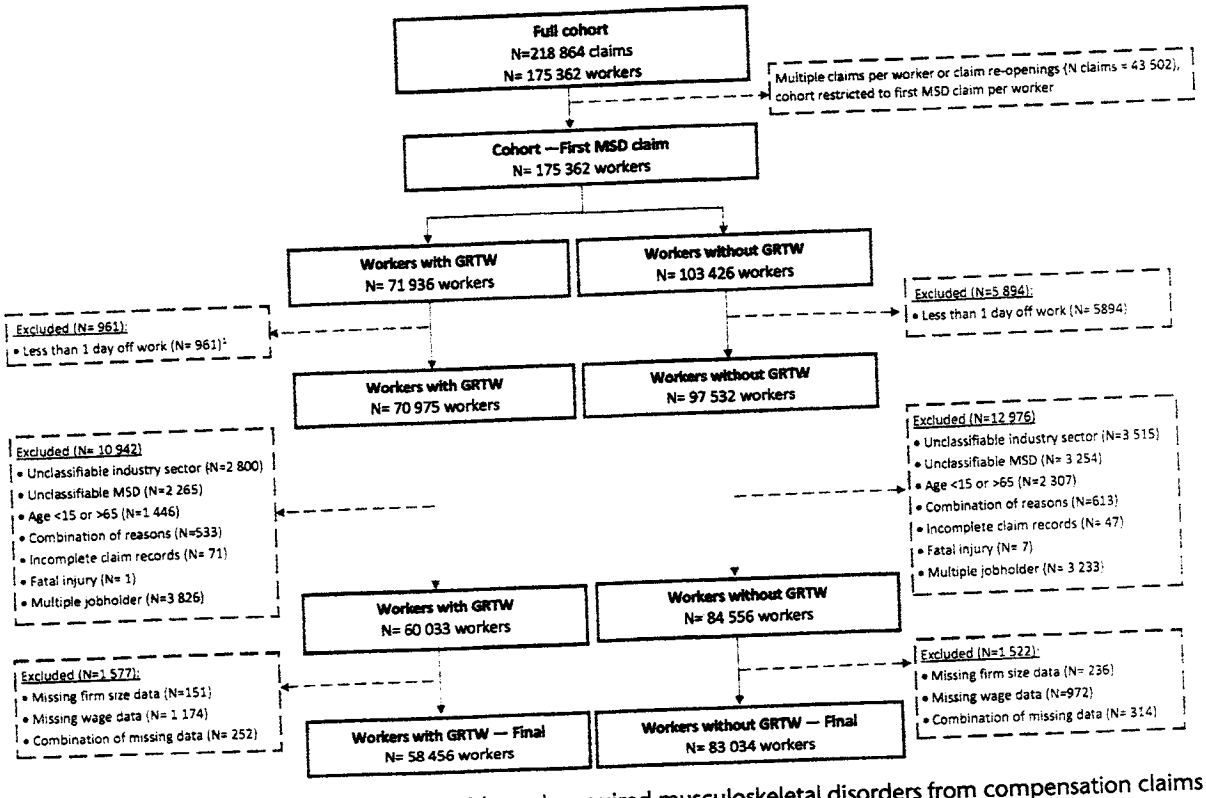


FIGURE 1. Construction of a cohort of workers with work-acquired musculoskeletal disorders from compensation claims data in British Columbia between 2010 and 2015. GRTW, gradual return to work.

2. Exclusions based on cohort definitions:
   - Claim is not related to a classifiable MSD (defined using International Classification of Diseases, Ninth Revision, Clinical Modification codes [ICD-9-CM] and National Work Injury Statistics Program Nature of Injury codes). Disorders not mapping to one of these nine categories were excluded from the cohort because they were too small to be an independent category for investigation.
   - Age less than 15 or more than or equal to 65 years.
   - Multiple jobholders at the time of injury.
   - Claims from self-insured industry sectors.
   - Claims for a work-related fatal injury.
   - Insufficient follow-up (less than 1-year follow-up information is available).
3. Exclusions based on missing data on firm size, industry, wage, or sex information.

A total of 218,864 unique claims were identified between January 1, 2010 and December 31, 2015. The eligibility restrictions were conducted in four stages: (i) restrict the cohort to the first MSD claim per worker in the years 2010 to 2015 (excluding 43,502 claims); (ii) restrict the cohort to workers with at least 1 day off work to ensure a RTW trajectory and the possibility of Gradual RTW (excluding 6856 claims); (iii) exclude claims based on the additional exclusion criteria stated above (excluding 23,918 claims); and (iv) exclude claims based on missing data (excluding 3099 claims). The final cohort included 141,490 unique workers/claims. This included 58,456 workers (41%) with Gradual RTW and 83,034 workers (59%) without Gradual RTW within their RTW trajectory.

Musculoskeletal Disorders (MSDs)

MSDs were categorized into nine major categories using ICD-9-CM codes based on the Barell matrix[19] for musculoskeletal injuries (ICD-9-CM codes 805–848): sprains/strains, fractures, and dislocations; and for musculoskeletal diseases (ICD-9-CM codes 710–739): dorsopathies and rheumatism (excluding the back). Sprains/strains and fractures were each divided into three body regions; (i) head and neck/spine/back/torso; (ii) upper extremities; (iii) lower extremities.

Outcome—Gradual RTW

Gradual RTW was defined in two ways:

- First, workers who commenced modified work after a period of total temporary disability.
- Second, some workers had no period of time-loss, but experienced some type of modified duties of partial work hours as a consequence of the work injury.

Determinants of Gradual RTW

The following injury, socio-demographic, workplace, and temporal characteristics were investigated for the likelihood of an injured working having at least 1-day of Gradual RTW during follow-up:

Injury and Socio-Demographic Characteristics

MSD type as previously defined above.

Injury severity, determined using the method as applied by Clark et al,[19–21] by assigning an abbreviated injury score to each cell of the Barell matrix. Injury severity is ranked 1 (minor) to 4 (severe), and had a score of 0 for musculoskeletal diseases as these are not classified in the method of Clark and Ahmad.[20] For analyses, serious (3) and severe (4) injuries were grouped together due to a small sample size.

Sex (woman, man).

Age at the time of the MSD (15 to 24, 25 to 34, 35 to 44, 45 to 54, 55 to 64 years).

Annual wage at the time of MSD (less than $20,000, $20,000 to 39,999, $40,000 to 59,999, more than $59,999 [Canadian dollars, CAD]).

Prior claims were defined as at least one accepted claim for any type of injury or illness in the preceding 10 years to the MSD claim.

Workplace Characteristics

- Occupation as classified by 10 categories according to Statistics Canada's Standard Occupational Classification.[19]
- Industry sector as classified by seven categories according to the WorkSafeBC industry classification structure.[20]
- Size of the workers' firm measured as fulltime-equivalent (FTE) workers employed by the firm at the time of the MSD injury (less than 20, 20 to 99, 100 to 499, 500 to 999, more than 999 FTE).

Temporal Characteristics

- Claim year was identified as start date of the claim, by year (2010 to 2015).
- Continuous sickness absence for the first 30 days after the first lost-time day, as proxy measure for injury severity.

Statistical Analyses

Descriptive statistics (frequency counts and proportions) were used to describe the study cohort and compare characteristics between workers with and without Gradual RTW.

A logistic regression model was constructed to evaluate the relative contribution of injury, socio-demographic, workplace, and temporal characteristics to the proportion of workers having Gradual RTW. The model was built according to recommended methodological guidelines for multivariable regression analysis.[22,23] The overall performance and predictive ability of the model were tested using Nagelkerke R^2.[24–26] The other performance measures included the area under the receiver operating characteristics curve (AUC) to measure the final model's discriminative value.[24–26]

Additionally, the models were stratified for workers who were on sickness absence for at least 30 consecutive days after injury (Y/N), and by injury severity grouping (musculoskeletal diseases, minor, moderate, or serious/severe injury).[20] In a previous study using similar data, we showed that over half of workers RTW within 30 days,[7] and research on workers with low back injury in the American State of California found RTW rates were five times higher for workers with less severe injuries during the acute phase of disability (less than or equal to 30 days) but approximately two times higher during the subacute/chronic phase of disability (more than 30 days).[27] The two measures for injury severity were assumed to modify the likelihood of being provided with Gradual RTW based on this preceding evidence.

Descriptive statistics and prediction models were performed in Stata 15.1 (Stata Corp LP, College Station, TX).

RESULTS

Cohort Characteristics

Descriptive characteristics are summarized in Table 1. A total of 141,490 workers with an MSD lost-time claim in British Columbia between 2010 and 2015 were included in the final cohort. The sample comprised 62% men; the median age of the workers was 42 years (Inter Quartile Range [IQR] 31 to 52), and the median annual wage prior to injury was approximately CAD $41,000 (IQR 29,544 to 58,239). Back sprains and strains were the most common disorder type (44%), followed by upper (18%) and lower (17%) extremity sprains and strains. Less common injuries were fractures and dislocations. More than 70% of all claims were classified as

TABLE 1. Descriptive Statistics of Workers With an Accepted MSD Lost-Time Claim Between 2010 and 2015, by Gradual RTW Status, in the Canadian Jurisdiction of British Columbia

Workers (First Claim 2010–2015)	Total Workers $N = 141{,}490$ (Column %)	Workers With GRTW $N = 58{,}456$ (41.3%) (Row %)	Workers Without GRTW $N = 83{,}034$ (58.7%) (Row %)
Injury and socio-demographic characteristics			
Musculoskeletal disorder	25,609 (18.1%)	43.9%	56.1%
Upper extremity sprains and strains	24,236 (17.1%)	35.0%	65.0%
Lower extremity sprains and strains	60,975 (43.1%)	40.9%	59.1%
Back* sprains and strains	7026 (5.0%)	47.2%	52.8%
Upper extremity fractures	4858 (3.4%)	48.9%	51.1%
Lower extremity fractures	2639 (1.9%)	39.1%	60.9%
Torso† fractures	2276 (1.6%)	45.0%	55.0%
Dislocation	7113 (5.0%)	40.0%	60.0%
Dorsopathies	6758 (4.8%)	46.6%	53.4%
Rheumatism (excluding the back)			
Injury severity	13,871 (9.8%)	43.2%	56.8%
0—(unassigned, musculoskeletal diseases)	100,164 (70.8%)	40.2%	59.8%
1—minor	26,896 (19.8%)	44.3%	55.7%
2—moderate	461 (0.3%)	46.6%	53.4%
3—serious	98 (0.1%)	51.0%	49.0%
4—severe			
Gender	87,497 (61.8%)	39.0%	61.0%
Male	53,993 (38.2%)	45.2%	54.8%
Female			
Age (in yrs)	15,545 (11.0%)	34.7%	65.3%
15–24	30,648 (21.7%)	40.0%	60.0%
25–34	31,653 (22.4%)	42.6%	57.4%
35–44	38,742 (27.4%)	43.0%	57.0%
45–54	24,902 (17.6%)	42.7%	57.3%
55–64			
Annual wage ($ Canadian)	13,936 (9.9%)	35.2%	64.8%
<$20,000	52,930 (37.4%)	40.7%	59.3%
$20,000–$39,999	42,003 (29.7%)	43.6%	56.4%
$40,000–$59,999	32,621 (23.1%)	42.0%	58.0%
>$59,999			
Prior claims in last 10 years	64,665 (45.7%)	39.7%	60.3%
No	76,825 (54.3%)	42.7%	57.3%
Yes			
Workplace characteristics			
Occupation‡	3728 (2.6%)	48.0%	52.0%
Trades, transport and equipment operations#	6188 (4.4%)	44.9%	55.1%
Business, finance and administration‡	2 789 (2.0%)	40.9%	59.1%
Natural and applied sciences§	17,278 (12.2%)	43.3%	56.7%
Health	6928 (4.9%)	32.4%	67.6%
Education, law, and social services‖	2169 (1.5%)	38.3%	61.7%
Art, culture, recreation and sports¶	32,299 (22.8%)	44.7%	55.3%
Sales, service	53,388 (37.7%)	39.0%	61.0%
Management	5978 (4.2%)	32.9%	67.1%
Natural resources, agriculture	10,745 (7.6%)	46.1%	53.9%
Manufacturing and utilities**			
Industry‡	5389 (3.9%)	32.0%	68.0%
Primary resources	17,448 (12.3%)	47.0%	53.0%
Manufacturing	19,773 (14.0%)	36.7%	63.3%
Construction	13,187 (9.3%)	35.9%	64.1%
Transportation††	19,993 (14.1%)	51.6%	48.4%
Trade	6169 (4.4%)	39.2%	60.8%
Public sector	59,531 (42.1%)	40.0%	60.0%
Service sector			
Firm size (FTE)	17,726	32.0%	68.0%
<5 (no. of employers: 12,627)	7510	36.9%	63.1%
6–10 (no. of employers: 4321)	15,486	37.4%	62.6%
10–20 (no. of employers: 5094)	19,529	37.9%	62.1%
20–50 (no. of employers: 5555)	15,932	41.4%	58.6%
50–100 (no. of employers: 2303)	32,044	45.5%	54.5%
100–500 (no. of employers: 1780)	8444	45.7%	54.3%
500–1000 (no. of employers: 196)	24,819	47.5%	52.5%
>1000 (no. of employers: 127)			

*Back, head, neck, spine, and torso.
†Torso, back, neck, spine, and head.
‡Business, finance, and administration.
§Natural and applied sciences, related occupations.
‖Social science, education, government, service, and religion.
¶Recreation, arts, culture, and sport.
#Trades, transport, equipment operators, and related occupations.
**Manufacturing, processing and utilities.
††Transportation and warehousing.

minor injuries resulting from sprains and strains. Most fractures were classified as moderate or serious injuries. The most common industry sector was the services sector (42%) and the median firm size associated with an injured worker was 79 FTE workers (IQR 15 to 421). Seventy-eight percent of workers had no prior claim in the 10 years preceding their MSD claim.

Women worked on average in larger firms compared with men (median for women: 189 FTEs, IQR: 33 to 1208; median for men: 49 FTEs, IQR: 11 to 231). Also, 68.7% of all women worked in the services sector, compared with only 25.7% of the men. Furthermore, 76.3% of women had a minor injury severity score and 1.7% a moderate injury severity score, compared with 67.4% and 22.3% for men, respectively. Finally, the smallest firms (less than 20 FTE) had relatively more severe injury claims (0.7%) compared with larger firms (more than 20) (0.1%).

Injury and Socio-Demographic Characteristics of Workers With Gradual RTW

Over 40% of workers had at least 1 day of Gradual RTW within 1 year after injury. Workers with upper extremity fractures (47.2% of workers with this injury were provided with Gradual RTW), lower extremity fractures (48.9%), dislocations (45.0%), and rheumatism (46.6%) had a higher proportion of Gradual RTW compared with workers with sprains and strains. Workers with moderate (44.3%), serious (46.6%), or severe (51.0%) injury severity had a higher proportion of Gradual RTW compared with workers with a minor injury severity (40.2%). Relatively more women had Gradual RTW (45.2%) compared with men (39.0%). The percentage of workers with Gradual RTW increased with rising age and wage. Workers with a previous claim within 10 years preceding the current injury were more likely to have Gradual RTW (42.7%) than those without a previous claim (39.7%).

Workplace Characteristics of Workers With Gradual RTW

Comparing Gradual RTW by workplace characteristics, 32.4% of workers in an education, law, or social services occupation were provided with Gradual RTW, compared with 48.0% in a management occupation. Comparing industries, 32.0% of workers were provided with Gradual RTW in the primary resources industry, in comparison to 51.6% of workers in the trades industry. Finally, a clear dose–response relationship was observed between Gradual RTW and firm size (FTE), increasing from 35.0% of workers with Gradual RTW for firms with less than 20 FTEs, to 47.5% for firms with greater than 1000 FTE.

Temporal Characteristics or Workers With Gradual RTW

Overall, an increase in Gradual RTW was observed over the 6-year study period across all other injury, socio-demographic, and workplace characteristics, despite the total number of lost-time claims per year remaining unchanged (Fig. 2). In 2010, 35.2% ($N = 8235$) of workers had at least 1 day of Gradual RTW. This increased to 43.2% ($N = 10{,}244$) in 2013, and 47.4% ($N = 10{,}847$) in 2015. In parallel, the median duration until the first Gradual RTW event dropped from 20 days (IQR 6 to 54) in 2010 to 16 days (IQR 5 to 43) in 2015.

A similar upward trend in Gradual RTW was observed for both men and women (ranging from 32.6% in 2010 to 45.0% in 2015 for men, and 39.5% in 2010 to 51.2% in 2015 for women). By industry (Fig. 3), the trade (45.9% in 2010, to 58.6% in 2015) and manufacturing industries (40.7% in 2010, to 53.5% in 2015) consistently had the highest rates of Gradual RTW between 2010 and 2015, while primary resources (24.1% in 2010, to 38.3% in 2015) consistently had the lowest rates (although the rate did increase over time in this industry). The smallest temporal increase in Gradual RTW was observed in the transportation industry (8%), while the largest increase was observed in the public sector industry (17%).

The percentage of workers with Gradual RTW increased over time regardless of firm size. However, for very large firms (more than 1000 FTEs), Gradual RTW reached 50% in 2013 after which it plateaued, while for large firms (more than 100 FTEs), Gradual RTW reached 50% in 2015. The increase in Gradual RTW for very small firms (less than 20 FTE) was more incremental and reached 40% by 2015 (Fig. 4).

When evaluating the relationship between RTW and Gradual RTW, 15% of workers with sustained RTW within 7 days of their injury were provided with Gradual RTW. In contrast, 61% of workers with sustained RTW after 30 days were provided with Gradual RTW. This increased to 70% of workers with sustained RTW between 270- and 365-days post-injury.

Likelihood of Workers Receiving Gradual RTW

In line with the descriptive statistics, the fully adjusted model showed that having serious injury severity, female sex, increasing age, increasing wage, working for a larger firm, a more recent claim year, and being on sickness absence for more than 30 days were related to receiving Gradual RTW within the first year after a work-acquired MSD (Table 2, model 1 and 2).

Type of MSD and injury severity were collinear as all back strains were assigned to the minor injury severity. Accordingly,

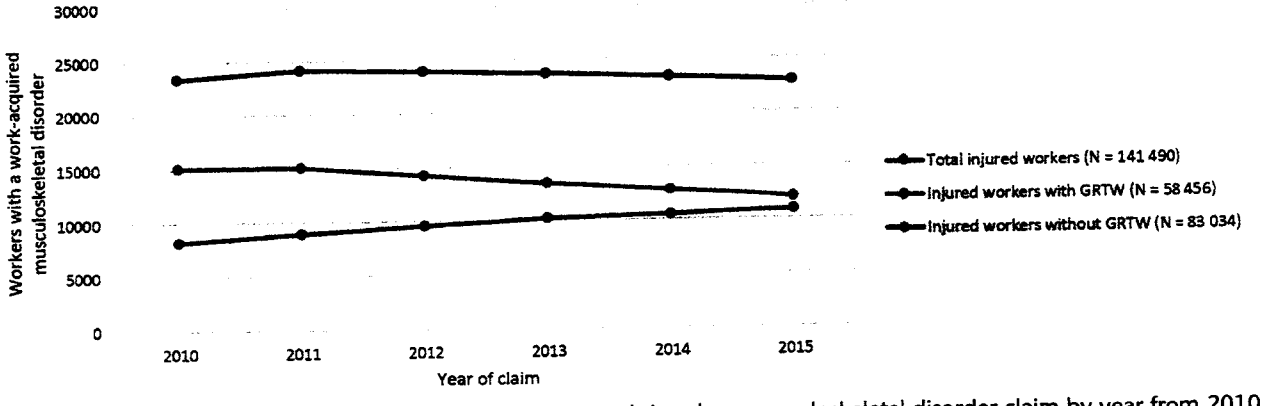


FIGURE 2. Gradual return to work for workers with an accepted time-loss musculoskeletal disorder claim by year from 2010 to 2015 in British Columbia, Canada. GRTW, gradual return to work.

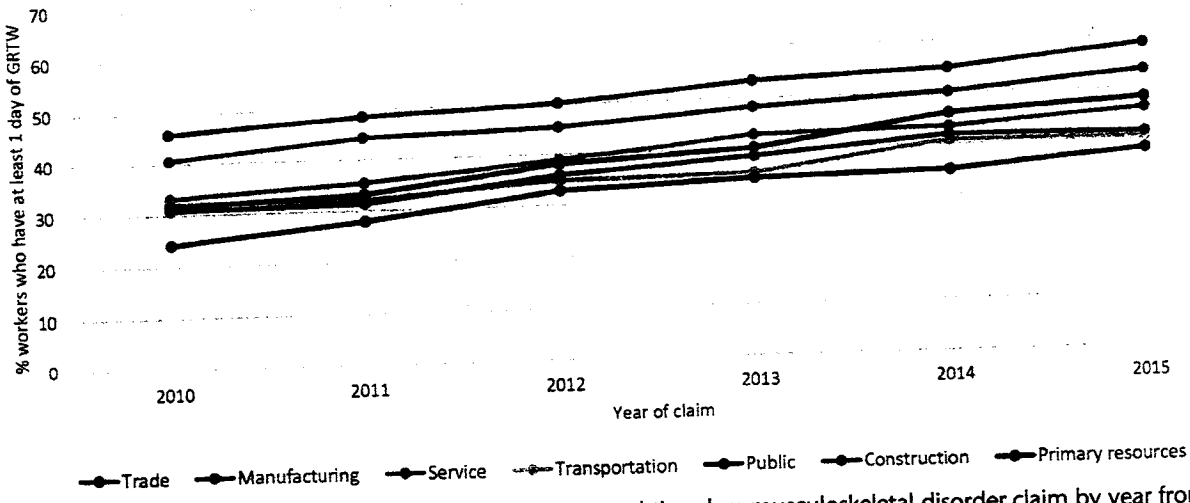


FIGURE 3. Gradual return to work for workers with an accepted time-loss musculoskeletal disorder claim by year from 2010 to 2015 in British Columbia, Canada, by industry sector. GRTW, gradual return to work.

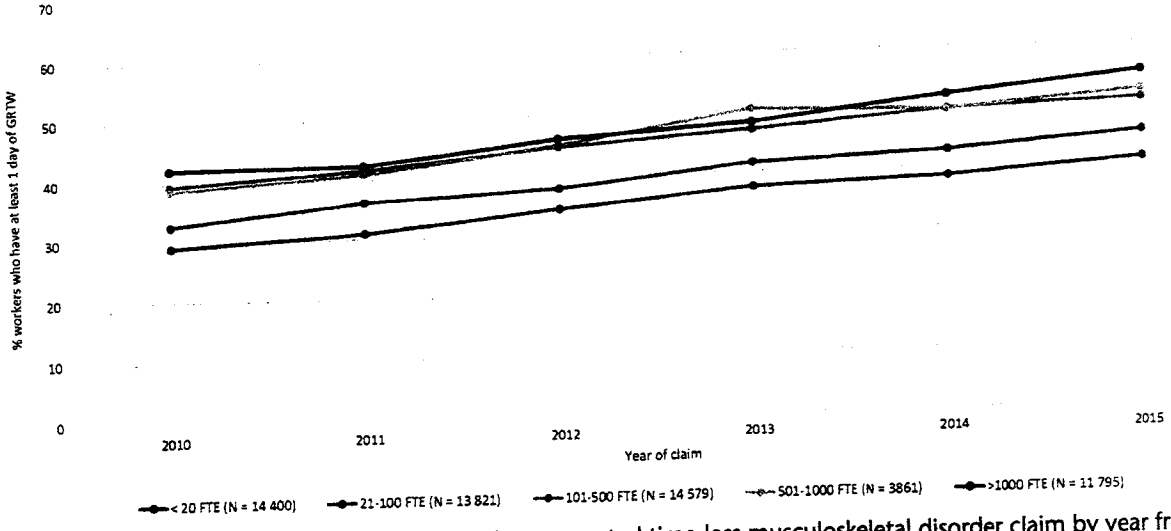


FIGURE 4. Gradual return to work for workers with an accepted time-loss musculoskeletal disorder claim by year from 2010 to 2015 in British Columbia, Canada, by firm size. FTE, full-time equivalent; GRTW, gradual return to work.

Model 1 included type of MSD and Model 2 included injury severity categorization. Model 1 shows slightly better model fit than Model 2, as identified by smaller Akaike Information Criterion (AIC) and Bayesian Information Criterion (BIC) scores. Workers with upper extremity sprains and strains (odds ratio [OR] 1.10; 95% confidence interval [CI] 1.07 to 1.13), upper extremity fractures (OR 1.34; 95% CI 1.27 to 1.41), lower extremity fractures (OR 1.38; 95% CI 1.30 to 1.47), dislocations (OR 1.31; 95% CI 1.20 to 1.32), and rheumatism (OR 1.20; 95% CI 1.14 to 1.27) had a higher odds of receiving Gradual RTW compared with workers with torso sprains and strains (Model 1). Similarly, workers with injuries categorized as severe (OR 1.42; 95% CI 1.38 to 1.47) and with musculoskeletal diseases (OR 1.11; 95% CI 1.07 to 1.15) had a higher odds of receiving Gradual RTW, compared with workers with minor injuries (Model 2).

Women had an increased odds of receiving Gradual RTW (OR 1.41; 95% CI: 1.36 to 1.45) compared with men.

Workers between 35 and 44 years of age had the highest odds of receiving Gradual RTW (OR 1.25; 95% CI 1.19 to 1.30) compared with the youngest workers aged 15 and 24 years.

Workers with higher annual pre-injury wage, compared with those with less than $20,000 annual wage, had a higher odds of receiving Gradual RTW (wage $20,000 to $39,999 OR 1.36; 95% CI 1.31 to 1.42; wage >$40,000 OR 1.59 95% CI 1.52 to 1.66).

Workers who had a previous claim within the 10 years prior to their injury had an increased odds of receiving Gradual RTW (OR 1.14; 95% CI 1.11 to 1.16) compared with those with no previous claim.

Workers in education, law, and social services occupations had the lowest odds (OR 0.60; 95% CI 0.54 to 0.62) of receiving Gradual RTW compared with workers in trades, transport, and equipment operation occupations. Workers in manufacturing (OR 1.42; 95% CI 1.36 to 1.49) and trades (OR 1.69; 95% CI 1.63 to 1.76) industries had the highest odds of receiving Gradual RTW

TABLE 2. Likelihood of Being Offered Gradual RTW for Workers With an Accepted MSD Lost-Time Claim Between 2010 and 2015 in British Columbia, Canada

	Model 1 - Full Model Including MSD ($N = 141,490$) OR (95% CI)	Model 2 - Full Model Including Severity ($N = 141,490$)	Model 3 Workers Not on Full Disability for the First 30 Days ($N = 100,037$) OR (95% CI)	Model 4 Workers on Full Disability for the First 30 Days ($N = 41,453$) OR (95% CI)	Model 5 Musculoskeletal Disease ($N = 13,871$) OR (95% CI)	MODEL 6 Minor Injury Severity ($N = 100,164$) OR (95% CI)	Model 7 Moderate Injury Severity ($N = 28,896$) OR (95% CI)	Model 8 Serious/Severe Injury Severity ($N = 597$) OR (95% CI)
Injury- and socio-demographic characteristics								
Musculoskeletal disorder					–	1.54 (1.48–1.60)	–	–
Torso sprains and strains	Ref	N/A			–	Ref	Ref	–
Lower extremity sprains and strains	0.81 (0.79–0.84)		0.75 (0.73–0.78)	1.01 (0.94–1.08)	–	1.68 (1.60–1.76)	–	–
Upper extremity sprains and strains	1.10 (1.07–1.13)		1.07 (1.04–1.11)	1.16 (1.09–1.23)	–	–	1.44 (1.35–1.54)	–
Upper extremity fractures	1.34 (1.27–1.41)		1.81 (1.67–0.96)	1.19 (1.10–1.28)	–	–	1.09 (0.99–1.22)	0.99 (0.67–1.48)
Lower extremity fractures	1.38 (1.30–1.47)		1.80 (1.61–2.00)	1.35 (1.25–1.46)	–	0.92 (0.72–1.15)	1.43 (1.30–1.58)	Ref
Torso† fractures	1.00 (0.92–1.09)		1.12 (0.99–1.28)	1.05 (0.94–1.17)	–	1.22 (0.95–1.56)	–	–
Dislocation	1.31 (1.20–1.43)		1.58 (1.40–1.77)	1.05 (0.92–1.20)	–	1.22 (0.95–1.56)	–	–
Dorsopathies	0.96 (0.92–1.02)		0.92 (0.87–0.98)	1.08 (0.98–1.19)	Ref	–	–	–
Rheumatism (excluding the back)	1.20 (1.14–1.27)		1.24 (1.17–1.32)	1.07 (0.98–1.18)	1.25 (1.17–1.34)	–	–	–
Injury severity								
MS disease	N/A	1.11 (1.07–1.15)	N/A	N/A	N/A	N/A	N/A	N/A
Minor		Ref						
Moderate		1.23 (1.19–1.26)						
Serious/severe		1.42 (1.20–1.68)						
Gender								
Men	Ref	Ref	Ref	Ref	Ref	Ref	Ref	Ref
Women	1.41 (1.36–1.45)	1.43 (1.38–1.47)	1.37 (1.32–1.42)	1.52 (1.43–1.61)	1.51 (1.37–1.66)	1.44 (1.39–1.49)	1.26 (1.18–1.36)	1.55 (0.88–2.73)
Age								
15–24	Ref	Ref	Ref	Ref	Ref	Ref	Ref	Ref
25–34	1.18 (1.13–1.23)	1.18 (1.13–1.23)	1.15 (1.10–1.21)	1.37 (1.25–1.51)	1.14 (0.99–1.32)	1.16 (1.10–1.22)	1.25 (1.13–1.38)	1.63 (0.68–3.92)
35–44	1.25 (1.19–1.30)	1.25 (1.19–1.30)	1.23 (1.17–1.29)	1.46 (1.34–1.60)	1.09 (0.95–1.25)	1.23 (1.17–1.30)	1.35 (1.22–1.49)	2.39 (1.00–5.70)
45–54	1.20 (1.15–1.26)	1.20 (1.15–2.25)	1.16 (1.10–1.22)	1.49 (1.36–1.63)	1.05 (0.91–1.21)	1.17 (1.11–1.23)	1.36 (1.24–1.50)	2.22 (0.97–5.07)
55–64	1.16 (1.11–1.21)	1.15 (1.10–1.21)	1.08 (1.02–1.14)	1.52 (1.39–1.67)	1.01 (0.87–1.18)	1.10 (1.05–1.17)	1.34 (1.22–1.48)	2.16 (0.94–4.93)
Annual wage ($ Canadian)								
<$20,000	Ref	Ref	Ref	Ref	Ref	Ref	Ref	Ref
$20,000–$39,999	1.36 (1.31–1.42)	1.36 (1.31–1.42)	1.30 (1.24–1.37)	1.50 (1.39–1.61)	1.15 (1.00–1.31)	1.37 (1.30–1.44)	1.47 (1.34–1.61)	2.12 (1.10–4.07)
$40,000–$59,999	1.59 (1.52–1.66)	1.59 (1.52–1.66)	1.45 (1.37–1.53)	1.96 (1.80–2.13)	1.35 (1.17–1.56)	1.58 (1.50–1.67)	1.76 (1.59–1.94)	1.93 (0.97–3.45)
>$59,999	1.59 (1.51–1.67)	1.58 (1.50–1.66)	1.47 (1.39–1.56)	1.86 (1.71–2.03)	1.40 (1.20–1.64)	1.55 (1.46–1.64)	1.78 (1.60–1.97)	2.49 (1.24–5.02)
Previous claims								
No	Ref	Ref	Ref	Ref	Ref	Ref	Ref	Ref
Yes	1.14 (1.11–1.16)	1.13 (1.11–1.16)	1.15 (1.11–1.18)	1.10 (1.05–1.15)	1.14 (1.06–1.23)	1.15 (1.11–1.17)	1.10 (1.04–1.16)	0.95 (0.64–1.40)
Workplace characteristics								
Occupation*								
Trades, transport and equipment operators#	Ref	Ref	Ref	Ref	Ref	Ref	Ref	Ref
Business, finance and administration	1.08 (1.02–1.14)	1.07 (1.01–1.14)	1.02 (0.95–1.09)	1.30 (1.15–1.46)	1.16 (0.96–1.39)	1.05 (0.98–1.13)	1.17 (1.01–1.34)	1.09 (0.42–2.85)
Natural and applied sciences§	1.10 (1.04–1.19)	1.08 (1.00–1.18)	1.13 (1.03–1.25)	0.99 (0.85–1.16)	0.93 (0.72–1.19)	1.07 (0.97–1.18)	1.21 (1.03–1.43)	4.61 (0.99–21.4)
Health	0.86 (0.81–0.90)	0.87 (0.83–0.92)	0.82 (0.77–0.87)	0.94 (0.86–1.04)	0.89 (0.76–1.04)	0.84 (0.80–0.89)	0.87 (0.75–1.00)	1.73 (0.35–8.57)
Education, law, and social services‖	0.60 (0.54–0.62)	0.57 (0.53–0.61)	0.52 (0.48–0.56)	0.80 (0.71–0.91)	0.65 (0.52–0.82)	0.55 (0.51–0.59)	0.65 (0.57–0.75)	0.69 (0.20–2.43)
Art, culture, recreation, and sports¶	1.04 (0.95–1.15)	1.00 (0.91–1.10)	1.19 (1.07–1.33)	0.62 (0.50–0.75)	0.89 (0.63–1.27)	0.89 (0.79–1.00)	1.44 (1.20–1.72)	1.55 (0.42–5.80)
Sales, service	1.06 (1.02–1.11)	1.06 (1.02–1.10)	1.01 (0.96–1.06)	1.17 (1.09–1.27)	1.05 (0.92–1.19)	1.05 (1.00–1.10)	1.10 (1.00–1.20)	0.73 (0.37–1.43)
Management	1.13 (1.05–1.22)	1.12 (1.04–1.20)	1.06 (0.98–1.16)	1.35 (1.17–1.56)	1.31 (1.04–1.66)	1.07 (0.98–1.17)	1.16 (1.01–1.34)	2.04 (0.77–5.38)
Natural resources, agriculture	0.99 (0.92–1.06)	0.98 (0.91–1.05)	1.09 (0.99–1.19)	0.86 (0.76–0.98)	0.94 (0.76–1.16)	1.04 (0.95–1.15)	0.91 (0.79–1.04)	1.77 (0.74–4.25)
Manufacturing and utilities**	1.01 (0.95–1.06)	1.02 (0.97–1.07)	0.98 (0.92–1.05)	1.06 (0.96–1.17)	0.91 (0.77–1.07)	1.00 (0.93–1.06)	1.11 (0.99–1.24)	1.14 (0.42–3.06)
Industry*								
Service sector	Ref	Ref	Ref	Ref	Ref	Ref	Ref	Ref
Primary resources	0.80 (0.74–0.87)	0.80 (0.74–0.86)	1.09 (0.99–1.20)	0.51 (0.45–0.58)	0.97 (0.77–1.21)	0.83 (0.75–0.92)	0.72 (0.63–0.83)	0.30 (0.12–0.78)
Manufacturing	1.42 (1.36–1.49)	1.43 (1.37–1.50)	1.44 (1.36–1.52)	1.39 (1.27–1.52)	1.52 (1.31–1.76)	1.44 (1.36–1.53)	1.31 (1.18–1.46)	1.67 (0.75–3.71)
Construction	1.06 (1.02–1.11)	1.06 (1.01–1.11)	1.22 (1.16–1.29)	0.85 (0.78–0.91)	1.08 (0.94–1.23)	1.07 (1.02–1.13)	1.04 (0.95–1.14)	0.91 (0.49–1.68)
Transportation††	0.88 (0.84–0.93)	0.88 (0.84–0.92)	1.03 (0.97–1.09)	0.68 (0.63–0.74)	0.97 (0.83–1.13)	0.93 (0.88–0.98)	0.73 (0.66–0.81)	0.68 (0.33–1.38)
Trade	1.69 (1.63–1.76)	1.70 (0.64–0.77)	1.79 (1.72–1.87)	1.52 (1.41–1.64)	1.61 (1.44–1.82)	1.72 (1.65–1.80)	1.63 (1.49–1.79)	2.28 (1.13–4.60)
Public sector	0.91 (0.86–0.97)	0.91 (0.86–0.96)	0.85 (0.79–0.91)	1.13 (1.01–1.27)	1.01 (0.83–1.22)	0.92 (0.86–0.98)	0.88 (0.77–1.00)	1.17 (0.40–3.43)
Firm size								
<20	Ref	Ref	Ref	Ref	Ref	Ref	Ref	Ref
21–100	1.17 (1.13–1.20)	1.17 (1.13–1.20)	1.03 (0.99–1.07)	1.39 (1.31–1.46)	1.08 (0.98–1.18)	1.17 (1.12–1.21)	1.22 (1.14–1.30)	1.00 (0.63–1.59)
101–500	1.51 (1.46–1.56)	1.51 (1.46–1.56)	1.33 (1.28–1.39)	1.87 (1.77–1.99)	1.40 (1.26–1.55)	1.53 (1.47–1.59)	1.52 (1.41–1.63)	0.93 (0.52–1.67)
501–1000	1.55 (1.47–1.63)	1.54 (1.47–1.62)	1.38 (1.30–1.46)	1.95 (1.76–2.16)	1.38 (1.17–1.63)	1.61 (1.52–1.71)	1.42 (1.26–1.61)	0.63 (0.14–2.92)
>1000	1.55 (1.49–1.61)	1.55 (1.50–1.61)	1.36 (1.30–1.42)	2.10 (0.95–2.25)	1.51 (1.34–1.70)	1.58 (1.52–1.65)	1.46 (1.33–1.60)	1.50 (0.69–3.24)

TABLE 2. *(Continued)*

	Model 1 - Full Model Including MSD ($N = 141,490$)	Model 2 - Full Model Including Severity ($N = 141,490$)	Model 3 Workers Not on Full Disability for the First 30 Days ($N = 100,037$)	Model 4 Workers on Full Disability for the First 30 Days ($N = 41,453$)	Model 5 Musculoskeletal Disease ($N = 13,871$)	MODEL 6 Minor Injury Severity ($N = 100,164$)	Model 7 Moderate Injury Severity ($N = 28,896$)	Model 8 Serious/Severe Injury Severity ($N = 597$)
	OR (95% CI)		OR (95% CI)	OR (95% CI)	OR (95% CI)	OR (95% CI)	OR (95% CI)	OR (95% CI)
Temporal characteristics								
Claim year								
2010	Ref	Ref	Ref	Ref	Ref	Ref	Ref	Ref
2011	1.10 (1.06–1.15)	1.10 (1.06–1.15)	1.15 (1.10–1.21)	1.00 (0.93–1.07)	0.98 (0.87–1.11)	1.11 (1.06–1.16)	1.16 (1.06–1.26)	0.93 (0.51–1.70)
2012	1.26 (1.21–1.31)	1.26 (1.21–1.31)	1.30 (1.25–1.37)	1.18 (1.10–1.26)	1.19 (1.05–1.34)	1.27 (1.21–1.33)	1.25 (1.14–1.36)	2.08 (1.13–3.81)
2013	1.47 (1.42–1.53)	1.47 (1.41–1.52)	1.56 (1.49–1.63)	1.29 (1.21–1.39)	1.37 (1.21–1.54)	1.49 (1.42–1.56)	1.48 (1.36–1.61)	1.16 (0.63–2.13)
2014	1.60 (1.54–1.66)	1.60 (1.54–1.66)	1.66 (1.58–1.74)	1.50 (1.40–1.61)	1.48 (1.31–1.67)	1.63 (1.56–1.71)	1.60 (1.46–1.74)	1.59 (0.88–2.89)
2015	1.78 (1.71–1.85)	1.78 (1.71–1.85)	1.86 (1.77–1.95)	1.66 (1.54–1.78)	1.73 (1.54–1.95)	1.83 (1.75–1.92)	1.69 (1.55–1.84)	1.87 (0.98–3.59)
First 30 days on continuous sickness absence								
No	Ref		N/A	N/A	Ref	Ref	Ref	Ref
Yes	1.36 (1.33–1.40)	1.39 (1.35–1.42)			1.35 (1.25–1.45)	1.51 (1.46–1.55)	0.97 (0.92–1.02)	1.06 (0.64–1.76)

Stratified for being on total sickness absence for at least the first 30 days (Y/N) and by injury severity 0 = musculoskeletal diseases; 1 = minor injuries; 2 = moderate injuries; 3 = serious and severe injuries.
*Back, head, neck, spine, and torso.
†Torso, back, neck, spine, and head.
‡Business, finance, and administration.
§Natural and applied sciences, related occupations.
‖Social science, education, government, service, and religion.
¶Recreation, arts, culture, and sport.
#Trades, transport, equipment operators, and related occupations.
**Manufacturing, processing, and utilities.
††Transportation and warehousing.

compared with those in the primary resources, transportation, and public sector industries (Model 1).

A dose–response relationship was observed between the size of the worker's firm and receiving Gradual RTW with the highest odds of Gradual RTW among workers in a firm larger than 100 FTEs (OR 1.51; 95% CI 1.46 to 1.56) compared with workers in a firm of less than 20 FTEs.

Finally, an increase in the odds of receiving Gradual RTW was observed from 2010 to 2015 (OR 1.10, 95% CI 1.06 to 1.15 in 2011 and OR 1.78, 95% CI 1.71 to 1.85 in 2015 compared with 2010).

Continuous sickness absence in the first 30 days after the first lost-time day was associated with an increased odds of receiving Gradual RTW (Model 1: OR 1.36; 95% CI 1.33 to 1.40). In stratified models by absence duration, being female, being older, having a higher wage, and working for a larger firm were associated with a higher odds of receiving Gradual RTW among workers with continuous sickness absence for at least 30 days compared with workers with a continuous sickness absence for less than 30 days (Model 4). In contrast, there was a greater trend over time between 2010 and 2015 in the proportion of workers of receiving Gradual RTW for workers with a continuous sickness absence of less than 30 days compared with more than 30 days (Model 3 and Model 4).

Stratifying the model by injury severity, an increased odds of receiving Gradual RTW was observed for women (OR 1.55; 95% CI 0.88 to 2.73), increasing age (25 to 34 years: OR 1.63; 95% CI 0.68 to 3.92; 35 to 44 years: OR 2.39; 95% CI 1.00 to 5.70); 45 to 54 years: OR 2.22; 95% CI 0.97 to 5.07; 55 to 64 years: OR 2.16; 95% CI 0.94 to 4.93), and increasing wage ($20,000 to $39,9999 OR 2.12; 95% CI 1.10 to 4.07; $40,000 to $59,999 OR 1.93; 95% CI 0.97 to 3.45; more than $59.999 OR 2.49; 95% CI 1.24 to 5.02) among workers with serious and severe injury severity compared with those with musculoskeletal diseases, minor and moderate injuries. The effect sizes are larger in the model stratified by severity, however the precision of the estimates decreased because of the smaller number of workers with serious or severe injury severity. For workers with serious injury severity, no effect of firm size, claim year or being on continuous sickness absence for at least 30 days was observed.

The overall performance and predictability of the models are shown in Table 3. The models explained between 6.1% and 15.1% (Nagelkerke R^2) of the variation in the Gradual RTW outcome, and the models' AUC was between 0.62 and 0.70 (indicating fair predictability).

DISCUSSION

Main Findings

This study examined when and under which circumstances Gradual RTW is provided to workers with a work-acquired MSD in British Columbia, Canada, by injury, socio-demographic, workplace, and temporal characteristics, for the period 2010 to 2015. Gradual RTW is considered a key aspect of an RTW trajectory leading to safe, timely, and sustainable RTW. However, Gradual RTW in British Columbia (and many other jurisdictions) is not standardized by the compensation system, and variety in Gradual RTW programs have been observed between industries, even within the same jurisdiction.[18,28–30] Identifying differences in the provision of gradual RTW for workers with musculoskeletal disorders can inform the targeting of current and future RTW interventions reducing inequalities in the provision of gradual RTW, and ultimately improving work disability outcomes. Using workers' compensation data in British Columbia between the years 2010 and 2015, we found that over 40% of workers with an MSD time-loss claim received Gradual RTW within 1 year after injury, and that this increased from 35% in 2010 to 47% in 2015. The model showed that

TABLE 3. Summary of Performance of Predictive Models of Receiving Gradual RTW

	Area Under ROC Curve	Log Likelihood	LR chi^2	Prob $>chi^2$	AIC	BIC	Psendo (McFadden) R^2	Nagelkerke r^2
Total sample (MSD) ($N=141,490$)	0.6276	−92,380.684	7094.28	0.0000	184,847.4	185,271.3	0.037	0.066
Total sample 2 (injury severity) ($N=141,490$)	0.6240	−92,575.985	6703.68	0.0000	185,228.0	185,602.6	0.035	0.062
<30 days ($N=100,037$)	0.6206	−64907.075	4412.03	0.0000	129898.2	130297.7	0.032	0.058
>30 days ($N=41,453$)	0.6693	−26711.38	3739.42	0.0000	53506.76	53869.32	0.064	0.115
MS disease ($N=13,871$)	0.6207	−9166.3294	641.31	0.0000	18404.66	18676.01	0.030	0.061
Minor injury severity ($N=100,164$)	0.6346	−64719.891	5561.59	0.0000	129517.8	129888.8	0.041	0.073
Moderate injury severity ($N=29,896$)	0.6280	−17776.191	1379.45	0.0000	35630.38	35950.17	0.035	0.067
Serious/severe injury severity ($N=559$)	0.6973	−353.06622	67.30	0.0008	778.1324	933.8738	−0.006	0.151

having a serious or severe injury, female sex, increasing age, increasing wage, increasing firm size, duration of sickness absence, and a recent claim year increased the probability of being provided with Gradual RTW. The models' overall fit was moderate (AUC 0.62 to 0.70), but the explained variance was low (ie, between 6.1% and 15.1% of the variance in Gradual RTW was explained by the identified determinants).[25,26]

Comparison With Literature

Injury- and Socio-Demographic Characteristics

Previous research showed that workers with minor injuries have a lower proportion of Gradual RTW.[7,31] The current study was restricted to MSDs only and we found similar results, showing that workers with more severe injuries like fractures and dislocations are more likely to be provided with Gradual RTW compared with workers with sprains and strains. Also, workers with sprains and strains were more likely to have early sustained RTW than other injury types, as shown in a previous study using similar data.[7] When workers RTW shortly after injury, this may be an indication that Gradual RTW is not required as is the case for some minor injuries. Indeed, categorizing MSDs by injury severity in the current study, as suggested by Clark and Ahmad,[20] showed a higher proportion of Gradual RTW for workers with a musculoskeletal disease (eg, rheumatism) or a serious injury (eg, lower extremity fracture) compared with workers with a minor injury (eg, upper extremity sprain/strain). When stratified by injury severity, the effect of increasing firm size on a higher proportion of workers with Gradual RTW was smaller for workers with a severe injury. The findings suggest that serious injuries may require Gradual RTW, while workers with a minor injury are more likely to RTW within short disability durations without the need for Gradual RTW.

Our study confirmed previous findings and showed that men had a lower proportion of Gradual RTW than women,[31,32] even within models adjusted for occupation and industry, models stratified by shorter or longer disability durations, and models stratified by injury severity (except for workers with the most severe injuries). More men work in industries associated with manual activities that may necessitate full recovery before RTW with limited opportunities for Gradual RTW, such as might be seen in construction occupations. Indeed descriptively, we observed a lower percentage of workers with Gradual RTW in the trades and primary resource occupations. However, in the adjusted models and the stratified models by industry sector (data in Supplementary Table S1, http://links.lww.com/JOM/A669), a consistent increased proportion of Gradual RTW remained for women across industries. Other studies have also shown that women might have a slightly longer duration of work disability, which might increase their likelihood of participation in modified duties while still on disability benefits.[33,34]

Workers aged 35 to 54 years were most likely to receive Gradual RTW. We hypothesize that age is a proxy measure for seniority on the job. Older workers are likely to have more experience, longer job tenure, and better benefits.[35] The experience and job tenure within one employer can result in the ability to perform a wider range of tasks on the job with more opportunity for Gradual RTW, and more investment by the employer to retain and return an experienced worker to their job. This will increase the likelihood of an older worker being provided with Gradual RTW by their employer or being in positions with flexibility amenable to task or time accommodation and modification. Younger workers tend to have more precarious employment arrangements that may result in them being less likely to be offered Gradual RTW when injured, or more likely to RTW sooner without the benefits of Gradual RTW out of a sense of job vulnerability. Furthermore, there has been a growth of nonstandard businesses and precarious employment conditions over recent decades, and increasing numbers of, mainly younger, individuals who are self-employed or working on temporary contracts. The rapidly growing gig economy, characterized by freelance work[36] and automation,[37] further increases employment precariousness. As such, younger workers may be in work arrangements where Gradual RTW is less likely to be offered.

Workers in the higher income groups were more likely to receive Gradual RTW compared with the workers in the lowest income groups. This might be related to the preceding explanations associated with age. For example, a 55-year-old woman working health care with an annual wage of $85,000 represents a worker with seniority in the job, a longer tenure, and more benefits—all factors that make this worker less replaceable, and increases the chance of being offered Gradual RTW. Conversely, an 18-year old man with an annual wage of $25,000 working in construction represents a worker with little seniority and job tenure and fewer benefits—all factors that make this worker replaceable if injured and less likely to be offered Gradual RTW. Income can also reflect socioeconomic status and the nature of the work, with a greater likelihood of Gradual RTW opportunities among workers with a higher income in jobs with more flexibility. Secondly, workers with a higher income might be more knowledgeable about the system and benefits with a better ability to navigate the system and negotiate for Gradual RTW. The highest income category was slightly less likely to receive Gradual RTW compared with the two middle income categories. Those in the higher income groups (1) may be harder to replace, giving that these workers are higher skilled or more experienced, so firms are incented to offer Gradual RTW sooner than to those in lower income groups; but (2) could be opting to RTW on a full-time basis to ensure their pre-injury income, due to a cap in salary benefits by the workers' compensation system in British Columbia.[31,32]

Workplace Characteristics

Of all workplace-related characteristics, firm size (FTE) was the strongest determinant of employers providing Gradual RTW services to their employees. All injured workers in a firm with more than 20 FTE had a higher proportion of Gradual RTW than workers in smaller firms. The cut-off at 20 FTE is a meaningful

categorization, because workplaces in British Columbia with 20 or more workers are required to have a joint health and safety committee. These committees support the employer's duty to ensure a healthy and safe workplace, and to identify and resolve health and safety issues in the workplace.[38] As such, they may be effective advocates of Gradual RTW for injured workers. Further, the offer of Gradual RTW is often a function of firm size and financial capacity, and supported by studies showing a shorter work disability duration for workers in larger firms (eg, Breslin et al[40] and Cole[41]). Larger firms with more employees (ie, occupations and work activities/tasks) have generally better access to resources and more possibilities to offer modified hours or duties compared with smaller companies.[39] The observed increase in Gradual RTW among larger firms persisted in models stratified by disability duration as a measure of injury severity.

An unexplored area when associating firm size with the offer of Gradual RTW is the ability to implement and offer Gradual RTW that may be greater in larger firms compared to smaller firms, in part due to there being additional occupational health regulatory requirements for larger firms. Also, safety regulations are primarily developed for larger firms and may be less effective in smaller ones, which may limit the ability to offer safe Gradual RTW options in smaller workplaces.[39,40] Finally, workers in smaller firms may be concerned that reduced hours or altered work tasks could jeopardize their employment resulting in early RTW without Gradual RTW options. Prospects of this occurring are greater in small firms where job security and employment protection legislation are generally not as strong.[41]

While residual confounding remains a possibility without better measures of injury severity, even within the MSD category, the findings suggest that larger workplaces have more opportunities to provide Gradual RTW to injured workers. This is an important finding for workers' compensation systems and employers, since over 50% of workers in the current cohort worked in a firm with less than 100 FTEs and had a lower likelihood of Gradual RTW compared to very large firms.

Temporal Characteristics

We found a notable increase in the offers of Gradual RTW from 35% in 2010 to 47% in 2015. Based on the authors' expertise and work with stakeholders in British Columbia, there has been an increasing recognition of the benefits of Gradual RTW and an increasing acceptance among compensation systems and health professionals that this is good practice. Secondly, WorkSafeBC indicated an increase in claims assigned to RTW specialists since 2012 that could have also contributed to an increase in Gradual RTW (personal correspondence). It is likely that there is an upper limit in the provision of Gradual RTW, as some minor injuries may not warrant it and for some severe injuries it is not feasible. Future research on Gradual RTW will help to illuminate these relationships further.

Strengths and Limitations of the Study

First, using administrative data allows for the inclusion of large samples. The detailed population-based data used in this study, representing all time-loss claims for MSDs in the province of British Columbia, Canada, coupled with a detailed and refined Gradual RTW outcome, is a main strength of this study. Second, the administrative data also contained a comprehensive set of descriptive factors for investigating the likelihood of being offered Gradual RTW. Third, using administrative data enables a long follow-up observation period without sample attrition.

At the same time, the use of administrative data can be a limitation. In the case of Gradual RTW, factors like job strain, job satisfaction, fear avoidance beliefs, subjective RTW prognosis, self-rated work ability, RTW motivation, and support from supervisors and colleagues are likely important predictors for considering Gradual RTW. These factors are not measured using administrative data and may help explain why the multivariable model explained only 6.1% to 15.1% of the variance in the Gradual RTW outcome.

Secondly, administrative data may be subject to misclassification or miscoding and lead to information bias. However, cleaning of the data was intensive and incomplete claims were excluded from analysis and any bias is hypothesized to be non-differential with a conservative effect on the observed findings. Finally, the results may not be generalizable to jurisdictions that have different compensation and RTW assessment, treatment, and benefit criteria.

Thirdly, more clinical data is necessary to construct a refined injury severity measure, with the potential to build a more comprehensive predictive model for Gradual RTW outcomes. Notwithstanding this, the determinants model constructed in this study has considerable relevance to work disability management systems, occupational medicine professional, and employers as this model identifies circumstances the uptake of Gradual RTW could be improved.

Implications for Research and Practice

A number of studies have shown that Gradual RTW can lead to sustainable full-time employment.[42–45] However, a key question in work disability research is whether work-disability systems are sufficiently sensitive and coordinated to properly identify when and under what circumstances workers can benefit most from Gradual RTW. Our study can inform policy-makers and occupational health professionals to identify workers most likely in need of Gradual RTW, under the assumption that Gradual RTW is a central tool in the worker's RTW trajectory. These results identify areas where additional focus or support is needed to encourage the use of Gradual RTW. In particular, additional information and/or support may need to be provided to small employers as they may not have the capacity to develop their own Gradual RTW program.

CONCLUSION

This study identified seven injuries, socio-demographic, workplace, and temporal characteristics related to Gradual RTW after a work-acquired MSD. Identifying differences in the provision of gradual RTW for workers with musculoskeletal disorders can inform the targeting of current and future RTW interventions reducing inequalities in the provision of gradual RTW, and ultimately improving work disability outcomes.

ACKNOWLEDGMENTS

Esther Maas is supported by a Canadian Institutes for Health Research (CIHR) postdoctoral fellowship. Mieke Koehoorn was supported in part by a CIHR Chair in Gender, Work and Health. Christopher McLeod is supported by a CIHR New Investigator Award and a Michael Smith Foundation for Health Research Scholar Award. All authors are supported with research operating funds from WorkSafeBC through the Partnership for Work, Health and Safety. All inferences, opinions, and conclusions drawn in this manuscript are those of the authors, and do not reflect the opinions or policies of the Data Steward(s).

REFERENCES

1. Association of Workers' Compensation Boards of Canada (AWCBC). Key Statistical Measures, Annual KSM reports 2004–2013. Toronto (ON); 2015.
2. Mirolla M. The cost of chronic disease in Canada. Stat Canada. 2014. Available at: http://www.gpiatlantic.org/pdf/health/chroniccanada.pdf. Accessed November 6, 2019.
3. Picavet H, Schouten J. Musculoskeletal pain in Netherlands:prevalences, consequences and risk groups, the DMC 3 - study. *Pain*. 2003;102:167–178.
4. Pedersen J, Bjorner JB, Burr H, Christensen KB. Transitions between sickness absence, work, unemployment, and disability in Denmark 2004–2008. *Scand J Work Environ Heal*. 2012;38:516–526.

5. Pedersen P, Lund T, Lindholdt L, et al. Labour market trajectories following sickness absence due to self-reported all cause morbidity—a longitudinal study. *BMC Public Health*. 2016;16:337.
6. Lindholdt L, Labriola M, Nielsen CV, Horsbøl TA, Lund T. Sequence analysis to assess labour market participation following vocational rehabilitation: an observational study among patients sick-listed with low back pain from a randomised clinical trial in Denmark. *Occup Environ Med Res*. 2017;7:e015661.
7. McLeod CB, Reiff E, Maas E, Bültmann U. Identifying return-to-work trajectories using sequence analysis in a cohort of workers with work-related musculoskeletal disorders. *Scand J Work Environ Heal*. 2018;44:147–155.
8. Waddell G, Burton AK, Aylward M. A biopsychosocial model of sickness and disability. *Guid Newsl*. 2008;1–3.
9. Waddell G, Burton K. Is work good for your health and well-being? *Occup Med (Chic Ill)*. 2007;57:229–1229.
10. Pransky G, Gatchel R, Linton SJ, Loisel P. Improving return to work research. *J Occup Rehabil*. 2005;15:453–457.
11. Canadian Medical Association. The physician's role in helping patients return to work after an illness or injury. *Can Med Assoc J*. 1997;156:680A–690A.
12. Gensby U, Lund T, Kowalski K, et al. Workplace disability management programs promoting return to work: a systematic review. *Campbell Syst Rev*. 2012;8:153.
13. Krause N, Dasinger LK, Neuhauser F. Modified work and return to work: a review of the literature. *J Occup Rehabil*. 1998;8:113–139.
14. Franche RL, Cullen K, Clarke J, et al. Workplace-based return-to-work interventions: a systematic review of the quantitative literature. *J Occup Rehabil*. 2005;15:607–631.
15. Cullen KL, Irvin E, Collie A, et al. Effectiveness of workplace interventions in return-to-work for musculoskeletal, pain-related and mental health conditions: an update of the evidence and messages for practitioners. *J Occup Rehabil*. 2018;28:1–5.
16. Association of Workers' Compensation Boards of Canada. Detailed key statistical measures (KSM) report 2017 [Internet]; 2017. Available at: http://awcbc.org/?page_id=9759. Accessed April 24, 2019.
17. WorkSafeBC. Rehabilitation Services and Claims Manual Volume II; 2005.
18. WorksafeBC. Preventing Musculoskeletal Injury (MSI) - A Guide for Employers and Joint Committees; 2009.
19. Barell V, Aharonson-Daniel L, Fingerhut LA, et al. An introduction to the Barell body region by nature of injury diagnosis matrix. *Inj Prev*. 2002;8:91–96.
20. Clark DE, Ahmad S. Estimating injury severity using the Barell matrix. *Inj Prev*. 2006;12:111–116.
21. Cryer C. Severity of injury measures and descriptive epidemiology. *Inj Prev*. 2006;12:67–68.
22. Harrell FE, Lee KL, Mark DB. Multivariable prognostic models: issues in developing models, evaluating assumptions and adequacy, and measuring and reducing errors. *Stat Med*. 1996;15:361–387.
23. Steyerberg EW. *Clinical Prediction Models. A Practical Approach to Development, Validation and Updating*. New York: Springer; 2008.
24. Bewick V, Cheek L, Ball J. Statistics review 14: logistic regression. *Crit Care*. 2005;9:112.
25. Steyerberg EW, Vickers AJ, Cook NR, et al. Assessing the performance of prediction models: a framework for some traditional and novel measures. *Epidemiology*. 2010;21:128–138.
26. Greiner M, Pfeiffer D, Smith R. Principles and practical application of the receiver-operating characteristic analysis for diagnostic tests. *Prev Veter Med*. 2000;45:23–41.
27. Krause N, Dasinger L, Deegan L, Rudolph L, Brand R. Psychosocial job factors and return-to-work after compensated low back injury: a disability phase-specific analysis. *Am J Ind Med*. 2001;40:372–392.
28. WorkSafeBC. WorkSafeBC Rehabilitation programs & services [Internet]; 2019. Available at: https://www.worksafebc.com/en/health-care-providers/rehabilitation. Accessed January 29 2019.
29. AMEBC. Handbook For Mineral and Coal Exploration in British Columbia; 2008.
30. Yassi A. Occupational Health Incident Reporting System for the Forestry Sector Reporting System for the Forestry Sector; 2013.
31. Gray SE, Hassani-Mahmooei B, Kendall E, Cameron ID, Kenardy J, Collie A. Factors associated with graduated return to work following injury in a road traffic crash. *J Transp Heal*. 2018;10:167–177.
32. Bethge M. Effects of graded return-to-work: a propensity-score-matched analysis. *Scand J Work Environ Health*. 2016;4:273–279.
33. Berecki-Gisolf J, Clay FJ, Collie A, McClure RJ. Predictors of sustained return to work after work-related injury or disease: insights from workers' compensation claims records. *J Occup Rehabil*. 2012;22:283–291.
34. Macpherson RA, Koehoorn M, Fan J, et al. Do differences in work disability duration between men and women vary by Province in Canada? *J Occup Rehabil*. 2019;29:560–568.
35. Pransky GS, Benjamin KL, Savageau JA, Currivan D, Fletcher K. Outcomes in work-related injuries: a comparison of older and younger workers. *Am J Ind Med*. 2005;47:104–112.
36. Steinmetz K. Exclusive: See how big the gig economy really is. Time Magazine; 2016; p. 6.
37. Brougham D, Haar J. Smart Technology, Artificial Intelligence, Robotics, and Algorithms (STARA): employees' perceptions of our future workplace. *J Manag Organ*. 2018;24:239–257.
38. WorkSafeBC. Joint Health & Safety Committees [Internet]; 2019. Available at: https://www.worksafebc.com/en/health-safety/create-manage/joint-health-safety-committees.
39. Galizzi M, Leombruni R, Pacelli L, et al. *Injured workers and their return to work: beyond individual disability and economic incentives. InEvidence-based HRM: a Global Forum for Empirical Scholarship, vol. 4*. Emerald Group Publishing; 2016, 2–29.
40. Breslin FC, Kyle N, Bigelow P, et al. Effectiveness of health and safety in small enterprises: a systematic review of quantitative evaluations of interventions. *J Occup Rehabil*. 2010;20:163–179.
41. Cole G. Returning to work after injury: factors that influence the timing. *Hum Resour Manag Int Dig*. 2016;24:19–21.
42. Hogelund J, Holm A, McIntosh J. Does graded return-to-work improve sick-listed workers' chance of returning to regular working hours? *J Health Econ*. 2010;29:158–169.
43. Schneider U, Linder R, Verheyen F. Long-term sick leave and graded return to work: what do we know about the follow-up effects? *Health Policy*. 2016;120:1193–1201.
44. Schneider U, Linder R, Verheyen F. Long-term sick leave and the impact of a graded return-to-work program: evidence from Germany. *Eur J Heal Econ*. 2016;17:629–643.
45. Streibelt M, Bürger W, Nieuwenhuijsen K, Bethge M. Effectiveness of graded return to work after multimodal rehabilitation in patients with mental disorders: a propensity score analysis. *J Occup Rehabil*. 2018;28:180–189.

OBC Secretariat
67 Yonge Street, Ste. 1400
Toronto ON M5E 1J8
Phone: 416-254-8673
E-mail: maria.marchese@cme-mec.ca

ONTARIO BUSINESS COALITION (OBC)

Vision: an Ontario workplace compensation system that is sustainable, that serves the needs of the employers that participate in the system and their workers and that contributes to the Province's competitiveness
Mandate: to advocate on behalf of employers with regard to issues of importance concerning the Workplace Safety and Insurance Board and workplace injury and sickness prevention.
OBC Priorities

- **OBC Relationship Building- communication/consultation with WSIB President, Chair, Minister of Labour, Prevention Division and MLTSD Senior Management Level**
- **WSIB Surplus Funding Distribution Model**
- **Rate Framework Implementation**
- **WSIB Operational Review Implementation**
- **WSIA Legislative Reform**
- **Maintenance of Current Benefit Levels (including 72-month lock-in)**
- **OBC Membership Expansion / Alignment of Efforts with Other Associations**
- **Occupational Disease Policy**

July 21, 2023

Workplace Safety & Insurance Board
Consultation Secretariat
200 Front Street West
Toronto, Ontario M5V 3J1

Sent Via Email: appealsfeedback@wsib.on.ca

Re: Dispute resolution and appeals process value-for-money audit consultation

The Ontario Business Coalition (OBC) appreciates the opportunity to provide feedback on the Workplace Safety & Insurance Board's (WSIB's) *Dispute Resolution and Appeals Process Value-For-Money Audit Consultation* (the Appeals Process Consultation).

By way of some background information, OBC was established 17 years ago with a mandate to advocate for an Ontario workplace compensation system that is sustainable, that serves the needs of the employers and workers that participate in the system, and that contributes to the province's competitiveness. We are mandated to work with senior officials at the WSIB and in government to make sure Ontario's workplace compensation system meets the needs of the province's employers, and compensates injured workers in a fair and efficient manner. OBC has a diverse membership base with employer organizations focused exclusively on workplace compensation issues. Our members represent employers in the manufacturing, auto assembly, construction, fuels and temporary staffing services industries.

OBC appreciates the assistance of the Officer of the Employer Adviser in the development of this response.

Recommendation 1.1 questions

OBC supports the use of mediation in appropriate cases to resolve issues as early as possible in the process. Employers generally prefer to have a more timely and efficient resolution of the issue(s), which can be one of the benefits of mediation. We recommend that cases that are most appropriate for mediation are those where there is a clear opportunity for the parties to compromise. For example, certain return to work issues would be well suited to mediation if the parties are willing to

actively engage in the process. Additionally, circumstances where both parties have issues in dispute may also be well suited to mediation if there is the potential that each party may agree to drop their objection (or objections) if the other party does the same.

OBC also proposed that the WSIB consider offering a case conference prior to the hearing. This may be an opportunity to make the appeals process more efficient in situations where mediation is not appropriate for the issue(s) in dispute or where the parties do not wish to participate in mediation.

If mediation does not resolve the issue(s), OBC recommends that the WSIB decide whether an oral hearing or a hearing in writing should be used, and the method of hearing should be determined based on the type of issue(s); in other words, whichever hearing method (written on oral) would normally be used for that type of issue should generally be the guiding factor to determine the appropriate hearing method if the mediation is not successful.

With respect to the timeframe for mediation, OBC supports using 45 calendar days from the time that both parties receive access to the file would be appropriate. Both parties to an appeal will need to have obtained access to the file and had an opportunity to review the file to participate in mediation, and sometimes there are delays in parties receiving access. Also, given that some files can be large and complex with multiple issues, we believe 45 days from the time that both parties receive access would be a more reasonable timeframe than 30 days to give parties a bit more time to obtain representation if they wish to do so and give those representatives sufficient time to review the file so that both parties can meaningfully participate in the process.

OBC also strongly recommends that if the WSIB is using alternative dispute resolution to resolve disputes, this should be done by a specialized and dedicated team that has received significant training in alternative dispute resolution. We believe that this option is preferable over training all staff on alternative dispute resolution in that it allows a dedicated team to hone its skills on this approach rather than adding the process to on to the workloads of decision makers dealing with a variety of tasks in the appeals process.

OBC also recommends that the alternative dispute resolution and appeals processes should only start once the objecting party has clearly documented the reasons for their objection (why the decision is incorrect or should be changed) and what outcome they are seeking. OBC also believes that the process should include a resource, or point of contact, for parties who have questions about how to fill out the forms correctly.

Recommendation 1.2 questions

OBC recommends that if the WSIB implements a new one-year time limit from the date of the decision to submit an appeals readiness form (ARF), appeals that were filed prior to the introduction of this new time limit should have one year from the date that the time limit is introduced to submit an ARF.

In addition, OBC also supports extending the time limit to submit an ARF in appropriate cases. Parties should be given an opportunity to indicate that they are not ready to proceed, the reason(s) why they are not ready to proceed, and how much additional time they will need to be ready. For example, in addition to the current criteria considered by the WSIB for time extensions, we suggest that the appellant may need more than 1 year from the decision date to be ready to proceed with their appeal if:

- there was a delay in receiving the WSIB decision that is being objected to;
- there was a delay in receiving access to the file;
- there is a reasonable delay in obtaining medical information that is relevant to the appeal;
- the parties are awaiting another decision from the WSIB's operating area regarding the same claim, and it would be beneficial to have both issues heard together on appeal so the claim can be considered more holistically; or
- a party is pursuing issues related to the same claim in another legal proceeding (e.g., at the Human Rights Tribunal of Ontario).

OBC believes that January 2024 too soon an implementation start date. We suggest the start date should be at least 6 months from the day on which the WSIB communicates this change to workers, employers, and the

broader stakeholder community. An appropriate start date would be one that would give sufficient opportunity for the Board to notify parties of this change in process and give parties sufficient time to obtain the information they will need and retain legal representation if they wish; legal representatives will also need sufficient time to prepare their cases.

OBC would appreciate more details as to how the Board intends to notify parties who filed an Intent to Object Form or Objection Form (ITO) in the past but never submitted an ARF that there is a new time limit that will apply. Many appellants would have received advice from representatives in the past that there was no time limit to proceed.

In addition, we would suggest that if the appellant filed their ITO when there was no time limit to submit an ARF, and the appellant did not have notice that this new time limit was being introduced, this should be a relevant factor weighing in favour of extending the time limit to file an ARF in cases where this new time limit was not met.

Recommendation 2.3 question

OBC recommends that, in addition to situations where accessibility or technological challenges may support the need for an in-person oral hearing, in cases where both parties agree that the oral hearing should be held in person (or in the case of a single-party appeal, if the appellant requests it) the WSIB should provide an in-person hearing when that is the wish of the affected parties.

Recommendation 3.1 question

OBC proposes that if there are multiple issues in an appeal and the return-to-work issue(s) is/are being expedited, that any other issue(s) that are ready to proceed (i.e., an ARF has been filed for the other issue(s)) should be included in the expedited process as this would likely be more efficient and effective for both the WSIB and the parties.

Recommendation 4.2 questions

OBC supports the option for a party to request that the WSIB exclude a decision (or decisions) from the Board's internal appeals process to pursue the holistic resolution of the issues for the person or business at the Workplace Safety and Insurance Appeals Tribunal (WSIAT).

OBC also supports excluding a decision (or decisions) from the Board's internal appeals process where both parties (or the appellant in a single-party appeal) wish to have the operating-area decision treated as the final decision of the Board so they may pursue an appeal at the WSIAT more quickly.

We are always available to discuss any of the points we have made in the attached submission.

Yours truly,

Chair
Ontario Business Coalition

Dispute resolution and appeals process value-for-money audit consultation

Workplace Safety and Insurance Board

Ontario Federation of Labour Submission

July 2023

Introduction

The Ontario Federation of Labour (OFL) is the central labour organization in the province of Ontario. The OFL represents 54 unions and speaks for more than a million workers from all regions of the province in the struggle for better working and living conditions.

With most unions in Ontario affiliated, membership includes nearly every job category and occupation. The OFL is Canada's largest provincial labour federation. The strength of the labour movement is built on solidarity and respect among workers.

We commit ourselves to the goals of worker democracy, social justice, equality, and peace. We are dedicated to making the lives of all workers and their families safe, secure, and healthy. We believe that every worker is entitled, without discrimination, to a job with decent wages and working conditions, union representation, free collective bargaining, a safe and healthy workplace, and the right to strike.

Organized labour, as the voice of working people, promotes their interests in the community and at national and international forums. We speak out forcefully for our affiliates and their members to employers, governments, and the public to ensure the rights of all workers are protected and expanded.

Position

The Ontario Federation of Labour (OFL) has grave concerns about how if implemented, the recommendations put forth by the KPMG's Value-for-Money Audit (VFMA), would restrict access to justice for injured workers, and debilitate their representatives' ability to sufficiently support workers. If the proposed timelines were implemented, representatives would not be able to fulfil their ethical, moral, and sometimes legal duty to represent injured and ill workers. And those unrepresented would simply not stand a chance in meeting any of the outlined timeframes given the complexity and bureaucracy of the compensation system, especially those who may have language, technology, or ability barriers.

Auditor

While we are accustomed to the annual Value-for-Money Audits, since their inception during the Mike Harris Conservative administration, this most recent iteration is perhaps the most inflammatory the injured and ill worker community has witnessed – but hopefully will not experience. The recommendations made by KPMG suggest that the corporation does not have an understanding of either the compensation system or compensation law in Ontario under the WSIA and provides a jurisdictional scan that does not capture the nuances of each jurisdiction's compensation system, therefore

negating any attempt for timeline comparison or otherwise. It also uses false comparators in other countries that do not have a no-fault system.

The report, problematically, also seeks to recommend changes that are out of the purview and authority of the WSIB – and that would require legislative changes such as the enforcement of a one-year time limit to submit an Appeal Readiness Form (ARF) – which is not the intended function of the yearly audits. Moreover, it references consultations with certain individuals from the labour and injured worker community who were not aware that they were providing formal consultation, as that consultation would have happened on a broader and more intensive scale. Those mentioned from the worker community were also not informed of any of the time limits that the report ultimately recommended, in providing any comment, and many are offended that their name is associated with the audit.

Also, as pointed out by UFCW Local 175/633's submission, we have witnessed various external reports authored such as those by Demers and Speer-Dykeman (reports that would favour injured and ill workers if ever implemented in full). Yet, this is the only report that has necessitated stakeholder consultation; a development that says quite a lot.

Overall, we believe the auditor's recommendations fall far outside of their scope and expertise and as a result, be abandoned. We also ask that for the next Value-For-Money Audit, a suitable auditor is selected. Ideally a subject matter expert in compensation law and adjudication.

Consultation process

We are also concerned with the integrity of the consultation process, where worker advocates located the Audit prior to it being circulated by the Board, and where our timeframe to respond to the recommendations was limited, despite informal conversations. We also see that the most recent consultation on Practices and Procedures incorporates some of the timelines that we are meant to provide comment on in this consultation. Most alarming, however, is that the recommendations were in the hands of the provincial government even before the consultation date was announced – leaving workers and their advocates to question how much their input will be considered at this stage, and the genuine nature of this consultation.

We share concern with the Injured Workers Consultants on how accessible the report and consultation are to injured and ill workers, or for those who speak languages other than English. A French translation would have been helpful for our Francophone members, and we ask that the WSIB provide such a document for future consultations.

In future audits, we also recommend that workers and their advocates are genuinely consulted by whatever body or individual is conducting an audit, that the auditor chosen has a background in compensation and the law in the Ontario context, and that the

worker and advocate community be able to weigh in on the recommendations far before the provincial government is approached by the Board. In fact, we question the provincial government's role at all in these consultations as the purpose of the audits are to ensure that the Board's programs are efficiently and effectively run – not to change the landscape of the workers' compensation system.

Our approach

Beyond these initial but glaring concerns, we will outline the impact that the proposed recommendations will have on: a) workers, b) worker representatives, and c) the overall system, and defer to our affiliates as the experts to answer the specific questions posed by the WSIB.

The timelines that are referred and objected to throughout our submission are the following:

1. Submission of the Intent to Object (ITO) form within 30 days of the decision;
2. Submission of supplemental information by injured or ill worker within 30 days of the ITO (60 days after the decision);
3. Completion of Alternative Dispute Resolution (ADR) and the reconsideration process by injured or ill worker within 30 days of the supplemental information being submitted (90 days after the decision); and
4. Submission of the Appeal Readiness Form (ARF) 9 months after ADR/the reconsideration process (1 year after the initial decision).

Useful observations

We believe the fundamental flaws of the report based on the auditor's misunderstanding and misinterpretation of compensation law and adjudication negates the use of this report. However, the following observations were appreciated:

- Holistic approach to issues is preferable to a fragmented one
- Existence of unnecessary administrative delays assigning an appeal to an ARO
- Enforcement of decision implementation is lacking
- Effective and accountable quality assurance lacking
- Delay in decision-making creates a more litigious environment
- Need to expand access to WSIB online portal

Labour has long been advocating for the last point, where workers and their representatives need access to the worker's portal to track appeals status, upload documents, and for general communication.

Unfortunately, none of the proposed timelines outlined above will alter these issues but could still be addressed separately.

We also appreciate the consideration put forth about the method of hearings. We believe that as before the pandemic, the default hearing method should be in-person hearings, with the worker having the option to choose otherwise (e.g. virtual or written). Hearings in person have a higher success rate because the adjudicator is often able to hear from all parties, and learn about the mechanisms of injury in greater detail (e.g. physical movement). It is also easier to deny someone when you never face them, as opposed to just reviewing their file. Further consultation will be provided on this element in the Practices and Procedures consultation.

Impact on workers

Put simply, other than the above observations, we do not see workers considered in any equation in the audit. The report makes no consideration for those workers who may be unrepresented or who may experience language, ability, or other barriers which could prevent them from responding within any of the proposed timeframes. Otherwise, none of these recommendations would have been put forward. We do not view it as a malicious or intentional attempt by KPMG to undermine workers' rights. We again think it originates from their lack of understanding of the compensation system both in Ontario and elsewhere, the law, who it is meant to serve, how the system originated, the Meredith principles, and the principles of justice. That being said, it would be malicious if the Board were to implement the recommendations, as they have heard the detrimental impact that it could have on workers, from workers and their representatives directly.

For example, as dictated by the Workers' Compensation Network, the KPMG report suggests that the WSIB can choose to enforce a 30-day time limit on decisions combined with a return-to-work one – an incorrect assertion as under section 120(3) of the Act, only decisions regarding Return to Work (RTW) or Labour Market Re-entry (LMR) have a 30-day time limit, and injured workers have six months to object to all other WSIB decisions. The intention for that current timeframe is to accommodate workers when they need a change of their RTW/LMR plan.

To apply the 30-day timeframe to any other type of WSIB decision, where workers otherwise have six months to object, would be a travesty of justice. Injured workers would be forced to proceed with an appeal that has insufficient evidence, or completely abandon it, leading to an overall chilling effect on appeals. For example, workers often cannot get in to see their family doctor (if they have one) in 30 days for supplemental medical opinions, let alone a specialist who could take months or years, particularly in rural areas.

In the case of more complex occupational disease claims, often workers and their representatives rely on external reports that can take a longer amount of time to gather sufficient historical exposure evidence [an issue that could be alleviated if sufficient funding and resources were allocated to the Occupational Health Clinics of Ontario Workers (OHCOW)]. As outlined by the United Steel Workers' District 6 submission,

there are over 2,000 denied claims currently within occupational disease cohorts that could be potential appeals. Implementing a time limit to submit an ARF in particular would create chaos in an already under-compensated group. It takes WSIB often a year to provide a decision on these claims, and requiring an Intent to Object (ITO) within 30 days, as well as an ARF within a year is unreasonable and unrealistic.

Injured and ill workers also could not find legal representation within 30 days, especially with the current workload and waitlists at all organizations that represent injured and ill workers, which can range from six months to three years. Once they are at the front of the line, each organization has its own intake process, which requires representatives to acquire authorizations (e.g. medical and legal waivers) and have all of this submitted to the WSIB – a step that could take longer when representing workers with technological or capacity barriers.

In addition to the time limit proposals, the proposed 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, is a completely unreasonable onus to place on workers who may be self-represented. In representing themselves, workers could unknowingly exclude their own entitlement to certain benefits (e.g. healthcare benefits) if the remedy section is not filled out with all benefits in mind, because they do not have access to a representative – whereas the standard remedy should be entitlement to any and all applicable benefits, where the WSIB can then adjudicate entitlement. Moreover, the ARO should not rely on the objecting party to determine the remedy of an appeal. It is within the ARO's jurisdiction to decide based on the merits of the case.

A recommendation also exists that an *electronic* Appeal Readiness Form (ARF) be completed with all fields filled out (otherwise it will not be accepted) which is completely unreasonable for unrepresented workers, or for those who are not familiar with or do not have the appropriate technology. Put simply, it is discriminatory. Nowhere in the Act specifies a requirement for electronic submissions, likely for this very reason. The current legal requirement under the Act [s. 120(2)] is that an objection must be in writing and indicate why the decision is incorrect or should be changed – much simpler but still, requires legal advice which workers will not be able to obtain within 30 days. Many injured and ill workers already find their interactions with the WSIB system psychologically distressing. Constricting timeframes and their ability to seek representation will be untenable for workers' mental health, in addition to whatever ails them from their workplace illness or injury.

Even if workers were able to somehow secure legal representation, likely by putting up money instead of accessing free representation through a legal clinic, union or the OWA, a 30-day timeframe would not allow for a representative to file an appeal with the proper amount of review and evidence dedicated to their claim. Again, leading to the same result – a lost appeal.

In a similar vein, we are concerned with the mention of incentives for early settlements and disincentives for moving forward with the appeal process. If a worker is unable to secure representation given all of the pitfalls and barriers mentioned above, we worry that a worker will be forced into a less than fair settlement because they do not have a representative to advise them otherwise. Given the language and other barriers discussed above, plus the complexity of the compensation system, many workers will not know that they may be entitled to greater benefits, or will not want to bet on an adversarial system to seek greater benefits, and will be forced to settle for a lower amount than what is justified by law.

One last concern we have is how workers will be notified of any changes to the timelines. If the WSIB successfully lobbies the government to alter any timelines in the WSIA, the OFL submits that it should not be up to worker representatives at any organization to notify injured and ill workers of those changes. The burden must be on the WSIB to provide advance notification, education, and clarification to workers about any changes to the compensation system. Especially as representatives will already be overburdened themselves with any process shifts.

Impact on representatives

Thirty days for submitting ITOs, thirty days for supplemental information, and thirty days to complete the ADR and reconsideration process, while also communicating all of these steps and the decision back to the worker is simply impossible for any representative to take on. If any of those timelines are implemented, worker representatives will be in crisis mode, and will essentially turn into time limit machines who are unable to represent workers as any claimant deserves to be represented by law. For example, representatives often do not receive WSIB decision letters for ten to fifteen days after they are dated, and it is often difficult for representatives, injured workers, or medical professionals to receive calls back from the WSIB earlier than weeks or months in relation to an appeal, likely because of their workload as well.

We imagine employer representatives will be in a similar mode, although with less impact on workers. And the auditor's suggestion that these timeframes are possible (or legal) again reveals their lack of knowledge on the amount of time and work required to prepare for each and every hearing or mediation. Their mention of 'arbitration' in conflation with mediation is also inherently flawed as the Act does not specify any arbitration role in mediation (which would require much more certification and training, to start). Moreover, nowhere in the report is there mention of timeframes or time limits for WSIB decision makers – the onus is put strictly on workers and their representatives, with the threat of no appeal as the penalty.

Depending on the organization, as mentioned above, worker representatives can have a six month to three-year backlog of workers in the queue to represent. And many have their own case management system which will now be turned upside down and take

quite a while to remedy. Also, as the WSIB may know, unions in particular have no legal duty to represent workers in their compensation claims, the OWA only has a mandate to represent non-unionized workers (unlike other provinces, if we are to talk about a jurisdictional scan), and the legal clinics are far underfunded for their current caseload. What happens to the workers who fall through the cracks? What happens to their appeals? Will they be forced to represent themselves?

The KPMG's suggestion that the WSIB "establish a roster of qualified representatives" and that compensation be tied to their "level of effort throughout the decision process" alarming for three major reasons [pg. 37 of VFMA]. First, the WSIB cannot dictate representation, or deem who is qualified to do so – they know that even if KPMG does not. Secondly, the level of workers' compensation should most evidently never be contingent on how the WSIB deems the representative's level of effort. Third, is that the WSIB suggests it may engage with the Law Society on this recommendation, as though they can interfere with solicitor-client relationships. The WSIB, like WSIAT, can establish a code of conduct for representative, but the suggestion that their scope extends any further, is alarming.

While the WSIB may see resource and capacity issues as an 'us' problem, it will be come an 'all of us' problem as the system breaks down, and most importantly, injured, and ill workers are poorly represented and unrepresented.

Impact on system

Workers and worker representatives want to see a swifter process more than any party involved in the compensation process. But the proposed recommendations will not achieve swifter justice; it will achieve the exact opposite. And a faster pace will not change the already unacceptable denial rate of claims, or fix operational issues.

If implemented, the proposed timelines will also achieve the opposite effect to what it is attempting to resolve. The Board would have to deal with frequent appeals of time limits because the truncated timeframe does not allow for a fair hearing. The WSIB would also have to deal with a great deal of inactive appeals that would have to be classified and maintained in some fashion and will cause even greater backlogs because of missed time limits.

We are also conscious that WSIB staff themselves are overburdened with work, as expressed in recent labour disputes, that there has been a large turnover in staff, and that training previously provided to new staff has been stunted. The impact of these proposed timelines will not have a huge impact on senior management, but they will have an impact on staff, which concerns us from a labour perspective.

Recent documentation has also shown the sheer amount of decisions overturned by WSIAT. Most recently, in 2022, data shows that 64 per cent (614 cases) of WSIB decisions were overturned by WSIAT, with an additional 17 per cent (158 cases) that

were allowed in part. If the proposed time limits were implemented, it would lead to greater denials of appeal rights, thereby preventing workers' ability to have their case heard by the Tribunal. This overturn rate also shows that perhaps it is not the appeals process that should be examined by another body, but the WSIB decisions themselves. We suggest the WSIB look inward before changing any of their outward processes.

Conclusion

We are keenly aware that the labour, legal and worker representative community will vehemently refute the validity and use of this report. It is now up to the WSIB as to whether or not they will listen.

The WSIB is characterized as an inquiry system as opposed to an adversarial one [Policy 11-01-02]. If any of the timeline included in the VFMA are implemented via legislation or otherwise, the Board will be further entrenched as an adversarial body. Most importantly, the impact of an adversarial body will be the denial or abandonment of appeals by workers. In other words, a major deterrent for workers to receive the justice they deserve under the law.

We have reviewed the worker community submissions and along with the thoughts expressed above, many with legal backgrounds will argue is not only dangerously inaccurate, but also limits the rules of natural justice (e.g. the right to a fair hearing), and could perhaps even be a violation of the Charter (e.g. under section 15) if implemented.

The Board does not have a duty to implement these recommendations – their duty is to evaluate them to ensure that the purposes of the Act are achieved (not altered). We ask that given its fundamental flaws, the report be abandoned. If the WSIB wants to know how workers can receive justice faster, and more frequently, they know who to call.

cj/COPE343

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,
Co-chair, john.mckinnon@iwc.clcj.ca

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

July 21, 2023

Workplace Safety & Insurance Board (WSIB)
Consultation Secretariat
200 Front Street West
Toronto, Ontario M5V 3J1

Submitted by email to: **appealsfeedback@wsib.on.ca**

Re: Ontario Mining Association comments on the WSIB consultation on its dispute resolution and appeals processes, online posting June / July 2023

The Ontario Mining Association and our members review public sector consultations to prepare submissions that reflect our industry's perspective and experience. **Ontario Mining Association member companies** (see the complete list) represent the range of mining operations in Ontario. Mining direct employment in Ontario totals approximately 29,000, with more than $3.7 billion paid in total worker compensation. Mining in Ontario directly contributes an estimated annual total of $8.0 billion to gross domestic product, $2.9 billion in wages and salaries, and approximately 75,000 jobs in the province via direct and indirect channels.

The Ontario Mining Association was established in 1920 to represent the mining industry of the province and is one of the longest serving industry organizations in Canada. We have a long history of working constructively with governments and communities of interest to build consensus on issues that matter to our industry and to the people of Ontario.

OMA comments on the WSIB consultation on its dispute resolution and appeals processes

As noted by the WSIB in its consultation, the proposed changes will include implementing recommendations from its value-for-money audit. OMA members have reviewed the WSIB consultation questions; our comments are included below (blue text).

The OMA appreciates the WSIB's initiative to consult and seek feedback on its dispute resolution and appeals processes. Enquiries regarding this submission may be addressed to:

President
Ontario Mining Association
T. 416-364-9301
Web: oma.on.ca
Email: info@oma.on.ca
Contact link

Recommendation 1.1: Our alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

The WSIA (**sec 120(2)**), outlines that the workplace parties must indicate in writing why the decision is incorrect or why it should be changed. Understanding that and what each party wants (i.e., the proposed remedy) is foundational to both formal and informal methods of resolving disputes in a timely and quality manner. We already ask these questions on our intent to object and appeal readiness forms, however, the parties do not always complete the information. In implementing this recommendation, we will make it mandatory to provide complete information through the current processes or through alternative dispute resolution.

Recommendation 1.1: We should adopt set timeframes for the reconsideration process. The audit recommends we adopt a 30-calendar-day time limit through legislative change. We will review the proposal for legislative changes with the Ministry of Labour, Immigration and Training and Skills Development. Ultimately, the Government of Ontario has jurisdiction over changes to the WSIA. However, we can implement timeframes that apply after we receive an intent to object form. For example, we could change the process so that once an intent to object form is submitted, a response on the reconsideration must be made within 30 calendar days and we could grant an additional 30 calendar days if any supplemental information is required and then allow 30 calendar days to complete the alternative dispute resolution and reconsideration processes and communicate the decision back to the person with the injury or business.

i. What appealable issues do you think are appropriate for this mediation-arbitration model?

All issues identified in the current practice directions with the following exceptions are suitable for mediation (ADR):

- Benefit related to debt
- CPP offset
- Time limit to initiate a claim
- Complex Occupational disease

All other issues can be addressed through the ADR process

ii. What principles should guide the mediation-arbitration approach? What else should we consider?

Both parties should come prepared to participate fairly in the process with the aim of resolving the issue:

- New evidence can be presented up to one week prior to the scheduled ADR.

- If, after reviewing the case file, either party does not think that they can resolve the issue through the ADR process, then they must provide written notice prior to the date and request that it proceed by written submissions.
- Information shared at the ADR process does not become evidence in the arbitrations/written submissions (i.e. if a party was willing to compromise on an issue).
- All decisions made through the ARO process are not precedent setting and cannot be relied upon in future decisions in the appeals process.

iii. If mediation does not resolve the issue, what factors should be considered to determine whether an oral hearing or a hearing in writing should be used for the arbitration component by the Appeals Resolution Officer?

- As noted below, there should be very few cases in which an oral hearing is required. Exceptions to written would be if a translator is required to assist with the evidence presented. In other provinces, the first level is only a written submission with any new evidence presented.

iv. To ensure expediency, what would be a reasonable timeframe for the mediation component? Is 30 calendar days reasonable?

- We agree that reconsideration decisions from the WSIB should be made within 30 days unless the issue is complex in which case 45 days would be reasonable.

v. How might alternative dispute resolution be used by front-line decision-makers? If there is a dedicated team of front-line operational experts delivering alternative dispute resolution, how much should other front-line decision-makers be trained in the approach?

- Recommend that the WSIB track the types of appeals (categorize them) to determine whether there are trends that occur such as initial entitlement being overturned. Further analysis would be completed by a team. The outcome of the analysis will help to identify gaps that are occurring in the decision-making process (i.e. LOE – misinterpretation of information initially submitted).

- If the ADR process upholds the initial decision: analysis can identify what evidence was relied upon to make the decision. This information could be communicated to the WSIB team so that they ensure similar evidence is present when making their decision.

vi. What factors should we consider in making the above information mandatory to initiate the dispute resolution and appeals process?

- The appeals process should automatically include an attempt to mediate (ADR) in all cases. This could be time saving for all parties.

vii. What factors should we consider when implementing 30—calendar-day timeframes for each step in the above reconsideration process?

- See comments at 1.2

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

Currently, once the time limit to object to a decision has been met, people with injuries and businesses have no time limit as to when they can submit the appeal readiness form. This means that an appeal readiness form can be submitted years after the original decision was made, and as mentioned above, without enough information about their desired outcome (i.e., the proposed remedy). As a result, it takes us more time and effort to address the reconsideration which makes it difficult for us to offer consistent service for all claims

i. If we were to implement a new one-year time limit from the decision date to submit an appeals readiness form on January 1, 2024, how should we manage appeals from before this date where an appeal readiness form has not yet been submitted?
    a. Should appeals from before this date be exempt from the requirement to send an appeal readiness form within one-year?
    b. If we were to make appeals from before this date exempt from the requirement to send an appeal readiness form within one year, what would a reasonable time limit be? Would one year from the new effective date be reasonable?

- There is currently a six month timeframe to initiate an appeal from the date of decision. However, there is no timeframe as to when the appeals readiness form is submitted. This allows appeals to be “bookmarked” forever.

- We propose a change to reduce the timeframe to initiate an appeal within three months (instead of six months); then implement the appeals readiness timeframe of six months (a total of nine months for the process). This provides an opportunity for the appeal to be resolved within one year or slightly longer.

How to manage appeals before this date where readiness form not submitted?

- Recommendation to address this issue is that letters would be sent to both the representatives on file (worker and employer) and the injured worker, advising that they have six months in which to submit the appeals readiness form related to the appeal from the date of the letter if they wish to proceed with their appeal or the appeal is deemed closed. These appeals have been in the queue for some time and

- so the representative should have started the process to collect any new evidence. We would recommend staggering the letters so that representatives are not overwhelmed with the number of cases advancing at the same time. Similarly, the WSIB would likely not have the resources to hear all of the appeals that are already in the queue.

ii. Under what extenuating circumstances should we consider extending the one-year time limit for submitting the appeals readiness form?

- There should not be any exemption for the one year requirement. The key to success is ensuring that the worker and representatives are given proper notice. The only exemption to the requirement would be medical as all parties would have been given notice of the appeal when they completed the participant form or the intent to appeal form.

iii. Is January 1, 2024, a reasonable start date for the new one-year appeal readiness form time limit? How much time would you need to make sure you have enough notice for a start date?

- Recommend that the new process come into effect by March 1, 2024 unless processes/staff are in place to commence Jan 1, 2024 for all new appeals. However, as noted above, we would recommend a staggered start for existing appeals in the queue. This would require notice to be sent out on a staggered basis with an exact time identified. No exemption unless medical from a facility (i.e. hospital) or physician can be produced to support that an individual was not capable of understanding the request.

The current criteria we consider for a time limit extension is in the **Appeals practices and procedures** document and below:

1. Whether the person received actual notice of the time limit.
2. The person was experiencing serious health problems.
3. Someone in the person's immediate family has experienced serious health problems.
4. The person had to leave the province or country due to an illness or death in their family.
5. The person has a condition that prevents them from understanding or meeting the time limit.
6. The person objected to other closely related issues within the time limit, and it would be impossible to address all of the issues separately.

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

Since the start of the pandemic in 2020, we have been very flexible in determining the method of resolution for appeals. We have worked directly with the parties to best accommodate their needs either online, in person, or in a hybrid manner for oral

hearings. We conducted a survey in 2022 on online oral hearings and it showed that they were positively received and that we should continue to offer them. Our current oral hearings are online. We make exceptions for in-person oral hearings in unique cases impacted by things like accessibility needs or technological challenges.

i. What other factors should we consider in determining whether the oral hearing should be offered in person or online?

- All oral hearings should be completed online whenever possible. The exception would be if a translator is required to be in attendance. However, we would suggest that to streamline the process, very few types of appeals need to be completed orally. These could include occupational diseases with the exception of NIHL or cases where the worker is deceased, which can be completed in written format. The process in other provinces does not include an oral hearing at the first stage of the appeals process. They have streamlined the process (i.e. Manitoba, Newfoundland).

Recommendation 3.1: We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.
We have an expedited appeal process for return-to-work decisions. Currently, the following decision types have a 30-calendar-day time limit to appeal and are considered for an expedited appeal:

- job suitability decisions where functional abilities or level of impairment are not in dispute
- lack of cooperation on a return-to-work plan from the person with the injury or business or during a training program
- suitable occupation and/or training plan decisions
- re-employment decisions

We do not use the expedited process if there are decisions involving other issues coupled with the above (i.e., those with a six-month time limit).
We are considering adhering to the 30-calendar-day time limit and expedited process when there are multiple issues (i.e., both those within the 30-calendar-day and the six-month time limits). This would mean that the return-to-work issue would be expedited through the appeals process independently regardless of whether it is coupled with other issues or not.

i. What factors should we consider in expediting return-to-work issues when there are multiple issues in an appeal?

- Fairness: when there are multiple issues to address, it is not clear that 30 days would be fair to both representatives. However, we also recognize that when RTW is involved, there is some urgency to resolve the issue. If the appeals branch will be following a 30 day timeframe, then the method used to resolve is ADR. In this way, if the other issues can't be resolved, then written submissions would afford both parties extra time if needed without delaying the RTW.

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.
Case Managers have 30 calendar days to implement appeals decisions from the Appeals Services Division or WSIAT. Decision implementation timeframes depend on how much of the required information is available on the claim file. If the Case Manager needs more information from the workplace parties, implementation may take longer than 30 calendar days.

Currently, the Appeals Resolution Officers' decisions sometimes lack instructions and the information required to implement their decision. We will review the way Appeals Resolution Officers' decisions are written to make sure they include directions for their decision to be implemented including any supplementary information needed. The decisions will also address the issue and entitlements requested by the parties as identified on the Appeal Readiness Form or the benefits that flow from the decision as part of the parties' proposed resolution to the appeal.

i. What factors should we consider in reinforcing the 30-calendar-day timeline for appeal implementation?

- When implementing an appeal decision, the aim is to implement within 30 days. However, if the Board requires additional information that goes back beyond two years (i.e. earnings information or lost time) then the board needs to allow additional time as this information may take longer to obtain.

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

We are assessing examples of decisions we make that rely on standardized calculations to determine if we should exclude them from our internal appeals process. This might include certain permanent impairment rating (quantum) decisions, and their non-economic loss monetary award calculations; certain loss-of-earnings benefits calculations and decisions; and certain personal care allowance decisions.

i. If we were to exclude decisions that rely on standardized calculations from our internal appeals process, what are some factors we should consider?

- Perhaps the process shouldn't exclude these types from appeals but rather, at the beginning of the ADR process, a Board "expert" in the NEL calculation or LOE payment or an overpayment could provide evidence (an explanation) to all participants including the mediator, so that there is a greater chance of resolution. These types of appeals are often related to communicating and comprehending the calculation.
- The ADR process would continue with the explanation being provided at the opening.

ii. Are there other decision types that we should exclude from our internal appeals process?

- No

iii. Sometimes in different claims for the same person, an issue in dispute may be active with WSIAT while another issue is active with us. Should there be options to request for us to exclude some decisions from our internal appeals process to pursue the holistic resolution of the issues for the person or business at the WSIAT? Under what circumstances would this be best? What else should we consider?

- The requirement under legislation is that an appeal be completed at both levels; not certain whether this option could be excluded.

- What may be relevant is that when there are multiple appeals at the Board level for the same worker/employer, they should be holistically addressed versus file by file. The reason for this recommendation is that, often at the WSIAT level, there is relevant information in other files that would assist with resolving the issue had it been made available at the board level. There may be a relationship between the file under appeal and the other files that are waiting to be heard. This would serve to minimize the issue noted above (File at WSIAT while another active with WSIB).

- This would also streamline the process when all issues are addressed in one session versus multiple appeal sessions for the same worker. If there is testimony regarding work history, the work, etc. it should be applicable for all cases.

Janet Paterson
President

Wayne Harris
Executive VP

Jeannie Howe
Secretary

Carol Moore
Treasurer

IN UNITY THERE IS STRENGTH

ONTARIO NETWORK of INJURED WORKERS GROUPS

HEAD OFFICE

127 Ravenwood Ave.
Thunder Bay, ON P7B 4H7
oniwgexec@gmail.com
www.injuredworkersonline.org

Wednesday, July 19, 2023

Dear Minister McNaughton,

Members of the Ontario Network of Injured Workers Groups (ONIWG) understand the WSIB has brought the latest KPMG Value for Money Audit Report of the Appeals to your attention and is requesting that you change legislation to allow its passing. It is for this reason that we decided to make our submission to you as well as the appeals process feedback and we hope that you take the time to consider how the process as well as the outcomes will destroy the lives of thousands of workers every year.

Minister, on behalf of the hundreds of thousands of injured and ill workers across Ontario as well as workers who will become injured or ill today and every day after, we trust that you will stand up for all of us and tell the WSIB no to this report when considering the impacts of these recommendations for all workers. While we agree there are changes needed in the appeals process at the WSIB, limiting access to workers with a disability is not the answer. Better and more thorough decision making, with the time needed for a complete information gathering by WSIB staff, would be a good start.

The truth is that this is an outright attack on every worker's right to fair and just compensation following a workplace injury or illness and we do not understand the WSIB's willingness to accept the recommendations, given the very apparent outcomes for all workers in Ontario.

The WSIAT recently started tracking outcomes for the WSIB's negative decisions. From July 1, 2022 to December 31, 2022, 956 hearings were held and 64.2% of the WSIB decisions were overturned in full, 16.5% of the WSIB decisions were overturned in part, 18.9% of the decisions were denied and .4% were abandoned. That means that 80.7% of the 956 decisions made by the WSIB, affecting 772 persons with workplace injuries or illnesses, have had to face unnecessary denials and lost opportunities for recovery.

Research shows that the window for recovery is greatly reduced the longer the injury or illness is left untreated. That doesn't include the impacts from the loss of financial benefits for the worker and their family members and the mental health issues that come from dealing with the compensation system. Currently, approx. 10,000 people each year with a work acquired disability receive a mental illness from their dealings with the WSIB.[1]

[1] 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 in Ontario

Christa Orchard Nancy Carnide Peter Smith Cameron Mustard

A positive decision at the WSIAT doesn't guarantee that the WSIB will rectify the situation. How is it that the WSIB can allow so many of their adjudicating decisions to be wrong and yet they are still allowed to carry on with no responsibility for the damage they are doing to so many workers and their families.

We do not believe for a moment that these are mistakes in their decision-making, given they keep making the same decisions over and over and don't learn from them. We also know that from January1 to March 31, 2023, of the 450 hearings that the WSIAT held, 219 or 49% were fully overturned, 117 or 26% were overturned in part and 112 or 25% were denied.

It is up to you, Minister McNaughton, to advise the WSIB that it is their responsibility to follow the WSIA legislation. You must remind the WSIB that their mission is not to guarantee the success of the employers but to ensure that workers who suffer workplace injury and / or illness will receive all the benefits that they are entitled to according to legislation to maximize their recovery to live their best life. The WSIB must be held responsible for their decision-making!

We now have the WSIB lobbying the government to change legislation brought forward by the KPMG in their Value for Money Audit Report on appeals. The KPMG's recommendations only focus on money-saving tactics for the WSIB and ignore the WSIB's responsibilities to workers injured, ill or dead from their workplace injuries, accidents or exposures. We question the use of the KPMG for this Value for Money Audit as it is apparent that they have no idea what the WSIB's mandate is.

Following the KPMG's suggestions will only create chaos in the appeals system right up to the WSIAT. The lives of workers and their legal representatives, if they are fortunate to find one in the short time proposed to submit the Intent to Object form, will be further damaged. Ultimately, the workers' legal representatives will be unable to maintain the rigid pace suggested in the report with their usual proficient, thorough and professional manner due to these short, unrealistic deadlines and it will be the workers who suffer the intended consequences.

Additionally, most workers won't be able to provide the medical to support this objection because the proposed 30-day time limit does not provide adequate time to determine the resulting medical issues. How will the lengthy waits to access appointments for physicians, medical diagnostics and specialists if necessary be accommodated in this process?

Many factors are involved for those workers who do not heal in the prescribed times and result in permanent injuries or illnesses. How will these claims be handled, given that secondary injuries are often involved over time? A real threat would be that the appeals system would become piece meal as well.

All workers, not only those injured or ill now, need to know that you will truly be there for all workers in Ontario as you have stated many times that you are. The KPMG Value for Money

Audit of Appeals will ultimately damage the appeals process and the WSIAT and any opportunities for workers, particularly those who have suffered permanent and life-altering injuries or illnesses, to reach recovery.

We believe that the KPMG had no jurisdiction to propose the recommendations that they made under the guise of the Value for Money Audit. We also question what the WSIB requested of them in this audit.

All workers in Ontario, including those currently injured and ill in Ontario, need you to:

1. Stand up for them.
2. Make the only decision that will retain the rights for workers to a fair and just hearing.
3. Tell the WSIB that the KPMG Value for Money Audit Report has no business being in any part of the WSIB or the WSIA legislation.

ONIWG would like an opportunity to meet with you to further discuss the KPMG report and the potential consequences that implementation of their recommendations would create for the appeals system. The use of the KPMG Value for Money Audit is a true waste of the WSIB's assets as there is little or no consideration for the well-being of injured and ill workers anywhere in this audit.

Respectfully submitted,

Janet Paterson

President

Injured & Ill Workers and Allies Demand Help With Skyrocketing Cost Of Living

I/we are writing you to express support for ONWIG's holiday demands.

People from all sides of the political spectrum agree that there is an affordability crisis in Ontario, and this holiday season nearly everyone is experiencing the crunch. Injured & ill workers – along with many of our marginalized allies – have spent years feeling a disproportionate amount of the pressure from austerity, cuts to services, and of inflation, making this a particularly difficult time of year for us.

The Ontario Network of Injured Workers' Groups (ONIWG) wants to take this opportunity to remind the Government of Ontario of some of the basic steps they could easily take to ease the awful poverty experienced by those who have been hurt on the job. **The easiest thing the government could do is simply honour its election promise of raising Loss of Earnings benefits to 90% of pre-injury wages, as a first step.** Additionally, the government must remember and act on the core demands of ONIWG's *Workers' Comp Is A Right* campaign:

- **End Deeming –** No more phantom jobs. Stop cutting injured and ill worker benefits by pretending they have a job when they are unable to work or to find suitable work. The previous legislature sat on a private members bill that would end deeming (Bill 119) for years without even calling it for a vote. A new version of the bill will be introduced soon and the government must do the right thing and pass it, or introduce anti-deeming legislation of their own.
- **Listen to our doctors –** Stop ignoring the advice of workers' treating physicians in favour of the clearly flawed opinions of "paper doctors" who never meet or examine the injured or ill worker.
- **Stop cutting benefits based on asymptomatic pre-existing conditions –** This practice – imported from the insurance industry – cuts workers off benefits by blaming so-called "pre-existing conditions" for workers' injuries, even if the condition never caused the worker to feel any pain or miss a single day of work for their entire pre-injury life.

The current Government of Ontario often speaks about their fiscal concerns and constraints, and preaches the need to be financially responsible. We would like to remind you that in the last few years alone, the WSIB has simply handed billions of dollars in refunds to employers, all while cutting workers benefits by deeming, ignoring workers' doctors, and blaming unrelated pre-existing conditions. When the WSIB uses these excuses to cut compensation benefits, injured & ill workers often end up in the publicly funded health system, and on OW/ODSP, creating a cost to taxpayers and unnecessarily depleting public resources, rather than being cared for by the employer funded workers' compensation system.

Year after year, the Ontario Government, Ministry of Labour, and WSIB just keep giving generous gifts to Ontario's wealthy employers. **Don't you think it's time to give injured workers their rights this year?**

For more information, visit: injuredworkersonline.org/workers-comp-is-a-right-campaign

Janet Paterson
President

Wayne Harris
Executive VP

Jeannie Howe
Secretary

Carol Moore
Treasurer

IN UNITY THERE IS STRENGTH

ONTARIO NETWORK of INJURED WORKERS GROUPS

HEAD OFFICE

127 Ravenwood Ave.
Thunder Bay, ON P7B 4H7
oniwgexec@gmail.com
www.injuredworkersonline.org

RESEACH ACTION COMMITTEE

To WSIB Appeals consultation

July 21, 2023

The ONIWG Research Action Committee was formed in 2013 and has been an active participant in workers' compensation research and policy and administration debates.

We request that the WSIB re-think this particular consultation and design a better one, to better involve and learn from the lived experience of injured workers and the knowledge of independent researchers.

We have real misgivings about the way the WSIB discussion paper characterizes the KPMG "consultation". It says:

"An independent third-party auditing firm (KPMG) made these recommendations based on a jurisdictional scan, research on leading return to work and recovery practices in Canada and internationally, and interviews with various stakeholder groups". With respect, we strongly object to these characterizations:

1)The KPMG firm is neither "independent" nor an expert in worker's compensation law and founding principles. It's simply an auditing firm, which specializes in advising corporations and government bodies rather than workers. The VFM mandate does not include the principle of fairness and justice for injured workers.

In 2011, KPMG performed a VFM audit of benefit policies. Its recommendations were widely condemned by workers. In order to give the review a sense of independence, the WSIB had the wisdom then to ask a truly independent expert, Jim Thomas, to hold hearings to bring forward recommendations for change to the WSIB that were based on a better consensus. We ask the WSIB today to learn from that experience.

2) The jurisdictional scan was not comprehensive and did not include examples from all relevant jurisdictions.

3) The global research was in fact quite limited and not shared. What leading research on return to work and recovery practices in Canada and internationally was actually looked at? We do not have a list of such research to understand how comprehensive this research was and how it was interpreted. Why did the WSIB not engage the world renowned Institute for Work and Health to produce a quantitative study on this matter?

4) There was no interview of any injured worker group that we know about. The report cites 2 leading members of the Ontario Network of Injured Workers' Groups as having been consulted. (They attended a meeting where information was shared but that is not being consulted which means having the opportunity to share your views.) They tell us categorically that they were not consulted and were unaware of the direction of the report and most importantly of its recommendations. This treatment of injured workers is most objectionable.

We ask the WSIB to extend the deadline, inform injured workers affected by the changes, and engage a truly independent expert in administrative law to discuss improvements to the WSIB dispute resolution and appeals system.

Sincerely,

Steve Mantis

Chair

ONIWG RAC

ONTARIO NURSES' ASSOCIATION

SUBMISSION

ON

WSIB's Dispute Resolution and Appeals

Process Value-for-Money-Audit Consultation

July 20, 2023

ONTARIO NURSES' ASSOCIATION
85 Grenville St.,
Toronto, ON M5S 3A2
Phone: 416-964-8833
Fax: 416-964-8864
www.ona.org

The Ontario Nurses' Association (ONA) is the union that represents 68,000 nurses and health-care professionals as well as 18,000 nursing student affiliates who provide care in hospitals, long-term care, public health, the community, clinics and industry throughout the province.

Executive Summary

ONA appreciates the opportunity to give feedback to the Workplace Safety and Insurance Board (WSIB) on their six categories of questions about the dispute resolution and appeals value-for-money audit (VFMA) recommendations.

ONA supports the stated objectives of the VFMA to provide efficient and effective administration of the dispute resolution process. We welcome changes to the system that would allow for more efficient and effective processes if these goals are appropriately balanced with flexibility, fairness, and due process.

As requested in WSIB's call for feedback, in the submissions that follow, we have provided suggestions for many of the VFMA recommendations on what we believe should be considered when developing processes to implement the recommendations.

We are otherwise asking that you reject outright Recommendation 1.1, which imposes a 30-day time limit to file an Intent to Object Form (ITO) and Recommendation 1.2, which sets a one-year time limit on filing the Appeals Readiness Form (ARF). As we will explain, we believe these recommendations are unworkable for workplace parties and would degrade the effectiveness of appeals at the Appeals Services Division (ASD) level.

Please consider our submissions on each recommendation below.

Recommendation 1.1: We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals.

We agree that Alternative Dispute Resolution (ADR) methods, such as mediation and negotiation, focus on finding mutually acceptable solutions and promoting communication between parties. This early resolution can prevent disputes from escalating into formal appeals, saving time and resources, and reducing the backlog of cases.

However, front-line decision-makers often deny entitlement to benefits without gathering the relevant medical information and other evidence (including speaking with the worker directly). In our experience, it is not uncommon to receive initial entitlement decisions where no effort has been made to obtain appropriate medical documentation before rendering an appealable decision. Furthermore, WSIB decision letters and the current objection process encourage parties to discuss their concerns with the front-line decision-maker. When these calls are placed, the decision-makers' position is often that the objecting party should proceed with an appeal. It is unclear how ADR training for front-line decision-makers would improve the current process.

We agree that mediation should be voluntary, and participating parties should be made aware of the terms and conditions of participating in the mediation process. However,

mediation should be conducted by a neutral decision-maker who has not previously rendered a decision on the issue. The process must recognize the unequal power dynamics in the workplace parties and the coercive power of poverty/hardship on injured workers without income, physical ability to work, or the mental health necessary to participate in ADR/mediation.

Mediation should not replace the legislated right to a hearing, and any unresolved issues should proceed to a hearing before an Appeals Resolution Officer (ARO). If a mediator issues a binding decision on unresolved issues (arbitration), it raises the possibility of inhibiting the mediation process and the possibility of tainting the mediator/arbitrator's understanding of the case because of information provided during the mediation process.

The purpose of mediation should provide an opportunity for resolving issues in line with the WSIB's legislation and policies. Mediation would also have utility in providing an opportunity to clarify and narrow the issues to be resolved and address evidentiary issues where they may exist.

A final concern with the proposed ADR system is that it may conflict with the proposed new one-year time limit for ARFs. In our experience as worker representatives, we are concerned and uncertain as to how there will be enough time to have an appeal file be "ARF ready" within the existing adjudicative model. If additional time is now devoted to ADR proceedings, we are concerned that this will further make the one-year ARF time limit unreasonable.

Essentially, from the time a front-line decision-maker issues a decision that is suitable for ADR, the worker will have to file an ITO, obtain representation, have file access issued to the representative, have the representative thoroughly review the file, gather more evidence in most cases, and then also participate in ADR. After all these steps are taken, assuming the one-year ARF window hasn't already been passed, if the ADR process adds more time and still does not produce an outcome that the worker is agreeable to, we are concerned that workers could miss their ARF time limit by participating in ADR.

If a new ADR process is implemented, the time limit to file an ARF should be placed on hold until the mediation process is complete and the issues are resolved, or it is determined that they are unresolved and should move forward to an ARO hearing. Any mediation process should be piloted, with feedback from stakeholders reviewed to assess the program's efficacy.

Recommendation 1.1: The audit recommends we adopt a 30-calendar-day time limit through legislative change and that the alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which

will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

We will address our concerns regarding the ITO and ARF, including imposed shortened time limits, the need to document reasons for objection and propose remedies on the forms. The same issues with shortening timelines and proposing remedies apply at either stage. We are ultimately requesting that you reject these recommendations.

While the recommendation to implement a 30-day time limit for ITOs and a one-year time limit for ARFs and the requirement to include a proposed resolution(s) may seem beneficial at first glance, there are significant issues external to the appeals process itself that pose real concerns about the ability to adequately prepare a claim for appeal. It is crucial to balance efficiency and fairness in the appeals process. While imposing time limits and requiring proposed resolutions may aim to expedite proceedings, these measures should not compromise the parties' ability to present their case adequately, explore alternative resolutions or consider new evidence. Flexibility, fairness and due process must be prioritized to ensure a just and comprehensive appeals system.

Based on our experience, implementing these arbitrary timelines does not reflect the multiple time-consuming steps required to prepare for objecting to and appealing WSIB decisions. The WSIB system presents numerous challenges relating to accessing all relevant documents pertaining to a worker’s claim. A decision can be received in the mail several days after the date of the decision. After receiving a decision, workers must then be able to understand the decision and potential long-term ramifications of the decision to determine whether it needs to be appealed; this is particularly complex where there are multiple issues in one letter or a delineation of entitlement. Parties also need time to obtain representation, which will likely take longer than 30 days, especially since the worker will have less than 30 days by the time the decision is received. In our experience, access to a claim file can take anywhere from four to eight weeks or longer. While waiting for the claim file, time limits are already running, and workers/representatives have not yet had an opportunity to conduct a substantive review of the claim, let alone determine the next steps for the appeal.

If the 30-day time limit is imposed for the ITO, that would mean the ITO must be filed without any access to the claim file, and presumably the information to complete the ITO will be based almost entirely on the information contained in the decision letter. It is unclear how any party can fill out a detailed ITO based solely on a decision letter and meet the expectations of the WSIB. We are concerned that under these circumstances ITOs would be unfairly rejected by case managers, effectively eliminating a worker’s right to appeal denial decisions in their claim.

The above-noted issues relating to delays with getting representation, waiting for file access and completing a substantive review of the file will also make it equally difficult to have the file ready for submission of an ARF within one year only. Once the claim file is received, most often it does not provide parties with full disclosure of all relevant evidence, unlike other legal or administrative proceedings. The onus instead, is on the parties to gather significant amounts of evidence up to and including medico-legal opinions from

treating practitioners. It is well-known that obtaining this evidence can be lengthy, challenging and beyond the control of the objecting party.

Similarly, it is also well-known that access to specialists and other forms of treatment (such as psychological services) under the OHIP system is severely backlogged. It can take upwards of a year to obtain even an initial consultation relevant to the issue being appealed. When workers no longer have access to the expedited referrals through the WSIB system, they are forced to rely on the services provided by OHIP to obtain the evidence necessary for their appeal.

In addition to the initial delays related to accessing representation and the claim file, parties also have to navigate WSIB's fragmented decision-making structure. Complicated claims with organic and psychological components are often handled by different case managers, all making various decisions at different times in the same claim. Implementing the recommended shortened time limits would mean further fragmenting appeals, as injured workers and representatives would be forced to file and move forward with appeals for decisions they do have while waiting for operations to make further determinations on other issues. Similarly, it is difficult to propose a remedy for one issue while awaiting decisions on other outstanding issues that may impact the remedy being sought. A holistic approach is necessary to address the issue of multiple decisions and the types of remedies sought.

Imposing 30-day and one-year time limits significantly compromises the parties' ability to preserve their rights to appeal a decision and present their case effectively and could undermine the fairness of the appeals process. Most experienced representatives will agree that the delay in appeals is brought about by the immense amount of work required to obtain the information necessary to proceed with the appeal.

By implementing these arbitrary timelines, the appeals process will look more efficient on paper, but the reality is that many appeals will be pushed through the system to meet these deadlines with insufficient information. This is inherently unfair to any objecting party.

If the WSIB decides to implement these timelines, (which we strongly oppose), any decisions rendered by the WSIB or ITOs submitted to the WSIB prior to the effective date of these new time limits should be exempt from the new time limits pursuant to s.119 of the *Act.*

In summary, implementing multiple strict time limits for appeals does not align with the principles of the *Act*, and instead prejudices parties to bring forward an appeal without all necessary evidence to obtain benefits that they are entitled to under the Act. It is essential to ensure a fair and comprehensive appeal process that allows sufficient time, flexibility and review of the unique circumstances of each case. ONA strongly opposes this recommendation and advocates for its removal.

Recommendation 3.1: We should make sure that return-to-work (RTW) decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

The recommendation to prioritize and expedite RTW decisions with a 30-day time limit through the appeals process has many potential drawbacks.

RTW decisions often involve complex considerations, including medical assessments, workplace accommodations and legal obligations. Parties involved in RTW disputes may require additional time to gather medical reports, consult experts and obtain relevant documentation. Rushing through the appeals process within a limited timeframe may not allow parties to present and analyze all relevant information, and may hinder the ability of parties to collect and present comprehensive evidence to support their case. Inadequate time for evidence gathering may lead to incomplete or biased assessments, negatively impacting the fairness of the appeals process. This could undermine the accuracy and fairness of the decisions made and may result in overlooking important details or potential solutions.

These concerns highlight another issue regarding potential expedited RTW appeals and the one-year ARF time limit. Often a worker that is going through RTW or Work Transition (WT) planning will file an ITO on a RTW, WT or Suitable Occupation (SO) decision to protect the right to appeal. Many workers may have reservations or concerns about the long-term suitability of a SO but will still try their best and cooperate by attempting the RTW or WT plan to the best of their abilities. Despite many workers' best efforts, they may ultimately struggle with the plan and not be successful in gaining employment in the SO. In such situations, these workers should still be able to appeal the suitability of the SO and any subsequent decisions at the conclusion or termination of the RTW or WT plan, especially if those decisions impact entitlement to Loss of Earnings (LOE).

It would not be fair for a worker to attempt a RTW or WT plan, not participate in an expedited appeal or file their ARF within one-year on these issues while they are attempting the plan, and then be unable to appeal an RTW/WT-related decision at the conclusion or termination of the plan. If such situations occurred, workers would essentially be penalized for attempting their RTW or WT plans and that is unfair. Therefore, if expedited RTW appeals and/or the one-year ARF time limits are introduced, WSIB should ensure workers are still allowed to appeal RTW/WT and SO decisions at the conclusion or termination of their plans.

Imposing a strict time limit may hinder the ability of parties to collect and present comprehensive evidence to support their case. Inadequate time for evidence gathering may lead to incomplete or biased assessments, negatively impacting the fairness of the appeals process.

Balancing efficiency and the need for comprehensive and fair decision-making in RTW cases is essential. While expediting the process is desirable, it should not come at the expense of thorough evaluation, due process rights and considering all relevant evidence.

The appeals process should prioritize fairness, equity, and the individual circumstances of each case to ensure just outcomes.

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.

In our experience, injured workers suffer the most significant hardship with delays in implementation, specifically with earnings information to determine LOE entitlement. WSIB has several tools to encourage timely responses from third parties but rarely uses them and should utilize these tools to enforce timely implementation of decisions.

WSIB should reinforce their implementation timeline and develop a robust framework to ensure that workplace parties respond promptly to requests for the information required to implement a decision.

We agree that reinforcing a 30-day time limit for appeal implementation and measuring organizational compliance can contribute to timely resolution, efficiency, accountability, and stakeholder satisfaction. However, it is essential to consider the complexity of cases, resource constraints and the need to balance speed and quality when implementing such a time limit. Piloting the recommendation and seeking input from relevant stakeholders may ensure its feasibility and effectiveness.

A timeline for implementation needs to balance speed and quality. While efficiency is important, it should not come at the expense of quality. Decision-makers must have sufficient time to review the decision to make well-informed decisions.

Conclusion

The current WSIB appeals system is an administratively laborious process requiring several operations decisions from multiple decision-makers, decisions that are rendered without sufficient evidence gathering, and delays in providing access to claim files. The current appeals system puts the onus on the injured worker to address these issues before proceeding with an appeal to present a case with all the relevant facts and evidence necessary for a fair and just hearing.

The adoption of these recommendations has the potential to produce results contrary to the intended goals because these recommendations if implemented, will likely lead to a range of hurried appeals being pushed through the system before there has been enough time for all issues to be adjudicated holistically, or for relevant evidence to be obtained that helps decide the appeal. If more appeals are hurried through the system due to unreasonable administrative time limits, it will ultimately lead to a higher percentage of appeals being transferred to the Workplace Safety and Insurance Appeals Tribunal (WSIAT) and prolonging the hardship of an injured worker seeking their statutory right to benefits.

For these reasons, we ask that you reject Recommendations 1.1 and 1.2, which impose unworkable timelines on workplace parties. We believe this will degrade the effectiveness of the WSIB’s appeals process.

We otherwise ask that you consider our feedback and that of the injured worker community as you consider implementing these recommendations. In particular, please consider the realities of working through the WSIB system for workplace parties and the need to balance efficiency and effectiveness with flexibility, fairness and due process into account as you implement the proposed changes.

WSIB dispute resolution and appeals process value for money audit consultation

Submissions of OPSEU/SEFPO

July 28, 2023

Ontario Public Service Employees Union /
Syndicat des employés de la fonction publique de l'Ontario
100 Lesmill Rd
Toronto, ON M3B 3P8
Phone: 416-443-8888 (or 1-800-268-7376)
https://opseu.org/

1. INTRODUCTION

The Workplace Safety and Insurance Board's plans to change its dispute resolution and appeals processes include measures that would impede access to justice and undermine the statutory goals of Ontario's workers' compensation system. The implementation of a one-year time limit for appeal readiness, a proposed legislative change to shorten objection time limits to 30-days, and more stringent requirements for objection to decisions would introduce new barriers for injured workers and survivors trying to exercise their appeal rights and obstruct them from getting the compensation, benefits, and services that they are entitled to and need.

The WSIB's recommendations are based on a value for money audit conducted by KPMG LLP on its dispute resolution and appeals process. To the extent that KPMG offers any rationale for its recommendations, it appears to be that stricter procedural requirements will result in faster reconsideration and appeal decisions, which would somehow improve recovery and return to work outcomes. Little evidence or analysis is provided to support this claim. Stakeholders have only been provided a sparse and selective "jurisdictional scan" and vague assertions that the proposed changes "align with best practices in recovery and rehabilitation."

The notion that making it more difficult to object to and appeal WSIB decisions would benefit injured workers only makes sense in consultant-speak. The value for money audit shows a lack of understanding of the workers' compensation system and the challenges that injured workers and survivors face in accessing their appeal rights.

In this consultation, the WSIB invites feedback on how to implement recommendations that unfairly restrict the appeal rights of injured workers and survivors. That is the wrong focus – those recommendations should just be scrapped.

As to the other recommendations the WSIB has invited feedback on:

- Reconsideration time frames will only make the dispute resolution process more cumbersome and complicated. Such time frames will not encourage meaningful dispute resolution and may undermine the quality of reconsideration decisions.
- The introduction of alternative dispute resolution methods makes sense but should be voluntary and limited to appropriate cases.

- Prioritizing and expediting time sensitive appeals makes sense. This should not be limited to return to work issues — appeals involving ongoing or significant periods of LOE should also be triaged.
- Improving appeal implementation timelines would be positive, but not at the expense of decision quality.
- Worker and survivor preference should be given significant weight in determining between an in-person or online hearing.
- The WSIB cannot refuse to consider appeals of decisions based on standardized calculations. Appeals where the WSIB's calculations are the only issue are likely less common than suggested and should be quickly and easily decided.

2. BACKGROUND

2.1 OPSEU/SEFPO's perspective

Ontario Public Service Employees Union / Syndicat des employés de la fonction publique de l'Ontario (OPSEU/SEFPO) is a trade union that represents approximately 185,000 members throughout Ontario. Our members work throughout the provincial public sector and the broader public sector, including in the Ontario Public Service, for Ontario's Colleges of Applied Arts and Technology, for the Liquor Control Board of Ontario, in the healthcare sector, in the education sector, and for a wide range of community agencies.

OPSEU/SEFPO has a unique perspective on Ontario's workers' compensation system. Not only does OPSEU/SEFPO represent members in their WSIB appeals, we are also the exclusive bargaining agent for workers' compensation advocates at the Office of the Worker Adviser, the Office of the Employer Adviser, and several community legal clinics including the Injured Workers Community Legal Clinic. OPSEU/SEFPO is therefore familiar with the perspectives of both union and non-union injured workers and of those who advocate on their behalf.

2.2 Changes must support the goals of the WSIA

Any contemplated changes to the WSIB's dispute and appeals resolution system must be measured against the purposes of its enabling legislation, the *Workplace Safety and Insurance Act* (WSIA). The WSIA and common sense both mandate this approach.

Section 161(2) of the WSIA requires the WSIB to "evaluate the consequences of any proposed change in benefits, services, programs and policies to ensure that

the purposes of this Act are achieved." And it is difficult to argue with the statement of Professor Harry Arthurs, one of the most decorated legal scholars in the world, who wrote in his review of the WSIB that "any well-run agency should confirm that its programs are achieving the goals laid out in [its enabling] statute."[1]

Those goals are set out in section 1 of the WSIA as follows:

> The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:
>
> 1. To promote health and safety in workplaces.
>
> 2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.
>
> 3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.
>
> 4. To provide compensation and other benefits to workers and to the survivors of deceased workers.

These purposes must be accomplished in a "financially responsible and accountable manner." This does not mean that financial considerations are to be the sole driver of decisions about Ontario's workers' compensation system. Financial responsibility and accountability are not goals in and of themselves. They instead govern the manner in which the WSIA's purposes are achieved.

To this point, it does not appear that the WSIB has considered whether the recommended changes to the dispute resolution and appeals process would advance the goals of the WSIA. To the extent that the VFMA auditors considered the purposes of the WSIA, their analysis is sparse and incomplete. They focus exclusively on recovery and return to work, and do not acknowledge that one of the WSIA's purposes is to provide compensation and other benefits to workers and survivors.

The WSIA's goal of providing compensation and other benefits to injured workers and survivors is not incidental or subordinate to other purposes. The inclusion of the goal of providing compensation and benefits to injured workers in the WSIA's purposes reflects a recognition of the Meredith principles and the historic

[1] Harry Arthurs, Funding Fairness: A Report on Ontario's Workplace Safety and Insurance System, 2012, p. 82.

compromise that led to the creation of Ontario's workers' compensation system — compensation is a fundamental part of the deal.[2]

The WSIB must assess whether the implementation of KPMG's recommendations would help injured workers and survivors get the compensation and benefits they are entitled to. This statutory purpose should be central in any discussion of changes to the dispute resolution and appeals process. Disputes and appeals will almost always involve questions about a worker or survivor's entitlement to compensation, benefits, and services. Any changes to this process should help the WSIB be more efficient and effective at getting its reconsiderations and appeal decisions right.

The WSIB should reject recommendations that would make it more difficult for injured workers and survivors to object and appeal decisions. Implementing such recommendations would undermine the goals of the WSIA. Restricting access to the appeals process denies workers and survivors access to high quality decision making and leaves them stuck without the compensation, benefits, and services they should have been entitled to and need to recover and return to work.

2.3 The WSIA requires a fair appeals process

While the WSIB has the power to determine its own practice and procedure, its discretion must be exercised consistently with the requirements and purposes of the WSIA.

Three WSIA provisions highlight the legislature's intent to create a robust and fair appeals process for injured workers and survivors:

- section 119(3) requires the WSIB to provide "an opportunity for a hearing," which may be conducted orally, electronically, or in writing;
- section 119(1) requires the WSIB to decide each case on its merits and justice; and
- section 119(2) requires the WSIB to find in favour of an injured worker or survivor where the evidence for and against their case is approximately equal in weight.

To fulfill these obligations, the WSIB must give injured workers and survivors a fair opportunity to pursue objections and appeals. The WSIB cannot issue a decision based on the merits and justice of a case with significant evidentiary

[2] Association of Workers' Compensation Boards of Canada website, About Workers' Compensation.

gaps. Nor can the WSIB determine whether the evidence on an issue is approximately even in weight if some or all of the relevant evidence is not before it.

2.4 No requirement to implement VFMA recommendations

The value for money audit was undertaken under section 168(1) of the WSIA, which requires the WSIB's board of directors to "ensure that a review is performed each year of the cost, efficiency and effectiveness of at least one program that is provided under this Act." This review must be performed "under the direction of the Auditor General" by qualified public accountants.

There is nothing in the WSIA that requires the WSIB to accept and implement the auditors' recommendations. Nor is there anything in the WSIA that absolves the WSIB of its obligations under section 161(2) to evaluate whether implementing the auditors' recommendations would further the goals of the WSIA.

2.5 The VFMA "report"

The VFMA "report" that the WSIB relies on to justify measures to restrict the appeal rights of thousands of injured workers and survivors appears to be a powerpoint slide deck.[3]

The WSIB attempts to justify its plans to implement the VFMA recommendations by asserting that they were made by "an independent third-party auditing firm … based on a jurisdictional scan, research on leading return-to-work and recovery practices in Canada and internationally, and interviews with various stakeholder groups."[4]

None of the reasons that the WSIB offers for implementing the VFMA withstand scrutiny.

Independence does not equal expertise

The independence of the VFMA auditors does not make up for their lack of expertise. None of KPMG's contacts for the audit appear to have any relevant subject matter expertise or relevant experience. There is no reason to believe that the auditors know much about either workers' compensation or administrative law and decision making — a gap highlighted by several bizarre

[3] KPMG, Value for Money Audit (VFMA) – Dispute Resolution and Appeals Process, November 30, 2022.
[4] WSIB Dispute resolution and appeals process value-for-money audit consultation webpage.

recommendations about the regulation of representatives and basic mistakes about the WSIB's legislative authority and practices.[5]

The auditors are accountants and management consultants. They surely have expertise in the things that accountants and management consultants usually do, like preparing financial statements, conducting forensic audits, and advising on corporate governance. But they have no qualifications to speak authoritatively about the adjudication of the complex and important cases that the WSIB's appeals system decides.

The jurisdictional glance

KPMG's description of its jurisdictional scan includes information about only six jurisdictions — including only three of the eleven other workers' compensation jurisdictions in Canada.[6] The reporting on the scan is highly selective and neglects to mention the major Canadian jurisdictions that have not adopted the practices that KPMG recommends.

The VFMA report includes no analysis as to whether the practices that KPMG observed in the scan are effective. Just because other workers compensation boards have adopted a policy or practice, does not make it a "leading practice" or even a good idea. Such a characterization would require an analysis that KPMG either has not done or has not provided to stakeholders.

What research?

The paucity of detail on the jurisdictional scan, however, is far more than KPMG provided about its "research on leading return-to-work and recovery practices in Canada and internationally." This research is neither provided nor cited in the VFMA report.

The only citation in the VFMA is to a hands-on guidebook called "Red Flags, Green Lights: A Guide to Identifying and Solving Return-to-Work Problems."[7] While this guide cites delayed decision making as a potential return to work "red flag", it doesn't even come close to suggesting that shorter objection and appeal time limits would improve return to work outcomes.[8]

---

[5] These errors are discussed in detail in the submissions of the IAVGO Community Legal Clinic at pp. 24-25 and correspondence from the Ontario Legal Clinics' Workers' Compensation Network to Jeffrey Lang dated June 5, 2023, at pp. 2-3.
[6] Value for Money Audit, pp. 41 – 45.
[7] Ellen MacEachen et. al. Red Flags, Green Lights: A Guide to Identifying and Solving Return-to-Work Problems, 2009.
[8] *Ibid.* at p. 44.

Instead of pointing to research, KPMG offers vague assertions that its recommendations for "early resolution" of disputes "align with" leading return-to-work and recovery practices like "timely and prompt communication with injured workers, development of timely and appropriate return-to-work plans and principals [sic] and ensuring the safety and well being of workers".[9] KPMG essentially assumes that anything that speeds up the dispute resolution and appeals process will improve recovery and return to work outcomes.

This approach lacks nuance. The WSIB could, hypothetically, make its reconsideration and appeals process lightning fast by deciding cases by coin flip. But no one could reasonably believe that such an approach would improve recovery and return to work outcomes, let alone ensure that workers and survivors get the compensation, benefits and services they are entitled to. Fairness and decision quality matter.

Interviews with some stakeholders on some issues

While KPMG lists the stakeholders it met with and includes its "external stakeholder interview guide", the VFMA includes little if anything about what information was gathered in these interviews and how it informed the recommendations.

Although not listed in the report, OPSEU/SEFPO Benefits Officer Jason Patterson attended one of the listed meetings with other worker representatives. Mr. Patterson confirms that there was no discussion of new time limits or a more onerous objection process. Had the auditors raised those issues, worker representatives and unions would have raised the concerns discussed below.

The list of interviewees also highlights KPMG's failure to hear from injured workers and survivors. According to its list, KPMG interviewed only two injured workers. These workers, both from the Ontario Network of Injured Worker Groups, do not appear to have been interviewed individually. They met with the auditors in a group meeting with eight other labour and worker representatives.

To put it plainly, it appears that KPMG reviewed the WSIB's dispute resolution and appeals process without considering the perspective and experience of those most affected by it. This deficiency may explain why KPMG's recommendations fail to account for the realities injured workers and survivors face in pursuing their objections and appeals.

[9] Value for Money Audit, slides 7 and 17.

2.6 Not enough emphasis on decision quality

The VFMA includes no analysis of the quality of the WSIB's adjudication. This is surprising as decision quality appears to have been within the scope of the audit. The audit's scope was:

> … to ensure that the WSIB is providing efficient and effective administration of the dispute resolution, appeals and implementation process and reaching fair outcomes for injured/ill persons or businesses while enabling process compliance and adhering to the principles of administrative law and natural justice.[10]

It is not clear how one can determine whether the WSIB's administration of the appeals process is "efficient and effective" and "reaching fair outcomes" without assessing the quality of decisions. But the auditors were unwilling to discuss worker representatives' concerns about decision quality and advised that it was not part of the audit.

The VFMA discussion of decision quality is limited to recommendations that WSIB "scale up" existing quality assurance processes and "establish a stronger linkage and appropriate feedback mechanism to policy development and training requirements."[11] There is nothing wrong with these recommendations, but much more is needed.

There are good reasons to be concerned about the WSIB's decision-making. Data that the WSIB provided in response to a Freedom of Information request shows that in 2021 the Appeals Branch granted 35% of worker appeals in full (19%) or in part (16%). In that same year, the Workplace Safety and Insurance Appeals Tribunal granted a staggering 73% of worker appeals in full (38%) or in part (35%).[12]

And it is not that long ago that the IAVGO Community Legal Clinic's "no evidence" report analyzed the WSIAT's 2016 decisions and found hundreds of cases where WSIB decisions were found to be inconsistent with medical evidence or based on conclusions that had no supporting evidence.[13]

---

[10] Value for Money Audit, slides 12 and 27.
[11] Value for Money Audit, slide 7.
[12] Decision outcomes for worker appeals, prepared by WSIB Corporate Business Information & Analytics (attached).
[13] Maryth Yachnin, no evidence: the decisions of the Workplace Safety and Insurance Board, 2017.

OPSEU/SEFPO's experience with the WSIB's front-line decision making has been similar. Our Benefits Officers regularly help members with appeals that should not have been necessary. Key medical evidence is often not obtained or ignored. Policy is not properly applied. The evidence of injured workers is presumed to be false, while self-serving employer assertions are accepted without scrutiny. There is little or no engagement with arguments advanced by worker representatives.

When the WSIB gets its decisions wrong, injured workers are not only denied the compensation and benefits that they are entitled to, but also timely access to the healthcare and return to work services necessary to recover and return to work. A speedier dispute resolution and appeals system will not undo the damage that results from low quality decision making.

The WSIB is holding the wrong end of the stick when it comes to the shortcomings of its dispute resolution and appeals system. If there is a concern about the volume of appeals or the negative effect that appeals have on recovery and return to work outcomes, the WSIB should focus on getting to the right result at the outset instead of imposing stricter procedural rules.

3. Feedback on recommendations

With the above background in mind, OPSEU/SEFPO provides the following feedback on the recommendations set out in the "Dispute resolution and appeals process value-for-money audit consultation" webpage.

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted.

The appeal readiness time limit is a bad idea. It would deprive many injured workers and survivors access to a fair hearing. A year will not be enough time for many injured workers and survivors to find a representative and gather evidence. The time limit will result in more appeals and more fragmentation of appeal issues. Some injured workers will miss this time limit and lose their chance to appeal.

Not enough time to find a representative

The proposed time limit would result in more unrepresented workers and survivors in the appeals process. There is a shortage of worker representatives. The Office of the Worker Adviser and community legal clinics are under-resourced and have long wait lists. Unions struggle to keep up with the number of injured workers seeking representation. There are few lawyers in private practice that competently represent injured workers. In this context, many injured workers

can't get a representative for close to or over a year after the WSIB decision they want to appeal.

An unrepresented worker or survivor is going to be at a disadvantage in preparing and presenting an appeal. Ontario's workers' compensation system is complicated and confusing. WSIB appeals often involve difficult legal, policy, or medical issues. Injured workers and survivors will have varying levels of literacy, communication skills, and ability to advocate for themselves. They may be suffering from injury-related cognitive impairment or face other barriers or disabilities that affect their ability to communicate, understand, or advocate for themselves.

Not enough time to gather evidence

Even if a worker or survivor is fortunate enough to find a representative quickly, gathering evidence can take years. Many appeals require medical evidence. Hospitals and clinics routinely take months to respond to requests for medical information. And in some instances, relevant medical evidence will not yet exist as workers face long waits for diagnostic tests, specialist consultations, surgeries, and other forms of treatment. Workers or survivors may also face additional delays obtaining independent medical evaluations and medico-legal reports that might support their appeals.

There are additional challenges gathering evidence in occupational disease cases. Obtaining exposure evidence can be complex and difficult – especially in cases where there have been long latency periods, multiple exposures, and/or where the workplace no longer exists – such as in the General Electric Peterborough cluster claims. And in many occupational disease cases, ill workers and survivors bear the burden of gathering scientific and medical evidence, given the WSIB's limited institutional capacity.

No consideration of emergent evidence

Medical and scientific developments may also justify a worker or survivor's decision to pursue an appeals years after objecting to a WSIB decision. Advances in medical technology, updated diagnostic criteria, and emergent scientific evidence can shed new light on the work-relatedness and severity of a worker's injury or illness — as we know from the McIntyre Powder claims. These workers and survivors should not be deprived of their appeal rights or forced to proceed with limited evidence.

More fragmentation

A one-year time limit will cause more fragmentation of appeals. Workers often appeal several WSIB decisions at a time. These decisions are usually issued

separately, sometimes months or years apart. Under the current process, workers can wait until they are ready to proceed on all the issues they wish to appeal before filing an appeal readiness form. If the recommended changes are implemented, workers will often need to file separate appeal readiness forms for each decision they wish to challenge or risk missing the appeal readiness time limit. There will be more appeals and they will be processed and determined by the Appeals Services Division separately.

More missed time limits

A new time limit creates new risks for workers and survivors. Some will miss the appeal readiness time limit by mistake — losing their opportunity to appeal for reasons that have nothing to do with the merits of their case.

No good reason for the appeal readiness time limit

Neither the WSIB nor KPMG have offered any compelling reasons for imposing an appeal readiness time limit. In the VFMA report, the WSIB and KPMG both assert that delay in pursuing appeals undermines recovery and rehabilitation.[14] But the VFMA does not refer to any evidence to show that providing injured workers and survivors the flexibility to determine when it is best for them to pursue an appeal makes it less likely that they will successfully recover and return to work.

Forcing appeals through the system quickly doesn't facilitate dispute resolution. Requiring injured workers to pursue their appeals before they are ready to do so is unlikely to improve their prospects of recovery or return to work. In many appeals, injured workers will be seeking the benefits and services they need to support their recovery and return to work. Giving workers the flexibility and time to put their best case forward would often be more supportive of recovery and return to work than pushing them into the appeals process before they are ready.

Similarly, disputes won't be resolved if injured workers and survivors are forced to appeal before they are ready — they will be prolonged. A worker or survivor that does not feel that they got a fair hearing and considered decision from the WSIB is more likely to appeal to the WSIAT.

Some appeals will have little bearing on recovery and return to work. These appeals might involve:

- survivors, whose recovery and return to work are seldom at issue;
- workers who have already recovered and returned to work and are seeking entitlement for a discrete period of benefits; and

[14] Value for Money Audit, slides 20-21.

- workers who are permanently disabled and have no prospect of returning to work with their accident employer.

Even in cases where recovery and return to work remains possible, it seems unlikely that a one-year time limit to appeal would make a meaningful difference. Even if the appeal readiness time limit is adopted, it may still take 12-18 months to get an appeals decision. Would a longer delay worsen outcomes? One suspects when we are talking about intervals of this length, additional time would make only a marginal difference. Of course, we can only speculate about this as neither WSIB nor KPMG have provided any empirical evidence to support claims about the purported benefits of adopting an appeal readiness time limit.

KPMG also makes the strange claim that a one-year time limit "reinforces procedural fairness."[15] Procedural fairness for who? Certainly not for injured workers and survivors. Not for the WSIB, which is an administrative decision maker not a party, and thus has no right to procedural fairness. And there is no issue of procedural fairness for employers — they are given notice of objections and appeals, access to claim files, and the option to participate as a party to the claim.

Recommendation 1.1: We should adopt set timeframes for the reconsideration process.

Objection time limits should not be shortened

In the discussion under this recommendation, the WSIB notes its intention to review a potential legislative amendment to the WSIA to shorten all objection time limits to 30 days with the Ministry of Labour, Immigration, and Training and Skills Development.

There is no need for any such review. The time limit to object should not be shortened. KPMG's recommendation to do so shows a lack of regard for the practical realities workers and survivors face in meeting time limits.

For many injured workers and survivors, a 30-day time limit will mean significantly less than 30 days to object. There is often a delay between the date of a decision and when it is emailed the worker or survivor. There is an additional delay for those workers and survivors who receive decisions by mail. And those who do not have access to or comfort with electronic filing or fax, may have to mail an intent to object form to the WSIB.

[15] Value for Money Audit, slide 9.

A 30-day time limit gives workers or survivors a short window to figure out what the WSIB's decision means and whether they wish to challenge it. That may be difficult. WSIB decisions address complex legal and medical issues. They are rarely written in plain language and are often full of acronyms and jargon. It is difficult for unrepresented workers, particularly those with low levels of literacy or English language comprehension.

And in many cases, injured workers and survivors will receive decisions at a difficult time — often in the immediate aftermath of a serious occupational injury or death. Particularly at the early stages of their claim, injured workers are consumed with dealing with their symptoms, getting treatment, and struggling to return to work. Many will have mental health conditions. Survivors may be coping with the loss of their spouse, father, or mother. They should be given flexibility and understanding.

There can be no doubt that shortening objections time limits by five months — an 84% reduction of the time to object — will result in more missed time limits. There will be far less margin for error. Honest mistakes will result in injured workers and survivors losing their chance to challenge the WSIB's decisions and being deprived of the compensation, benefits, and services they should have received. Taking away the appeal rights of workers and survivors on technical grounds does not further the purposes of the WSIA.

There is no indication that KPMG or the WSIB considered any of the challenges that injured workers and survivors would face in a shortened time to object to decisions. Indeed, it isn't apparent that much of anything was considered in support of this recommendation. The only thing KPMG offers is its "faster is better" rationale and a reference to its jurisdictional scan — which fails to mention that eight of the eleven Canadian workers' compensation jurisdictions (Manitoba, Saskatchewan, Alberta, British Columbia, Prince Edward Island, New Brunswick, Yukon Territory, and Northwest Territories/Nunavut) have longer time limits to object than the auditors recommend.[16]

Reconsideration time frames are unrealistic and unhelpful

There is no good reason to put time frames on the reconsideration process. Such requirements will only make the dispute resolution process more cumbersome and more confusing. Allowing workers and survivors a maximum of 60 days after an intent to object form is submitted to provide additional information is nowhere near enough time to find a representative and to gather relevant evidence. At that stage, injured workers may not even have a diagnosis, prognosis, or know their

[16]See the submissions of the IAVGO Community Legal Clinic at p. 17.

functional abilities. Why would any injured worker or survivor agree to resolve a dispute or accept a decision issued before they have legal or medical advice? As discussed above, forcing injured workers and survivors to proceed with the reconsiderations before they are ready to do so will not result in meaningful dispute resolution.

A short timeframe for WSIB staff to issue reconsideration decisions may undermine decision quality. We understand that WSIB decision makers already have overwhelming workload issues and that likely contributes to the decision quality concerns discussed above. WSIB decision makers should be given the time they need to ensure that they have the relevant evidence and to thoroughly assess the issues in dispute. Decision timeframes will only exacerbate workload issues and undermine the quality of the WSIB's dispute resolution services.

Recommendation 1.1: Our alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

The WSIB's recommendations are not clear about what it is proposing for objections in recommendation 1.1, when it states that "we will make it mandatory to provide complete information through the current processes or through alternative dispute resolution."

If the WSIB maintains the position it took in its response to the VFMA recommendations — that it intends to adopt "enhanced adherence" requirements for objecting to decisions — its plans are not authorized by the WSIA, are unfair to injured workers and survivors, and are likely difficult to implement.

In its response to the VFMA recommendations, WSIB management says that it will apply "enhanced adherence" to the requirements of section 120 of the WSIA such that parties will be required to:

- clearly outline the reasons for their objection and explain why the decision should be changed;
- provide any necessary supporting documentary evidence, and;
- describe their proposed remedy.[17]

This "enhanced adherence" goes beyond the requirements in section 120(2) of the WSIA, which states only that an objection "must be in writing and must indicate why the decision is incorrect or why it should be changed." There is no

[17] Value for Money Audit, slide 18.

requirement to provide necessary supporting documentary evidence or describe a remedy. And section 120(2) only requires objections to either "indicate why the decision is incorrect" or "why it should be changed?" — not both.

Section 120(2) includes no requirement for "clarity" or for an "explanation". Indeed, since the introduction of objection time limits into the workers' compensation system in 1998, the WSIB and the WSIAT have accepted bookmark objections that consist of general reasons, such as "the decision doesn't properly weigh the evidence and it is inconsistent with WSIB policy."

The enhanced adherence approach would require an unrealistic amount of information from injured workers and survivors, especially when they are unrepresented. Many injured workers and survivors will not understand the decisions they receive, let alone be able to articulate the legal or evidentiary basis for objecting or identify a remedy. They may not even yet have access to their claim file. And, as discussed above, key medical evidence is not available even within 6 months after the decision. It would be unrealistic to expect injured workers and survivors to have access to important evidence to support a reconsideration within 60 days of the decision.

It is important to remember that WSIB claims differ from many other legal proceedings in the number of time limits that a worker may have. In long-term or complex cases, it is not unusual for the WSIB to have issued 10-20 decisions. Some of these may be issued in quick succession. Requiring these injured or ill workers to provide detailed reasons and precise remedies to objecting to every decision in their case that they may want to appeal is unrealistic and unfair.

Making it more difficult to object would also result in injured workers and survivors missing time limits or abandoning meritorious issues. Having to figure out and articulate the basis for their objection and the remedy they seek will deter some from objecting. Injured workers with low levels of literacy or limited English comprehension would be disproportionately affected — leaving some of the workers and survivors that most need the benefits and services the WSIB is supposed to provide without a means of pursuing them.

There are also practical difficulties in administering "enhanced adherence". How will workers and survivors know what is required to meet the requirement of a "clear" explanation as to why they are objecting? How will they know what "necessary" documentation is? How precise will they have to be in describing their proposed remedy?

A more sensible approach would be to continue the existing practice of allowing parties to file bookmark objections, but not take any further action unless and

until the objecting party has provided more detail about the nature of the objection and any additional information they wish to provide. Such requirements would have to be applied flexibly with regard to whether the worker is represented and their ability to understand and articulate the basis for their objection and the remedy they seek.

Recommendation 1.1: We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals.

OPSEU/SEFPO supports the introduction of alternative dispute resolution into the WSIB's dispute resolution and appeals process. This, however, must be done carefully and with due regard to the vulnerability of workers and survivors.

As noted on the consultation webpage, there are only a few issues that ADR would suit — likely only the suitability of work with an accident employer and re-employment obligations. We agree that ADR would not be suitable for entitlement and compatibility issues.

The WSIA also limits the scope of mediation. Section 16 prohibits any agreement between a worker and employer to waive or forgo benefits.[18]

Mediation-arbitration would be most appropriate and effective at the appeals stage. Parties should have the option of requesting mediation-arbitration as an alternative to an oral or written hearing. A broader range of issues would be appropriate for mediation-adjudication in this context. In appropriate circumstances, these mediation-arbitrations could be expedited. The resulting agreements or decisions could be considered the final decision of the WSIB and subject to appeal to the WSIAT.

Participation in ADR should be voluntary. Workers and survivors should not be strong-armed into participating. Their right to a hearing should be respected and should not be subjugated to the WSIB's interests in reducing the volume of cases going to appeals.

There should also be a strong presumption that mediation is inappropriate if the worker or survivor is unrepresented. Injured workers and survivors are particularly vulnerable in ADR proceedings. They may not understand the implications of agreeing to mediation-arbitration or any agreement that they

[18] Section 63 of the WSIA allows Schedule 2 employers and workers to settle disputes about benefit payments.

reach. They may be in difficult financial situations and susceptible to employer and WSIB pressure to agree to a resolution that is not in their interests.

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

The WSIB has identified relevant criteria for determining whether an oral hearing should be held online or in person. In weighing those criteria, the WSIB should not put too much weight on geographical location. While geographical location is relevant, workers and survivors from more remote areas should not be deprived of the opportunity for an in-person hearing.

The injured worker or survivor's preference should be given significant weight. For some, travelling to a large urban centre or meeting in person is frightening and stressful. For others, the technological aspects of online hearings may be challenging and make the process even more intimidating. Online hearings may also pose problems for those with limited English language skills or those who require interpretation.

Recommendation 3.1 We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

Workers and survivors should have the option of an expedited process for return-to-work issues with a 30-day time limit. The expedited process should not be mandatory. In some cases, return to work decisions may involve or overlap with complex medical or evidentiary issues. As discussed above, workers and survivors should not be forced to proceed with appeals before they are ready.

A prioritized and expedited process should also be available for cases involving entitlement and ongoing or significant periods of LOE. These cases can be highly time sensitive: injury, diseases, or the loss of a family member can leave workers and survivors in desperate circumstances. They may need compensation, treatment, return to work assistance, and LOE to be able to pay their rent and feed their families.

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.

A 30-day time limit for appeal implementation would be a good step. That time limit, however, should only be presumptive and it should be applied with flexibility.

It is important that the WSIB issue implementation decisions quickly — but it is even more important to get those decisions right. Particularly in cases where the implementation involves a new RTW assessment, RTW plan, or SO determination, the WSIB's decision will be a critical step in the workers recovery, return to work, and compensation. Taking the time necessary to gather and review the relevant medical and vocational information will be critical.

Appeal decisions need to be implemented faster, but quality should not be sacrificed for speed.

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

The WSIB does not have the statutory authority to deny injured workers the right to an appeal. Section 119(3) requires the WSIB to give an opportunity for a hearing.

The WSIB may be overestimating the number of appeals that challenge standardized calculations. Some of the listed examples of standardized calculation issues involve more than just number crunching. In determining the degree of permanent impairment, for example, WSIB decision makers do more than plug numbers into a formula. For many organic injuries, the degree of impairment is determined based on measurements that have not been taken and assessments that have not be done. In these cases, the WSIB estimates the ratings based on other evidence on file.

For non-organic NEL awards, WSIB decision makers must make qualitative assessments of the workers' condition and its effect on their life. Using this information, they determine what class and where within that class the worker's impairment falls.[19] These determinations are far more complex and open to dispute than a standardized calculation.

There may also be legitimate disputes about the WSIB's method of performing calculations that it believes to be standardized. A recent example of such a dispute was described in *Grisales v. Workplace Safety and Insurance Board*,[20] where Clara Grisales challenged the WSIB's approach to calculating the indexation of her LOE payments. The WSIB refused to hear the Ms. Grisales' appeal. The Ontario

[19] Operational Policy Manual Document No. 18-05-11, Assessing Permanent Impairment Due to Mental and Behavioural Disorders, July 18, 2008.
[20] Grisales v Workplace Safety and Insurance Board, 2023 ONSC 3846 (CanLII).

Divisional Court determined that the WSIB's decision was unreasonable, set it aside, and ordered the WSIB to proceed with the appeal.

In the rare circumstance that an injured worker pursues an appeal that is truly just about whether the WSIB got the math right, it should be straightforward and easy for an appeals resolution officer to decide. There should be ways of determining these appeals quickly and efficiently without denying injured workers and survivors their appeal rights.

4. Conclusion

OPSEU/SEFPO welcomes the opportunity to discuss improvements to the WSIB's dispute resolution and appeals process. While there are some encouraging aspects of the recommendations, they are overshadowed by the WSIB's troubling plans to impose an appeal readiness time limit, advocate for shorter objection time limits, and make it more difficult to object. The WSIB should strive to remove the barriers that injured workers and survivors face in accessing compensation and benefits, not erect new ones.

Thank you for considering OPSEU/SEFPO's feedback.

Tab 1

Decision Outcomes for Worker Appeals - 2000 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all appeal decisions between January 1, 2000 and December 31, 2021 where the objection origin was the worker, the worker representative or a dual objection.
Excludes appeals that were returned or withdrawn.
Excludes appeals where the objection origin was the employer or employer representative.
Virtual Hearings are oral hearings where the hearing location is "teleconference" or videoconference".

Data Source:

Appeals Branch Tracking System as of April 12, 2017 for appeals decisions between 2000 and 2016.
InfoCenter as of March 31, 2022 for appeals decisions between 2017 and 2021.

Decision Outcomes for Worker Appeals

Decision Outcome	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
# of Worker Appeal Decisions	**6,800**	**6,203**	**6,002**	**6,084**	**5,984**	**6,048**	**5,774**	**5,620**	**5,288**	**5,539**	**5,603**	**6,392**	**7,864**	**9,096**	**7,570**	**6,792**	**5,550**	**4,106**	**3,530**	**3,329**	**3,319**	**4,305**
% Allowed	29%	30%	28%	29%	27%	27%	28%	27%	28%	26%	23%	21%	19%	18%	17%	18%	19%	18%	18%	20%	20%	19%
% Allowed in Part	19%	18%	18%	17%	17%	17%	17%	18%	17%	17%	16%	15%	16%	17%	16%	14%	15%	14%	14%	14%	15%	16%
% Denied	52%	51%	53%	54%	55%	56%	56%	55%	55%	58%	61%	64%	65%	65%	67%	68%	66%	68%	68%	67%	66%	65%

Decision Outcomes for Worker Appeals by Method of Resolution

Method of Resolution/Decision Outcome	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Oral Hearing	**2,372**	**2,255**	**2,414**	**2,456**	**2,357**	**2,326**	**2,299**	**2,334**	**2,052**	**2,198**	**2,028**	**1,834**	**1,510**	**1,814**	**1,480**	**1,298**	**1,012**	**819**	**709**	**689**	**271**	**586**
% Allowed	33%	33%	32%	30%	30%	31%	31%	31%	33%	31%	28%	26%	26%	25%	26%	27%	29%	29%	31%	29%	28%	26%
% Allowed in Part	27%	26%	23%	24%	23%	23%	23%	25%	25%	23%	24%	22%	24%	29%	28%	22%	25%	21%	20%	19%	22%	22%
% Denied	40%	40%	45%	46%	47%	46%	45%	44%	42%	46%	48%	52%	50%	46%	46%	51%	46%	50%	50%	53%	51%	52%
Hearing in Writing	**4,428**	**3,948**	**3,588**	**3,628**	**3,627**	**3,722**	**3,475**	**3,286**	**3,236**	**3,341**	**3,575**	**4,558**	**6,354**	**7,282**	**6,090**	**5,494**	**4,538**	**3,287**	**2,821**	**2,640**	**3,047**	**3,719**
% Allowed	27%	29%	26%	28%	25%	25%	25%	24%	25%	22%	21%	19%	17%	17%	15%	15%	16%	15%	15%	17%	19%	18%
% Allowed in Part	14%	13%	15%	12%	14%	13%	12%	13%	11%	13%	11%	12%	14%	14%	13%	13%	13%	12%	13%	12%	14%	15%
% Denied	58%	58%	59%	60%	61%	62%	63%	63%	63%	65%	68%	69%	69%	69%	72%	72%	70%	72%	72%	70%	67%	67%

Decision Outcomes for Worker Appeals with Virtual Hearings

-Prior to 2019 there were less than 5 virtual hearings per year therefore results have been summarized for 2000-2018.

Method of Resolution/Decision Outcome	2000-2018	2019	2020	2021
Virtual Hearings	**40**	**6**	**67**	**330**
% Allowed	33%	0%	34%	25%
% Allowed in Part	18%	17%	22%	21%
% Denied	50%	83%	43%	55%

Outcomes by Issue Category for Worker Appeals - 2000 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all appeal issue decisions between January 1, 2000 and December 31, 2021 where the objection origin was the worker, the worker representative or a dual objection.
Excludes appeals that were returned or withdrawn.
Excludes appeals where the objection origin was the employer or employer representative.
Appeal issues are not mutually exclusive to an appeals decision as an appeal can have multiple objection issues.

Data Source:

Appeals Branch Tracking System as of April 12, 2017 for appeals decisions between 2000 and 2016.
InfoCenter as of March 31, 2022 for appeals decisions between 2017 and 2021.

Outcomes by Issue Category for Worker Appeals

Issue Category/Issue Outcome	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Loss of Earnings	**291**	**579**	**861**	**1,065**	**1,298**	**1,556**	**1,709**	**1,776**	**1,827**	**1,907**	**2,127**	**2,546**	**3,348**	**4,401**	**3,266**	**2,922**	**2,525**	**1,722**	**1,522**	**1,453**	**1,517**	**1,967**
Allowed	106	210	310	390	479	546	600	640	726	661	654	668	787	1,007	757	656	590	407	350	372	394	527
Allowed in Part	37	100	136	179	201	281	284	325	326	348	359	416	561	687	521	433	371	229	193	194	227	261
Denied	148	269	415	496	618	729	825	811	775	898	1,114	1,462	2,000	2,707	1,988	1,833	1,564	1,086	979	887	896	1,179
Other	**5,404**	**4,225**	**4,021**	**3,704**	**3,303**	**3,011**	**2,692**	**2,455**	**1,984**	**2,061**	**1,879**	**1,721**	**1,982**	**2,231**	**1,975**	**1,643**	**1,361**	**1,023**	**822**	**817**	**786**	**1,005**
Allowed	1,806	1,403	1,245	1,194	1,039	901	838	765	611	575	461	348	386	436	386	316	287	210	140	156	163	238
Allowed in Part	619	525	469	426	386	318	276	261	182	191	162	139	165	182	147	131	116	84	63	55	57	60
Denied	2,979	2,297	2,307	2,084	1,878	1,792	1,578	1,429	1,191	1,295	1,256	1,234	1,431	1,613	1,442	1,196	958	729	619	606	566	707
Non-Economic Loss (NEL)	**1,141**	**970**	**1,009**	**1,084**	**1,168**	**1,103**	**1,051**	**1,085**	**1,105**	**1,071**	**1,140**	**1,301**	**1,804**	**2,357**	**1,943**	**1,610**	**1,223**	**978**	**787**	**625**	**831**	**1,209**
Allowed	381	328	276	258	310	282	288	305	287	290	258	235	364	507	320	247	215	143	122	94	130	209
Allowed in Part	47	38	47	44	60	56	43	50	51	57	48	52	87	169	123	107	78	73	46	34	37	78
Denied	713	604	686	782	798	765	720	730	767	724	834	1,014	1,353	1,681	1,500	1,256	930	762	619	497	664	922
Initial Entitlement	**1,406**	**1,344**	**1,272**	**1,201**	**1,147**	**1,218**	**1,146**	**1,142**	**1,005**	**1,159**	**1,070**	**1,271**	**1,422**	**1,684**	**1,364**	**1,300**	**1,137**	**966**	**860**	**907**	**713**	**1,032**
Allowed	525	543	482	472	398	420	401	367	344	354	325	373	351	412	322	331	283	246	228	217	190	236
Allowed in Part	71	76	57	51	58	52	47	42	38	33	28	46	49	54	48	36	37	40	41	28	28	48
Denied	810	725	733	678	691	746	698	733	623	772	717	852	1,022	1,218	994	933	817	680	591	662	495	748
New Condition	**719**	**634**	**606**	**634**	**677**	**635**	**620**	**584**	**551**	**618**	**555**	**677**	**754**	**982**	**859**	**875**	**825**	**636**	**419**	**393**	**420**	**520**
Allowed	190	169	123	143	164	121	150	154	133	135	107	112	110	140	146	136	131	99	68	70	73	98
Allowed in Part	44	26	37	28	34	38	28	33	24	34	28	29	33	38	37	43	36	28	14	17	15	24
Denied	485	439	446	463	479	476	442	397	394	449	420	536	611	804	676	696	658	509	337	306	332	398
Recurrence	**821**	**674**	**614**	**529**	**515**	**504**	**520**	**399**	**396**	**398**	**389**	**443**	**610**	**691**	**624**	**517**	**417**	**372**	**277**	**233**	**239**	**283**
Allowed	300	233	225	198	177	175	191	158	148	150	116	108	133	167	138	111	107	71	65	73	57	83
Allowed in Part	60	66	45	27	32	28	33	24	25	20	20	23	27	26	35	24	16	18	14	7	9	12
Denied	461	375	344	304	306	301	296	217	223	228	253	312	450	498	451	382	294	283	198	153	173	188
Health Care	**280**	**298**	**277**	**289**	**241**	**272**	**266**	**243**	**294**	**334**	**329**	**391**	**485**	**712**	**643**	**536**	**447**	**274**	**217**	**211**	**193**	**282**
Allowed	100	132	86	92	85	71	79	75	90	93	76	76	86	134	109	87	77	49	27	45	27	53
Allowed in Part	37	26	31	32	25	31	22	31	19	27	33	31	42	48	52	42	34	12	10	9	17	15
Denied	143	140	160	165	131	170	165	137	185	214	220	284	357	530	482	407	336	213	180	157	149	214
Psychotraumatic	**207**	**227**	**213**	**218**	**216**	**314**	**344**	**303**	**269**	**307**	**414**	**542**	**737**	**755**	**516**	**488**	**353**	**255**	**193**	**179**	**198**	**368**
Allowed	47	49	62	48	56	74	81	76	76	68	108	108	152	153	92	88	70	44	37	39	42	101
Allowed in Part	5	6	<5	<5	<5	13	7	10	9	11	18	25	30	29	18	14	12	10	8	6	9	18
Denied	155	172	147	167	157	227	256	217	184	228	288	409	555	573	406	386	271	201	148	134	147	249
Chronic Pain	**434**	**411**	**393**	**380**	**354**	**374**	**371**	**339**	**303**	**318**	**338**	**435**	**537**	**568**	**454**	**434**	**314**	**221**	**165**	**131**	**105**	**165**
Allowed	95	103	90	71	85	76	82	70	51	52	68	52	63	61	51	48	39	34	24	25	18	36
Allowed in Part	7	<5	<5	<5	<5	5	5	<5	<5	<5	6	<5	<5	12	<5	6	<5	<5	-	-	-	<5
Denied	332	304	301	305	267	293	284	267	250	265	264	381	470	495	399	380	273	186	141	106	87	127
Traumatic Mental Stress (TMS)	**-**	**-**	**8**	**35**	**63**	**67**	**49**	**46**	**50**	**50**	**64**	**66**	**71**	**62**	**57**	**72**	**48**	**43**	**27**	**79**	**45**	**84**
Allowed	-	-	<5	-	11	20	8	5	12	8	6	9	11	7	9	7	7	12	<5	<5	7	8
Allowed in Part	-	-	-	-	<5	-	-	-	-	<5	<5	<5	<5	<5	-	-	-	-	-	-	-	-
Denied	-	-	6	35	51	47	41	41	38	39	56	56	58	54	48	65	41	31	25	75	38	76
Chronic Mental Stress	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**12**	**85**	**56**	**72**
Allowed	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	10	<5	5
Allowed in Part	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	<5	<5
Denied	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	12	75	53	65
SIEF	**69**	**62**	**68**	**61**	**50**	**57**	**48**	**49**	**62**	**41**	**20**	**21**	**25**	**26**	**8**	**8**	**<5**	**5**	**8**	**8**	**36**	**11**
Allowed	34	33	32	27	23	25	21	25	29	17	6	5	8	11	<5	<5	-	<5	<5	<5	9	5
Allowed in Part	8	9	<5	9	<5	<5	<5	<5	7	8	<5	<5	6	<5	<5	<5	-	-	<5	<5	8	<5
Denied	27	20	35	25	23	28	23	20	26	16	13	12	11	13	5	<5	<5	<5	<5	<5	19	<5

Outcomes for Worker WSIAT Decisions - 2012 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all WSIAT decisions between April 1, 2012 and December 31, 2021 where the appellant was the worker or both (referring to both the worker and the employer).
Excludes WSIAT decisions that were withdrawn, abandoned, adjourned, or interim.
Excludes WSIAT decisions where the appellant was the employer, board, other or respondent.
WSIAT decisions at the claim level so a WSIAT decision that pertains to multiple claims will be counted more than once.

Data Source:

WSIAT Database from Legal Services Division for WSIAT decisions between 2012 and 2017.
InfoCenter report 3116 WSIAT Outcome Report For Claims as of April 12, 2022 for WSIAT decisions between 2018 and 2021.

Outcomes for WSIAT Decisions

Decision Outcome	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
# of Worker Appeal Decisions	**1,691**	**2,191**	**2,272**	**2,589**	**3,130**	**3,565**	**2,320**	**2,360**	**1,398**	**1,577**
% Allowed	33%	33%	34%	35%	38%	36%	36%	34%	35%	38%
% Allowed in Part	21%	24%	24%	23%	25%	29%	29%	34%	31%	35%
% Denied	45%	43%	42%	42%	38%	35%	35%	32%	34%	27%

Outcomes for WSIAT Decisions by Method of Resolution

-Method of resolution not available prior to 2018.

Method of Resolution/Decision Outcome	2018	2019	2020	2021
Alternate Dispute Resolution (Mediation)	**59**	**83**	**96**	**197**
Allowed	24%	47%	47%	40%
Allowed in Part	76%	52%	53%	60%
Denied	0%	1%	0%	0%
File Review	**592**	**539**	**497**	**261**
Allowed	41%	42%	37%	42%
Allowed in Part	14%	20%	21%	21%
Denied	45%	38%	42%	37%
Hearing	**1,650**	**1,723**	**801**	**1,112**
Allowed	34%	31%	33%	36%
Allowed in Part	33%	37%	34%	34%
Denied	33%	32%	33%	30%

Outcomes by Issue Category for Worker WSIAT Decisions - 2018 to 2021

Request ID: 6556
Requested By: Natasha Mohabir, Privacy, Access and Risk Manager, Compliance Services
Requested Date: April 12, 2022
Prepared By: Corporate Business Information & Analytics

Data Definitions/Notations:

Includes all WSIAT decisions between January 1, 2018 and December 31, 2021 where the appellant was the worker or both (referring to both the worker and the employer).
Excludes WSIAT decisions that were withdrawn, abandoned, adjourned, or interim.
Excludes WSIAT decisions where the appellant was the employer, board, other or respondent.
WSIAT decisions at the claim level so a WSIAT decision that pertains to multiple claims will be counted more than once.
WSIAT issues are not mutually exclusive to a WSIAT decision as they can have multiple objection issues.

Data Source:

InfoCenter report 3116 WSIAT Outcome Report For Claims as of April 12, 2022 for WSIAT decisions between 2018 and 2021.

Outcomes by Issue Category for Worker WSIAT Decisions

-Results not available prior to 2018 as only the outcome of the overall WSIAT decision was captured prior to 2018 as opposed to the decision for each individual issue.

Issue Category/Issue Outcome	2018	2019	2020	2021
Loss of Earnings	**990**	**1,054**	**568**	**788**
Allowed	432	485	261	346
Allowed In Part	245	273	159	262
Denied	313	296	148	180
Non-Economic Loss (NEL)	**592**	**653**	**385**	**487**
Allowed	276	293	163	219
Allowed In Part	47	54	31	49
Denied	269	306	191	219
Other	**555**	**518**	**438**	**447**
Allowed	264	220	189	208
Allowed In Part	58	68	51	59
Denied	233	230	198	180
Initial Entitlement	**406**	**493**	**275**	**351**
Allowed	193	215	108	168
Allowed In Part	22	30	15	30
Denied	191	248	152	153
New Condition	**329**	**317**	**217**	**252**
Allowed	124	112	72	90
Allowed In Part	24	23	16	14
Denied	181	182	129	148
Psychotraumatic Disability	**188**	**208**	**102**	**126**
Allowed	89	102	38	54
Allowed In Part	6	7	<5	7
Denied	93	99	62	65
Recurrence	**174**	**200**	**102**	**119**
Allowed	93	109	51	55
Allowed In Part	6	9	<5	9
Denied	75	82	48	55
Chronic Pain Disorder	**192**	**188**	**84**	**84**
Allowed	63	59	28	34
Allowed In Part	<5	<5	<5	0
Denied	126	128	54	50
Health Care	**129**	**171**	**110**	**124**
Allowed	65	67	52	64
Allowed In Part	13	18	7	5
Denied	51	86	51	55
Traumatic Mental Stress (TMS)	**<5**	**<5**	**12**	**15**
Allowed	<5	0	<5	<5
Denied	<5	<5	8	14
CMS-Chronic Mental Stress	**0**	**<5**	**<5**	**23**
Allowed	0	0	<5	<5
Denied	0	<5	<5	19
SIEF	**11**	**<5**	**<5**	**<5**
Allowed	6	0	<5	0
Allowed In Part	<5	0	0	<5
Denied	<5	<5	<5	<5

Peel Injured Workers

c/o 24 Enmount Drive
Brampton, ON L6T 4C8

Peelinjuredworkers@gmail.com

July 21, 2023

Via Email: appealsfeedback@wsib.on.ca

RE: Dispute Resolution and Appeals Process Value for Money Audit Consultation

Peel Injured Workers is a volunteer run peer support group representing injured workers in Peel Region. Our members are primarily those who have been permanently disabled by their work and who use their experiences to support one another and to advocate to improve our workers' compensation system. Peel Injured Workers receives no funding.

It is a difficult and confusing time when you are injured or made ill at work. Suddenly you are dealing with pain, dysfunctional, medical appointments, therapy, medications and their side effects, while trying to manage work, your home life and dealing with return to work. While managing all these new and challenging things, you are also trying to learn to deal with a complicated, daunting workers' compensation system that you know nothing about and the system does little to inform of your rights and entitlements. Dealing with WSIB as a new injured worker has been compared to being lost in a foreign country where you don't speak the language, you don't have a map and you don't know the rules or customs and you don't have anyone to guide you. You're puzzled and bewildered. You are completely lost. On top of this, you may not be sleeping at night due to pain and worry. There is so much uncertainty in your life.

Now you are being asked to appeal a decision within 30 days and within 90 days you have to give the reasoning for your appeal. Let's ignore the fact that it is not really 30 days when you consider mailing times or the fact that mail from the WSIB seems to have a way of mysteriously disappearing. You try to get help but all the organizations that help injured workers are underfunded and overwhelmed, especially now that they have all these additional time limits to deal with. You miss the time limit because while you know the decision is wrong, you don't know what the law says because you don't have time to get help. You many not even be able to send in an appeal because your injuries make it difficult to write or use a computer or maybe you lack those skills. Maybe you just can't focus because you are dealing with a brain injury, lack of sleep, pain or you are just overwhelmed. You are stressed and panicked. Deadlines provoke anxiety and stress and there is already too much of that in your life as you struggle to adapt to your new normal.

Your doctor has referred you to a specialist and you are told a specialist's report would help your claim but it will be more than a year before you can see the specialist. You're told the specialist might request an MRI or further testing but that will be another wait after you're seen All you know is that you can't make these unrealistic deadlines and now after a work injury, you don't know how you will keep a roof over your head or food on the table.

This is the scenario that injured workers in Ontario will be faced with if the KPMG Value for Money Audit recommendations are implemented. It will be disastrous for injured workers and their families. It will bring chaos to the system.

WSIB's consultation website states: "We will act on recommendations in the audit to strengthen our dispute resolution, appeals and appeals implementation processes"

Unfortunately, these recommendations will do the opposite. Perhaps instead of relying on consultants who clearly do not understand the appeals system or workers' compensation at all, you actually rely on those who are most affected by these changes, injured workers and their advocates. What is being proposed will lead to the loss of appeal rights for injured workers and chaos in a system that supports injured workers that is already under resourced. Managing time limits already consumes too much time within the system, time, that could be used to provide more services. Will you also be looking at increasing funding to organizations like the Office of the Worker Adviser or the Occupational Health Clinics for Ontario Workers? These new time limits and the rush to access services will have ripple effects throughout the system including within the WSIB itself. Do you plan on adding additional staff to manage these new time limits?

You are proposing to strip away the appeal rights of injured workers. What steps have you taken to ensure that injured workers are aware of this consultation process? If you were really interested in consulting, you wouldn't have allocated such a short time to the process and in the summer, when many groups are not meeting due to heat, family obligations and vacations. Consultations take place in the summer when you aren't really interested in hearing what people have to say. We know the WSIB has already accepted the recommendations presented by KPMG and having been through this before, this is likely just an exercise in futility. But we hope that you will consider the negative consequences if these recommendations are implemented.

Injured workers gave up their right to sue in return for a system of fair and just compensation. We haven't had that in a long time and if these recommendations are implemented, there will be nothing just about this system. The ability to appeal is fundamental to justice and any functioning workers' compensation system. Time limits hurt injured workers. They are particularly punitive to injured workers who have zero knowledge or interaction with the workers' compensation system. You should be focused on removing barriers that prevent injured workers as persons with disabilities from accessing justice, instead you are creating more.

The KPMG Recommendations will introduce new time limits. Strict deadlines such as these exacerbate stress and anxiety making it even harder to respond. We know that dealing with a workplace injury and all that comes with it is extremely stressful and research shows us that 50% of permanently disabled injured workers suffer from major depressive disorders. These are injured workers who didn't come into the system with mental illness, it was dealing with the system that made them mentally ill. Why make it even more so? An injured worker should be focused on their rehabilitation, not whether they meet a timeline that they may not even be aware of. These timelines don't recognize the difficulties that an injured worker will face accessing representation when services have extensive wait lists or getting specialists appointments especially in the current healthcare environment.

The 30 day time limit is particularly punitive. How does an injured worker respond when they may have never received the letter? Our members have all had WSIB letters "lost" in the mail.

If you want to truly address the issues with the appeals system, introducing new time limits and restricting access to justice is not the way to do it. As we learn in health and safety, you need to look to the root cause and that root cause is the poor decision making at the WSIB. If good decisions were being made at the operating level, there would be no need to appeal.

In 6 months last year, from July 1, 2022 to Dec. 31, 2022 when decisions started being tracked, the Workplace Safety and Insurance Appeals Tribunal, overturned decisions from the WSIB, in whole or in part, in 80% of hearings. We know this is not an anomaly because this year between Jan. 1, 2023 and Mar. 31, 2023 that number is 75%.

In 2017, the Industrial Accident Victims Group of Ontario (IAVGO) did a review of the 2016 WSIAT decisions and the findings paint a disturbing picture of WSIB decision making. From their report "No Evidence"[1], IAVGO wrote:

> The 2016 decisions of the Workplace Safety and Insurance Appeals Tribunal tell a stark and troubling story. In hundreds of appeals, Tribunal decision makers comment that the decisions of the Workplace Safety and Insurance Board are "unreasonable" and "arbitrary," ignore the "unanimous opinions" of doctors, are based on "not a single word of medical or other reliable evidence," and could place the worker at "medical risk."

In 175 decisions[2], WSIAT found that WSIB decisions were contrary to "all or all discussed medical evidence". As the evidence shows, the problem with the appeals system will not be rectified by implementing the recommendations made by KPMG, since they failed to recognize that the actual decision making at WSIB is the problem. Speeding up the appeals process by forcing injured workers to meet unrealistic time limits and putting the whole system in chaos trying to meet those time limits, does nothing to fix the bad decision making.

We ask that you reject the KPMG recommendations and focus on fixing the bad decision making at the WSIB. A good start would be to start would be to stop ignoring treating healthcare providers. We sure injured workers and their representatives would be glad to assist you in identifying and fixing the problems with WSIB decision making.

Respectfully submitted,
PEEL INJURED WORKERS
per

Catherine Fenech
President

cc Minister of Labour, Immigration, Training and Skills Development Monte McNaughton
WSIB Board of Directors

---

[1] http://iavgo.org/wp-content/uploads/2013/11/No-Evidence-Final-Report.pdf
[2] http://iavgo.org/wp-content/uploads/2013/11/IAVGO-March-10-2017-WSIAT-2016-review-chart.pdf

Feedback to the WSIB

The PWU

The Power Workers' Union (PWU) has been diligently representing skilled workers in the energy sector for over seven decades. In 1944, the formation of the Employees' Association of Ontario Hydro laid the foundation of our union. Our present name – the Power Workers' Union – was adopted in 1993. The PWU represents approximately 15,000 people (about 70 percent of the unionized electricity workers in the province) working in Ontario's generating stations, transmission and distribution lines and system control facilities.

Affiliations and partnerships assist the PWU in its ability to monitor and influence evolving labour and energy policies that can affect our membership. Although the PWU is autonomous and self-supporting under partnerships, it is affiliated with the Canadian Labour Congress and the Canadian Union of Public Employees at the federal level. At the provincial level, the PWU is affiliated with the Ontario Federation of Labour and nearly 50 local Labour Councils across the province.

We also have valuable partnerships and jurisdictional accords with the relevant construction unions that work in our industry. Partnerships with the Canadian Union of Skilled Workers and the Labourers' International Union of North America, along with other Building Trades Unions help to enable the supply of skilled workers to our employers through our Hiring Hall Agreements.

The PWU does everything that it can to ensure that the places where our members work are safe, but when workplace injuries and/or occupational diseases occur, we are there to assist our members.

The Annual WSIB Audit

The Workplace Safety and Insurance Act (WSIA) requires that the board of directors (of the WSIB) ensure that a review is performed each year of the cost, efficiency and effectiveness of at least one program that is provided under this Act (S 168 (1)).

The WSIB employed independent auditor KPMG to conduct the most recent annual audit. The audit reviewed the dispute resolution process, the appeals process, and the appeals implementation process. KPMG issued a final report dated November 30, 2022. The KMPG auditors provided recommendations to improve the cost, efficiency, and effectiveness of the WSIB. Auditor recommendations may have intended or unintended consequences when implemented. **The auditors are not subject matter experts.** It falls upon the WSIB to determine and implement useful recommendations.

We support any change that can improve the quality of service and benefits the WSIB provides to workers injured, made ill or killed in the workplace. **We have concerns about planned action by the WSIB.**

Key Proposed Changes and Potential Impact on Injured Workers

The PWU provides representation for members seeking WSIB benefits. Our members represent a small percentage of Ontario workers seeking compensation benefits.

Thousands of injured workers do not have immediate access to representatives or legal services. Many do not understand or are incapable of navigating the complexities of appealing a WSIB decision. Many workers must overcome barriers to participate. Barriers such as physical and psychological impairments,

language, education, technology deficiency, and geographic location. Many injured or ill workers that are denied WSIB benefits become reliant on government support such as OHIP, ODSP, OW, and CPPD. They transition to publicly funded support instead of receiving benefits funded through the employer funded compensation system. It is troubling therefore that the **WSIB has announced plans to seek changes to the WSIA, and alter policy/ practices that are unnecessary and by design will negatively impact injured workers and further erode workers' access to natural justice and fairness.**

1. **Recommendation to implement restrictive time limits on the WSIB appeals process.**

The WSIB has indicated they will seek a legislative change and operational policy and practice revisions to implement much more stringent time limits for advancing an appeal.

- The Intent to Object (ITO) form would have to be submitted within 30 days of the initial written decision date. **Present legislation allows 6 months for this to occur.**
- The injured party would be required to submit supplemental information within 30 days of the ITO (60 days after the decision). **Presently there is no time sensitive requirement for submitting new information.**
- Injured parties 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). **Presently, there is no requirement to participate in an ADR process and there is no time sensitive requirement for submitting a reconsideration request.**
- The Appeal Readiness Form (ARF) would have to be submitted 9 months after ADR/the reconsideration process (1 year after the initial decision). **Presently there is no time sensitive requirement for submitting the ARF.**

A new appeal system based on imposed time limits, whether by changes to legislation, changes to WSIB policy, or both, is unnecessary, and is a blatant attack on injured parties' access to natural justice and fairness.

A further concern with the restrictive time limits is how this will affect the agencies that provide free assistance to injured workers and/or their representatives with WSIB appeals. There is concern that restrictive appeal time limits will impact on their ability to provide quality service to the client. This includes agencies that receive government funding**. Will that funding now be placed in jeopardy due to difficulty in providing appropriate assistance within a restrictive time limit?** Examples include an agency assisting with research and expertise in identifying possible links between occupational illness and exposure to workplace hazards. A second example is an agency coping with a high volume of claim files. To put this in perspective a scan of WSIB statistics of claims registered in 2023 up to May 31, 2023, reveals the WSIB did not allow 33 801 claims of 99 800 claims registered. In 2022, WSIB statistics indicate the WSIB did not allow 70 643 of 255 281 claims registered. **In the 17-month period from January 1, 2022, to May 31, 2023, over 144 000 claimants were denied entitlement to WSIB benefits. Those claimants may be seeking assistance in launching a WSIB appeal.**

The proposed time limit changes are fiscally unfounded and by design will negatively impact injured workers. The WSIB is operating with a financial surplus.

A worker seeking out representation and/or the gathering of evidence does not create a burden for the WSIB. A claim is inactive following the WSIB acknowledgement of an intent to object to their decision. It is our experience that carriage of a claim is assigned to a case manager once new activity has

been identified on a claim. A dormant claim does not create an increased workload for WSIB staff or create a financial burden on the WSIB.

The WSIB has suggested delays in advancing an appeal is unfair to the injured worker and by implementing time limits they are providing these workers with an improved service. This contention is not accurate. The WSIB has already issued a negative decision to the worker. A negative decision is not an offer of improved service. The burden has shifted to the injured party to provide new information for consideration. The WSIB intends to put restrictive time limits on this activity, thereby instituting a further disservice to the appellant.

The present system allows an injured party time. The initial decision is delivered to the injured party by mail. Many workers who have low literacy, limited English, or don't understand the WSIB system and may not understand the decision letter. The injured party may need to seek out and obtain representation. The representative would require written authorization to represent and submit this form to the WSIB along with a request for access to the claim file. The claim file once received would undergo a review to confirm the issues and understand what, if any, new information is required. It should be noted here that this often involves seeking information that could have been gathered by the WSIB decision maker. At some point during this activity the Intent to Object Form would be submitted to maintain the right of appeal and identify the issues at hand. Evidence gathering includes activities such as seeking out witnesses, witness statements, or obtaining job descriptions. Appealing complex claims, psychological claims, or occupational disease claims can require extensive research or referrals to third parties such as health care specialists or other agencies that may have long wait times.

All these activities take time. Time is what the WSIB wants to take away from the appeal process. That is unfair to injured parties and is not in keeping with the spirit and intent of the compensation system and natural justice. **The present 6-month time limit for objecting to a WSIB decision with no further imposed time limits is appropriate and more reasonable than the proposed system of multiple enforceable time limits.**

Restrictive time limits will cause appeals to be denied or abandoned simply due to missed time limits rather than the merits and justice, whether implemented through legislative and/or WSIB policy/practice changes. **Is this the real intent of implementing these recommendations?**

2. **Recommendation to exclude issues from hearing eligibility.**

The WSIB is recommending certain issues be excluded from the appeals process. Present legislation requires the Board to provide a hearing (WSIA S. 119). **Repealing this section of the WSIA will give the WSIB sole authority to determine what issues can or cannot be appealed. This recommendation impairs an injured party's access to natural justice and fairness by potentially limiting access to the appeals process.**

3. **Recommendation to introduce an Alternative Dispute Resolution (ADR) process.**

The proposed introduction of an Alternative Dispute Resolution (ADR) process is puzzling from a financial perspective and does not benefit injured workers claiming WSIB benefits. History has shown this type of activity was not effective in the past at the WSIB. The Workplace Safety and Insurance Act (WSIA) prohibits employers from influencing and inducing workers to withdraw or abandon a claim for

specific WSIB benefits (S. 22). Why does the WSIB want to implement an ADR process that influences and induces injured parties to proceed, withdraw or abandon a claim for specific WSIB benefits for which they may be entitled? This added process could be traumatizing for an injured party seeking benefits. The injured party will not be able to negotiate and derive greater benefits beyond what is already allowed by WSIB policy. The WSIB is recommending extensive training for staff. How is this an improvement of the present system? **We fail to see how this recommendation is an efficient use of WSIB funds and human resources. We are concerned that injured workers will bear the brunt of this initiative by not pursuing benefits to which they should be entitled.**

4. **Improvement of the fragmented compensation system.**

The WSIB has indicated they would like to move to a less fragmented and more holistic and consistent approach to decision making. This includes the creation of quality control loops and improved implementation strategies following a decision. Recent data obtained from the Workplace Safety and Insurance Tribunal (WSIAT) highlights the challenges the WSIB will encounter in delivering fair and consistent decision making. A review of WSIAT overturn statistics from 2012 -2022 has shown a steady increase year over year in overturned decisions. In 2012 the WSIAT overturned 54% of all WSIB decisions. 33% in full and 21% in part. By 2022, WSIAT overturned 79% of all WSIB decisions. 64% in full and 15% were overturned in part. **These statistics demonstrate a steady deterioration of consistent decision making between the WSIB and WSIAT over the past ten years.**

In human terms, this represents many injured or ill workers who had to suffer through further physical, financial, psychological and social hardships and endure a lengthy appeal process to receive justice and WSIB benefits. **An alignment of consistent decision making at the WSIB and the WSIAT is welcomed by injured workers and their advocates and is long overdue. Improvements to adjudicative and implementation processes within the WSIB are also welcomed.**

<u>Request for action</u>

These proposed changes are occurring against a backdrop of operating surpluses at the WSIB. An entity that provides employees with generous salaries and benefits to administer the Ontario compensation system. In October 2022, a WSIB news release announced the WSIB is offering the lowest average premium rate in 20 years that included a surplus rebate expected to be 1.2 billion dollars back to employers. **It has not gone unnoticed that no improvement has been made to injured worker benefits.**
In the same WSIB news release Hon. Monte McNaughton, Minister of Labour, Immigration, Training and Skills Development was quoted as saying **"Our government is driving generational change at the WSIB <u>to deliver for people injured at work</u> while also keeping costs low for Ontario businesses. Working together, we will be taking more action in the coming months to support safe employers and put workers and their families first." ..The WSIB has demonstrated it is keeping costs low for Ontario businesses.**

1. **We call on the WSIB to now deliver for people injured or made ill at work.**
2. **We call on the CEO and Board of the WSIB, and senior WSIB management to address worker advocate concerns regarding the proposed changes to legislation and WSIB policy/practice direction.**

Respectfully submitted by Karen Pitsadiotis and Phil Hames, PWU WSIB Staff Officers.

Submission to the WORKPLACE SAFETY & INSURANCE BOARD regarding the Value for Money Audit (VFMA) Dispute Resolution and Appeals Process

Provincial Building and Construction
Trades Council of Ontario

July 17, 2023

INTRODUCTION

The Provincial Building and Construction Trades Council of Ontario represents 14 building and construction trades unions. These unions and their respective locals represent 150,000 men and women who work in every discipline of Ontario's construction industry.

Workplace incidents and occupational diseases affect workers in the construction sector at an alarmingly high rate. This means that workers and their unions have to deal with the Workplace Safety and Insurance Board (i.e., the "Board") more often than is the case for workers employed in other sectors. Most times, this means that workers and union representatives need to appeal adverse decisions to the Board's Appeals Service Division (ASD).

The Board is currently consulting with stakeholders on proposed changes to the "Dispute and Appeals Process." The proposed changes were recommended by KPMG in a November 30, 2022 report entitled "Value for Money Audit (VFMA)-Dispute Resolution and Appeals Process."

Prior to reviewing the specific recommendations, it is important to mention that the Provincial Building Trades Council was not one of the external worker stakeholder organizations consulted by KPMG while the review was being held.

Considering that the Ontario Council represents the largest such council in Canada, and that there was a labour side member from the construction sector serving on the WSIB's Board of Directors, neither the council nor any of its affiliates were invited to participate in the review and consultations that gave rise to the preparation of the KPMG report.

The following represents our comments on the VFMA process and its recommendations.

- **VFMA KEY FINDINGS**

KPMG determined that the Board's Dispute Resolution and Appeals Process, currently reflects 'low' value for money. The specific concerns and recommended areas for improvement include the following:

- Fragmentation of appeals so that workplace party issues are not dealt with holistically, which leads to multiple appeals with slow resolution and added cost and decision-making delays for the workplace party.
- Unnecessary administrative delays in terms of assigning the appeal to the Appeals Resolution Officer which prolongs the appeals process.
- Lack of timelines in place to register an appeal and lack of enforcement of appeal implementation timelines, which do not support effective rehabilitation and return to work practices. This is further evidenced by the fact that the average appeal timeline for 2021 was in excess of 200 days.
- Lack of an effective and accountable quality assurance processes across dispute resolution and appeals decision making. Current quality assurance processes do not set rigorous standards for determining whether cases should move into the formal appeals process, proceed straight to the WSIAT, or return to the front line for further reconsideration.

- The litigious nature and the decision-making delays associated with the process are contrary to the WSIB's strategic objective of "Meeting Our Customers Needs and Expectations", and do not support leading practice rehabilitation and return-to-work principles. Processes can be improved to support WSIB objectives focused on accessible and personalized customer service, and timely, quality and fair decision making.

It goes without saying that the Board should always be looking for improvements to best serve its stakeholders. However, the Board's Dispute Resolution and Appeals Process was not an area that needed major improvements as articulated by the KPMG recommendations.

Moreover, both the employer and worker stakeholders had no major issues with the Board's ASD and corresponding procedures. The VFMA report's recommendations are surprising to the Ontario Building Trades Council.

Over the last few years, worker stakeholders have voiced serious concerns not with the Board's ASD process but rather with the lack of quality decision making at the Board's operating area. Unfortunately, when blatantly bad decisions are made by the WSIB with respect to injured workers' claims, and when those decisions are appealed at the operational level, the bad decisions are simply upheld.

The typical line that workers hear from the Board essentially add up to the following general response: "we can assure you that your concerns have been reviewed and although you are disappointed, the right decision has been made." This condescending approach then forces workers to appeal such decisions to the Board's ASD or to the Workplace Safety and Insurance Appeals Tribunal (Tribunal) with the expectation that there is a higher probability that the correct decision would be made at those levels. However, the very fact that at the operational level, the claims managers refused to rescind their original decisions, is very frustrating, worrisome, and damaging to the system as a whole.

Fundamentally, neither the ASD nor the Appeals Tribunal should be seen as substitutes for poor quality decision-making at the Board's operational level. The operational level should not make insufficiently informed, inaccurate, or incorrect decisions with the expectation that eventually, the correct decisions would be made by the ASD or at the Appeals Tribunal level.

Moreover, the practice of standing by bad decisions is administratively inefficient, costly, and burdensome to the workers' compensation system because it encourages case managers to escalate cases to higher administrative levels where they are unnecessarily prolonged. Given the structure of the system, it is unrealistic to expect that this behaviour will change, absent any dramatic directives for change.

It would have been much more efficient for the Board to have focussed the VFMA on the operating area and decision-making process. A review of the decision-making process would have been supported by the worker stakeholders. Unfortunately, the VFMA focussed on the Appeals process rather than looking at the quality of decision making at the operating area.

➢ SPECIFIC RECOMMENDATIONS & COMMENTS

Dispute Resolution

1.1 Mediation and Early Resolution

This recommendation presumes that the Board operating area has conducted the appropriate investigations and that all relevant medical information was available and considered. If the Board considers a mediation stream, the Provincial Building Trades Council suggests that guidance be taken from what has been implemented by the Workplace Safety and Insurance Appeals Tribunal.

https://www.wsiat.on.ca/en/appealProcess/early_intervention_program.html

Essentially, once it is determined that a mediation/early resolution stream is warranted and accepted by most stakeholders, the Board does not need to reinvent the wheel. The Tribunal has been providing an early intervention program for years with success. Additionally, the Tribunal has knowledge and expertise and can assist in developing training materials to help guide Board decision makers.

1.2 Timelines for submission and completeness of Appeals Readiness Form

The VFMA recommends that the WSIB enact a one-year time limit to submit the Appeal Readiness Form (ARF). The Building Trades Council asserts that the Board **cannot implement this recommendation as the law does not allow it.**

Essentially, the Board has no statutory power to create a new time limit. Once a worker or representative completes an Intent to Object form (ITO) he or she has met the time limit under Section 120 of the *Workplace Safety and Insurance Act*, and the Board cannot impose an additional time limit.

Moreover, if the Board does move to implement a time limit, which our Council fundamentally disagrees with, and since the Board has no legislative authority to implement such a limit, a one-year time limit (as an example) would not provide justice to injured workers. At a minimum, the worker should have two years. Additionally, the process needs to be open to extensions based on extenuating circumstances.

The proposed one-year window will be problematic as many workers will not be able to meet the time limit. Considering the wait times for an MRI, as well as specialist appointments and referrals, the one-year time limit will cause undue hardships to most claimants.

Moreover, those workers who request assistance from the Occupational Health Clinics for Ontario Workers (OHCOW) and/or the Office of the Worker Advisor (OWA) will also have difficulty meeting the one-year limit due to long wait times for services.

It can take months for injured workers to secure legal representation; in many cases, more than 90 days. For instance, at the OWA, the average wait time for someone to review a file is over seven months and may take as long as 17 months in some offices. This will result in an increase in self-represented injured

workers who will be unwillingly pushed through a complicated appeals 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, effectively curtailing their ability to assert their rights.

1.3 Fragmentation of the Dispute and Appeals Process

Consolidating all issues and matters under dispute would be a positive development. We agree that a 'holistic' approach needs to be taken. This would include taking stock of future considerations and entitlements. However, the current approach is not effective.

For example, when a worker wins an initial entitlement after having his or her case linger in the bureaucratic 'abyss' for two years. His or her case is then returned back to the operating area, and if the Board simply allows loss of earnings for a couple of weeks and then deems that the worker has recovered without any residual impairment. The worker would then be 'ping ponged' back to the appeals system for ongoing entitlement, permanent impairment, and loss of earnings. A move to a 'holistic approach' would presumably ensure that all issues would be dealt with, eliminating the 'ping pong' phenomenon.

Appeals Services

2.1 WSIB should amend the current processes of the Appeals Services Division (ASD) to ensure continuous improvement

We support that workers and their representatives have a duty to ensure that their cases are appeals-ready prior to proceeding to appeals. However, there is a plethora of cases that end up at the ASD due to a lack of quality decision making and appropriate investigations at the Board's operating area. Prior to implementing changes to the ASD, the Board needs to look at the lack of quality decision making and the real reconsideration process once the ITO form is submitted.

Better linkage between ASD and Tribunal decisions

We support that the Board establish a high-quality link between the decisions of the ASD and Tribunal. It is frustrating that the Tribunal, for example, when deciding cases dealing with pre-existing conditions, has an approach which goes against adjudicative practice. By this, we mean that the Board consistently and wrongfully misapplies both the intent and spirit of its own policies to deny claims by citing so called pre-existing conditions.

It is acknowledged that a Board policy, must of course, be subject to interpretation, based on the facts in every particular case. There must be a certain degree of flexibility in both the interpretation of a policy and in its application in a particular case. However, this is not the same as totally ignoring a policy or refusing to apply it.

It is, in our opinion, a slippery slope for the operational area and the ASD to be given such broad discretion to apply or refuse to apply a policy. Either the policy is supported by a reasonable interpretation of the *Act*,

or it is not. If it is the former, then the policy ought to be applied unless there is an explicit finding that, given the merits and justice of the individual, it ought not to be applied.

2.3 Appeal Hearing Method

The current ASD process attempts to resolve as many cases as possible via written submissions. It is submitted that oral hearings provide a better opportunity for parties to provide additional information and feedback. During the COVID-19 pandemic, the Board turned towards virtual hearings to ensure access to justice. There is no need to move away from oral hearings, preferably in-person, but with the ability to hold them virtually.

3.1 Return to Work (RTW): Expedited 30 Day Appeals

We support that the Board and ASD implement a process that would expedite RTW appeals as directed by section 120 of the *Act*.

3.2 Delay in Appeals Implementation

We support a 30-day time limit for appeals implementation by the operating area. The current process, after a worker is successful, is cumbersome and inefficient. Workers should not be affected by the inability of the Board to ensure appropriate staffing levels in the payment services division.

4.2 Final Decisions of the WSIB

We disagree with the recommendation that the Board should exclude decisions based on standardized calculations (i.e., Non-Economic Loss (NEL) or Second Injury Enhancement Fund (SIEF)) from its internal appeals process while relying on calculations from the initial decision maker and any quality assurance steps undertaken thereafter. Essentially, the KPMG report recommends that workers and employers would have to appeal these decisions directly to the Tribunal.

Our Council reiterates that the WSIB **has no ability under the *Act*** to refuse to hear certain appeals, making KPMG's recommendation impossible. Section 119(3) of the Act provides that "The Board shall give an opportunity for a hearing."

SCHEDULE 2 EMPLOYERS' GROUP

Via email **Appealsfeedback**@wsib.on.ca

July 21, 2023

Appeals Services
WSIB
200 Front St. West
Toronto, Ontario
MSV3J1

Re: Dispute Resolution and Appeals Process Value-for-Money Audit Consultation

On behalf of the Schedule 2 Employers' Group (S2Eg), we appreciate the opportunity to provide feedback to the WSIB on the six (6) implementation issues identified in the consultation document. The Schedule 2 Employers' Group Executive is pleased to provide our input, however, are disappointed that consultation did not occur earlier, i.e. upon the WSIB's receipt of the full VFMA report in the late Fall of 2022. We are also troubled that this appears to be a continuing process with the WSIB and provide a copy of our 2012 submission to the former head of Appeals Services to illustrate the point.

We agree that it is advisable to periodically review the WSIB program areas to ensure consistency with the governing law(s), policies and mandates, effectiveness and effeciency, but also stakeholder perspectives. The 2022 VFMA review report provides observations and ideas crafted by the evaluators and with respect to the mandate set out by WSIB. However, it is not clear that the evaluators were aware of, or understood, some of the WSIB appeal services history. An example relevant to the current report and consultation is the proposed reconsideration process and integration of operations/appeals services, which remind some of us of the former Decision Review Specialist role within operations and the eventual decision to discontinue these operational reviews/reconsiderations. The transparency and independence of an appeal system is integral to its value – both in terms of confidence that the parties engaged in the process may, or may not have and in the quality of the decisions that (hopefully) would lead to less appeals to the Tribunal.

As Schedule 2 employers, who pay full costs plus and Administrative Fees to the WSIB, this must be done in a financially responsible manner (as required by the Workplace Safety and Insurance Act (WSIA) purpose clause). It must be equitable and objectively based as a determinant for benefit entitlement.

Notwithstanding our overall concerns about the report and process prior to the consultation opportunity, the following are our thoughts related to the 'implementation' issues.

1.1 ADR and appeals processes should only start once a party has clearly documented the specific decision, their reasons for change, and a remedy.

We agree that the VFMA recommendation for a 30-day time limit to provide objection details is a legislative issue. However, (and this may be an example of the Auditors' lack of practical experience with the WSIB system, appeals in particular), many parties file an Intent to Object (ITO) form simply to satisfy the statutory time limit for an objection to be filed and this is a necessity as it is often not apparent what will transpire in future and over the lifetime of a claim. ITOs often do not have details (page 2) and are not requesting a 'reconsideration' at all. To characterize ALL ITOs as a request for reconsideration is unnecessary and ill-advised, in our considered opinion.

We also do not agree that the decision-makers at the operational level can ALL be appropriately trained to be effective mediators, or that most issues in dispute can be mediated. Even if parties engage in discussion with WSIB to try to resolve issues, all decisions that arise from these interventions are still eligible for appeal, thereby negating any finality or limiting litigation. Having some staff within the Appeals Services Division who are charged with the responsibility of providing mediation services could be helpful, but this was attempted several times in the past, in various ways – and FAILED. For whatever reason, WSIB disputes do not appear amenable to mediation, even MANDATORY MEDIATION which you have proposed.

We do agree that RTW issues can and would benefit from a mediation approach.
We do not agree that mediators should be allowed to be decision-makers on any issues.

All references to 30 days in issue #1.1 if any of these measures are adopted should be changed to at least 90 days at least, unless/until WSIB portal access is fully functional for all.

1.2 Implement a one-year time limit after the initial decision date for 'readiness' forms to be submitted.

This whole section seems contrary to the intent of the legislature when it introduced and implemented time limits for objections in the first place.

We agree that currently a party ***can*** file and ITO and not ***ever*** move forward with the objection. And some objections do move forward later – sometimes alone, but often with later decisions as the case evolves. There is some efficiency in the batching of issues and incorporating both parties' issues in a fulsome proceeding. Perhaps the WSIB should consider how its process could affect change aimed at this type of outcome?

One year from the date of the decision, would (in most cases) be only 6 months after the statutory time limit to file an objection. However, this might be possible when the WSIB Employer and Worker portals are able to post decision letters, ***and*** the WSIB has capacity for representatives to independently obtain the information as well. Why would parties submit their 'resolution' and how could the WSIB possibly ***require*** them to. We do not disagree that the Appellant should have to indicate at least a remedy, but to fully argue their case (especially for unrepresented parties) would be arduous and likely unhelpful.

As you may, or may not know, the Tribunal has announced changes to its appeal filing and processing system which takes effect in November 2023. As such, our position would be that any further changes to the WSIB objection/appeals system should NOT BE as of January 1, 2024, but should be later than that … perhaps January 1, 2025?

We note that the excerpt from the ASD P&P with respect to extension of time (EOT) is completely devoid of any considerations of an employer's circumstances. This must be remediated.

2.3 Establish criteria for determination of hearing method.

We implore the WSIB to return to making 'in person' oral hearings their default disposition method. While we are all cognizant of the reasons for videoconferencing and other technology-based changes (i.e. 2020-2021 COVID pandemic), the only chance that the parties have to be together and hear 'first-hand' all of the evidence and exchange their insights and arguments is through an oral hearing. Much is lost in the experience of videoconferencing and written submissions are a burden for most (not even considering whether the quality of the submissions, or lack thereof, assists the decision maker). If the default is not 'in person', then it should at least NOT be in writing only.

3.1 Ensure that RTW decisions with 30-day time limit are prioritized and expedited.

Agreed. The purpose of an alternate/earlier time limit was to ensure that RTW issues were brought forward and resolved (one way or the other) as soon as possible in hopes that RTW efforts would be successful and timely. Adding LOE issues should NOT disturb the RTW 30-day time limit as it is now set out in the ASD P&P. The LOE issue can be dealt with later as 'flowing from'.

3.2 Reinforcing the 30-calendar-day time limit for appeals implementation.

Firstly, the WSIB's internal performance measure is incorrectly termed a 'time limit' in this question. Certainly, it would seem logical that performance measures apply to whatever personnel/divisions/issues that the WSIB senior management determines is appropriate. And the WSIB has exclusive authority over its own practices. However, the appeals implementation currently often happens before parties receive a copy of the decision and are often not contacted for input. This is particularly troubling for Schedule 2 employers who pay full cost, plus Admin fees to the WSIB. The decisions should be processed in the usual course of business at WSIB and not considered urgent. We suspect that this metric has is foundation in a 'pay the worker' sentiment, but we encourage the WSIB to consider this question in the broader concept of its priorities, quality and customer service.

4.2 Should we exclude decisions based on standardized calculations form the internal (WSIB) appeals process and have these decisions go directly to the WSIAT.

We would refer to you the legislation which sets out some exceptions to the WSIB appeal process (e.g. access disputes S.59, 3rd party right to sue S.31) and limits to the Tribunal's jurisdiction (WSIA S. 123). For the WSIB to do so would be akin to a party requesting that the WSIB Appeals Service 'deem' the decision a final decision of the WSIB. This discretionary power is used rarely and acts to deprive the party of the opportunity to argue their case at BOTH levels of appeal afforded by the WSIA. As such, it would be our position that 1) this issue requires legislative change, and 2) it would be a disservice to the stakeholders. Clearly there are NEL award and SIEF quantum decisions that are overturned by the ARO – we request that this data be provided for further consideration.

All of which is respectfully submitted for your consideration.

Yours truly,

Laura Russell
Chair, Schedule 2 Employers' Group

Via Email appealsfeedback@wsib.on.ca

July 21, 2023

Mr. Frank Veltri
Senior Director
Appeals Services Division
WSIB
200 Front St. West
Toronto, ON M5V 3J1

Re: Consultation WSIB Dispute Resolution and Appeals Process value-for-money audit

Dear Mr. Veltri:

We are writing to provide our feedback on the WSIB's dispute resolution and appeals process consultation. We thank the WSIB for engaging with its stakeholders and the opportunity to provide feedback on the value-for-money (VFM) audit recommendations that will directly impact system users.

Who we are:

SBCI is a not-for-profit co-operative consulting firm that provides representation on WSIB appeals to 61 of Ontario's 72 publicly funded, English/French and Catholic school boards..

SBCI's roster of seven paralegals and two lawyers provide representation to these school boards at all levels of appeal within the Ontario workers' compensation system. Annually, SBCI participates in an average of 101 written and oral hearings before the Appeals Services Division and another 39 annually before the WSIAT. We also participate directly in hundreds of claims annually with Entitlement Adjudicators and Case Managers in relation to adjudicative decisions and reconsiderations rendered by the WSIB.

Preliminary Discussion

While the WSIB considers stakeholder feedback, and implementation of changes, the WSIB must ensure there is adequate lead time, structure and resources in place to successfully support these. The current structure and resources do not support the proposed changes being considered and brought forward by the audit. The changes

are expected to result in an influx of appeal volume due to imposed appeal time limits. Adequate resources such as staffing and tools, along with training are necessary to ensure a seamless transition without impacting workplace parties. Other provinces that have implemented some of these practices have advanced infrastructure in place to successfully deliver services. WSIB's introductory comments about the review indicated the changes will occur 'over a two-year period'. We recommend clear timelines; deliverables set out and consideration delays may occur.

Any changes to the appeals approach or process must allow stakeholders adequate notification period to familiarize with changes, and include written communication, website updates, stakeholder events and training.

Recommendation 1.1: We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals.

We strongly agree the WSIB invest in front line training on mediation and dispute resolution. The current level of knowledge and skills in dispute resolution at the reconsideration stage is lacking. In some claims, the file and issue(s) reviewed by a Reconsideration Adjudicator, mainly for initial entitlement stage, but not for ongoing entitlement issues.

Reconsiderations at the front-line level must be thorough, objective, and well reasoned. Often, reconsiderations are brief and do not address the new evidence or arguments that have been presented resulting in a superficial standard letter sent to the objecting party and parties.

Once the ARF is submitted, the reconsideration must be robust and thorough. Secondary review by the decision maker's Manager must be thorough and documented. Currently, there is a second signature on the appeal referral form without evidence of a thorough review indicated.

From our perspective a very small percentage of reconsiderations are allowed, less than 10%, while on appeal, a greater percentage are allowed.

A robust reconsideration process is much more useful than mediation/arbitration.

Reconsideration Adjudicators as an objective second reviewer is a potential opportunity for meaningful reviews provided experienced and trained staff are involved.

It is anticipated that self-represented, or vulnerable groups will require education and access to resources.

Recommendation 1.1: Our alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

We propose the WSIB adopt a checklist type approach to their forms allowing the appellant to easily identify the reasons for the objection, such as policy and law or evidence were not considered. The form should indicate the party to provide their reasons and desired outcome and attach any evidence.

We should adopt set timeframes for the reconsideration process.

Yes; 30 to 60 days is reasonable.

i. What appealable issues do you think are appropriate for this mediation-arbitration model?

We do not support a mediation-arbitration model at the WSIB. Drawing from the experience at WSIAT, this method was discontinued following concerns from the stakeholder community that both decision maker/mediator was problematic. WSIB should draw on the experience of WSIAT.

Since decisions at WSIB are appealable to WSIAT, we do not view mediation at WSIB will succeed since there is a lack of finality to decisions at WSIB and decisions can be appealed to WSIAT. ADR or mediation may afford the opportunity to narrow the issues, remove some issues or clarify the desired outcome.

ii. What principles should guide the mediation-arbitration approach? What else should we consider?

Should WSIB give serious consideration to a mediation-arbitration approach, first the parties must agree and it should be optional. Also, it would be limited to certain issues and exclude initial entitlement or issues of causation.

iii. If mediation does not resolve the issue, what factors should be considered to determine whether an oral hearing or a hearing in writing should be used for the arbitration component by the Appeals Resolution Officer?

Apply the method of resolution criteria in the ASD Practice and Procedures document, most current version.

iv. To ensure expediency, what would be a reasonable timeframe for the mediation component? Is 30 calendar days reasonable?

A longer time allowance when there are multiple claims, issues, complexity or owing to a large file size, anything 1,000 pages and more. These are just some examples and not an exhaustive list. For these, files, we recommend approximately 90 days.

v. How might alternative dispute resolution be used by front-line decision-makers? If there is a dedicated team of front-line operational experts delivering alternative dispute resolution, how much should other front-line decision-makers be trained in the approach?

See discussion under 1.1.

vi. What factors should we consider in making the above information mandatory to initiate the dispute resolution and appeals process?

vii. What factors should we consider when implementing 30—calendar-day timeframes for each step in the above reconsideration process?

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

i. If we were to implement a new one-year time limit from the decision date to submit an appeals readiness form on January 1, 2024, how should we manage appeals from before this date where an appeal readiness form has not yet been submitted?

As participants in the claims process, employers' desire finality in a claim, however, that is not always possible as claims remain active, new issues evolve or there are extenuating circumstances. In some cases, evidence becomes available beyond a 1-year limit that was not available which may impact the decision and claim.

For example, initial or ongoing entitlement and underlying or pre-existing condition is confirmed or diagnosed. This would also apply in SIEF decisions, NEL Benefit offsets or deteriorations.

Currently, WSIAT applies **a two-year time limit** and sends written notification prior to the expiry. We submit adopting a similar practice by WSIB would be reasonable.

WSIB must develop system processes and templated letters prior to implementation.

ii. Should appeals from before this date be exempt from the requirement to send an appeal readiness form within one-year?

Yes, grandfather in those claims that have already been appealed, and allow a two-year notice for those claims to move forward or they are considered expired/withdrawn. The appellant is permitted to have an opportunity to respond and indicate why they need additional time to proceed with their appeal such as awaiting new evidence, medical information, etc. The Appellant must show what steps they have taken to support their request.

The WSIB must be prepared to handle a high volume of appeals anticipated as a result of imposing time limits.

iii. If we were to make appeals from before this date exempt from the requirement to send an appeal readiness form within one year, what would a reasonable time limit be? Would one year from the new effective date be reasonable?

Two years would be consistent with WSIAT approach and practice. We recommend adopting an automated system to send a notice in advance of the expiry date, at six (6) months and 30 days.

iv. Under what extenuating circumstances should we consider extending the one-year time limit for submitting the appeals readiness form?

As stated above, a two-year time limit should be adopted. Extending the time limit would be based on extenuating circumstances with evidence to support it. This would be an administrative decision and not appealable.

v. Is January 1, 2024, a reasonable start date for the new one-year appeal readiness form time limit? How much time would you need to make sure you have enough notice for a start date?

Commencing with a new calendar year as a ‘go-live’ date is reasonable. It would be easy to administer as an effective date but may not allow sufficient notice periods to workplace parties. However, we emphasize the WSIB must have adequate time to implement infrastructure and resources to support the changes.

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

i. What other factors should we consider in determining whether the oral hearing should be offered in person or online?

We strongly endorse an improved appeal intake process and checklist by WSIB staff when determining an oral virtual hearing versus an in-person hearing. Many times the parties arrive at the virtual hearing, and the worker is unfamiliar with technology, does not have access to a computer or high-speed internet, particularly with self represented workers. A checklist will ask the appellant to confirm if they have access to a computer, high speed and comfortable with using it from their own private location. Also, they would confirm language to conduct the hearing, French or other, and whether an interpreter is needed.

It is possible to conduct hybrid hearings both in-person and virtual. The worker can attend in-person at a WSIB regional office and the employer virtually, or some combination. The same approach is applicable when there are witnesses.

Other factors to consider are evolving, quality technology that is accessible, secure and free. The option to have closed captioning because the audio is not always clear. Transcripts must be available free or in a cost-effective manner.

Recommendation 3.1: We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

We agree with the narrow list of decisions that have been provided.

We are considering adhering to the 30-calendar-day time limit and expedited process when there are multiple issues (i.e., both those within the 30-calendar-day and the six-month time limits). This would mean that the return-to-work issue would be expedited through the appeals process independently regardless of whether it is coupled with other issues or not.

i. What factors should we consider in expediting return-to-work issues when there are multiple issues in an appeal?

Pure RTW decisions are not as common and typically intertwined with entitlement decisions or other benefits decisions, such as areas of injury, NEL initial and redetermination, which have a 6 month time limit to appeal. Many objections are received within the time limit, however, moving through the appeals process must allow for due process and disclosure to the participants.

An expedited appeals process involving pure RTW issue(s) bundled with other claims issues would be fine for single party appeals. Otherwise, with a participating respondent, adequate time is necessary for due process and fairness. The unintended result would cause a higher number of appeals that are fast-tracked and overburden the system and delays in the system.

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.

Currently, the Appeals Resolution Officers' decisions may lack instructions and/or the information required to implement their decision. We will review the way Appeals Resolution Officers' decisions are written to make sure they include directions for their decision to be implemented including any supplementary information needed. The decisions will also address the issue and entitlements requested by the parties as identified on the Appeal Readiness Form or the benefits that flow from the decision as part of the parties' proposed resolution to the appeal.

i. What factors should we consider in reinforcing the 30-calendar-day timeline for appeal implementation?

The appellant party must be clear in the desired outcome of their appeal, and have the evidence available, so that the ARO can write a decision to address their request and write clear decisions which can be implemented by front line operations. The ARF must clearly state the outcome desired, for example, LOE Benefits from and to-date. Alternatively, the WSIB must clearly state the issues in a hearing ready letter, like WSIAT, confirming any issues that are not within scope or that are not being pursued at any other level, WSIB or WSIAT.

Parties must provide the information in a timely manner and failure to do so will result in placing the implementation into inactive status and restarting the clock when the information is received.

For employers, implementation when obtaining cost credits, notably for health care benefits or amalgamations, is onerous and a significant amount of time to follow up with WSIB staff is required. An automated systemic approach as a solution is recommended.

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

We are assessing examples of decisions we make that rely on standardized calculations to determine if we should exclude them from our internal appeals process.

This might include certain permanent impairment rating (quantum) decisions, and their non-economic loss monetary award calculations; certain loss-of-earnings benefits calculations and decisions; and certain personal care allowance decisions.

We do not endorse this approach. All decisions should remain within the internal appeal process. However, dedicated technical staff may be assigned and these decisions streamed to ADR approach.

i. If we were to exclude decisions that rely on standardized calculations from our internal appeals process, what are some factors we should consider?

See above.

ii. Are there other decision types that we should exclude from our internal appeals process?

See above.

iii. Sometimes in different claims for the same person, an issue in dispute may be active with WSIAT while another issue is active with us. Should there be options to request for us to exclude some decisions from our internal appeals process to pursue the holistic resolution of the issues for the person or business at the WSIAT? Under what circumstances would this be best? What else should we consider?

The current practice at WSIAT is to place an appeal into inactivate status while the party pursues other issue(s) at WSIB. The WSIB should take the same approach. The onus is on the appellant, to complete appeal activity in other claims or at the WSIB, in a timely manner. These issues must be identified at the appeal intake stage and dealt with rather than on the day of the hearing to avoid adjournments. The Appeals Director had the authority to issue a final decision of the WSIB to allow the appellant to pursue holistic adjudication at WSIAT. We submit this process continue, provided both parties agree. In single party appeals, this is straightforward, and a final decision can be issued. When it is a dual party appeal, or dual appeal issues, to do so would be highly prejudicial when a hearing is not held and given the opportunity to make submissions on an issue.

Closing Remarks

Again, we thank the WSIB for engaging and inviting stakeholder feedback on the appeal system improvements. We look forward to the WSIB's updates and new/revised approach.

On behalf of the SBCI staff of lawyers and paralegals,

Yours Truly,

Figen Dalton

Figen Dalton, CRSP, CDMP
WC Consultant and Licenced Paralegal

SUBMISSION FOR WSIB'S
APPEALS SERVICES DIVISION and VALUE FOR MONEY AUDIT

The Sudbury Workers Education and Advocacy Centre is a small non-profit organization made up of workers, students and community volunteers, all dedicated to improving the lives and working conditions of people, especially those in low-waged and precarious employment. We provide public legal information on your rights at work; work with clients one-on-one to help them resolve workplace issues or understand how to access justice; convene workers together to learn and share from each other, and to educate and empower them to be community leaders; undertake community-based research; and advocate for change. As part of our work, we host the Sudbury Injured Workers Group, which is a member of the Ontario Network of Injured Workers Groups. (ONIWG.)

Value for Money Audits (VFMA) are a legislated requirement of WSIB on an annual basis under the *Workplace Safety and Insurance Act, 1997*. However, the VFMA which was performed on the Appeals Services Division (ASD) appears to have over-reached their mandate, and have recommended changes that would a) require legislative change, and are therefore outside the scope of the auditors; and b) will do harm and damage to the workers, the very people WSIB is supposed to be protecting and supporting.

A VFMA that provided a recommendation to limited the ability to make appeals would make sense if it was was determined that the number of appeals going before WSIB was frivolous and excessive. In fact, the contrary is true.

The Ontario Legal Clinic's Workers' Compensation Network undertook a Freedom of Information act with WSIB around appeals. They discovered that although yes, the number of appeals has increased over the last 20 years, with nearly 2/3rds of worker appeals denied by the ARO. However, when these appeals were then taken to the Workers Safety and Insurance Tribunal (WSIAT), the majority of those appeals (77%) were successful. This means that 77% of the time spent on appeals, the WSIB wasted money in denying workers benefits that should have been allowed. A true VFMA would have made recommendations that enabled WSIB to make better initial determinations that would not require workers to have to fight for what was rightfully theirs to begin with.

If the KPMG recommendations are adopted, workers will be unable to obtain sufficient evidence within the time lines suggested to create effective appeals. This will continue to result in poor decisions being made on incomplete information that will ultimately be ruled in favour of the

worker at the WSIAT. Worse, many workers will choose not to appeal, because they will not have the mental or physical capacity to undertake the work required while they are still very much recovering. Although this would in theory show a savings at WSIB, the cost to the workers and the costs passed on to other social systems will result in an overall loss. It will also open up the WSIB to challenges of the legal fairness of the system.

KPMG has overstepped their authority in making these recommendations, and have demonstrated little understanding of the workers compensation system. They have made recommendations, such as enforcing a 1-year time limit to submit the Appeal Readiness Form, which is in violation of the existing statutes. They have recommended an incentive program that would provide workers with less benefits in exchange for speedy processes. This is the antithesis of a program that was created to ensure that workers had full and fair compensation for their injuries at work.

The current WSIS system is in need of reform. It is not only failing to compensate workers appropriately, but also adding additional harm to workers. In 2021 the Dalla Lana School of Public Health, University of Toronto, the Institute for Work & Health and Monash University published a study that showed that the mental health of workers dealing with WSIB deteriorates significantly. The study demonstrated that after a physical workplace injury, there is a high prevalence of mental illness as well. They further showed that WSIB clients who reported poor interactions with their WSIB caseworker had a higher prevalence of serious mental illness in the 18 months following their injury.

The changes proposed by KPMG, will put additional pressure on workers who are already finding it difficult to navigate a system that claims to be there to compensate them, but denies them at every turn. It will slow down and overburden an already overburdened system. The changes must be rejected. Instead, recommendations from stakeholders who are representing and supporting injured workers, such as the Ontario Legal Clinics' Workers' Compensation Network among others, should be given real and serious consideration as a way of improving the WSIB system.

The injured workers that come to us report frustration, confusion and feel ignored by WSIB. They already struggle to obtain medical information in the existing time frames to satisfy WSIB, who often then ignores their treating physician in favour of their own medical opinion. We cannot take away what slim access to justice that injured workers currently have. It would be against the interests of the workers, and the interests of justice, to accept these recommendations.

Sincerely and respectfully,

Scott Florence

Executive Director

The Legal Clinic

10 Sunset Blvd
Perth, ON K7H 2Y2
Tel: 613-264-8888 x 28
Fax: 613-264-8931

21 July 2023

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

Dear Grant Walsh:-

Re: Dispute resolution and appeals process value-for-money audit consultation

We are a community legal clinic that provides legal services to low-income and vulnerable members of our community, including injured workers with WSIB claims. We have serious concerns about the findings and recommendations of the value-for-money audit and the proposed changes in the WSIB appeal process. In particular, we are concerned about the proposals to drastically reduce the time for workers to file objections and appeals and to submit medical or other evidence.

In our experience, injured workers often face difficulties understanding and navigating the WSIB claims and appeals process, as well as barriers to obtaining medical evidence such as specialist assessments and reports. Tighter deadlines will only create additional obstacles for workers in the WSIB claims and appeals process. Changes to administrative procedures cannot come at the expense of the fair and just adjudication of workers' claims.

The proposed changes, if implemented, would have a sweeping impact on the WSIB appeal process and should be the subject of a robust public consultation process. However the consultation period is very short, announced on June 9 and ending on July 21, 2023; the consultation is by written submission only and will be available on the website only ***after*** the consultation is completed.

We are concerned that those most affected by the proposed changes, i.e. injured workers, do not know about the audit, the proposed changes or how it will affect them and/or will not be able to participate meaningfully in a consultation that is being conducted online by written submissions only.

We are writing to seek the following:-

1. **Time**: Extend the public consultation period by at least 6 months
2. **Public** meetings: Hold in-person public meetings across the province with workers

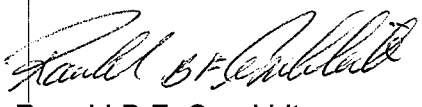
The Legal Clinic

10 Sunset Blvd
Perth, ON K7H 2Y2
Tel: 613-264-8888 x 28
Fax: 613-264-8931

3. **Notice**: Notify all Injured Workers of the proposed changes and consultation opportunities

In view of the very short timeline for public consultation, we request your response well before the deadline of July 21, 2023. In particular, please confirm in writing whether the public consultation period will be extended by no later than **July 14, 2023**.

Yours truly,



Ronald B.F. Cronkhite, BA LL.B
Executive Director
The Legal Clinic

Cc:

- Hon. Monte McNaughton, Minister of Labour, Immigration, Training and Skills Development, 400 University Ave., 14th Floor, Toronto, ON M7A 1T7
  Email to: Monte.McNaughtonco@pc.ola.org Minister.MLTSD@ontario.ca

- appealsfeedback@wsib.on.ca

July 10, 2023

Dear Mr. Lang,

Re: WSIB dispute resolution and appeals process value-for-money audit consultation

The Thunder Bay & District Injured Workers Support Group is absolutely opposed to recommendations put forward by KPMG in their Value for Money Audit (VFMA) that we understand the WSIB is considering accepting and we are recommending that you reject the audit in its entirety.
We suggest that you review your mandate as a provider of compensation benefits to workers injured or made ill at their workplace and hire an independent qualified person that understands the plight of injured or ill workers dealing with the compensation system that you preside over because clearly KPMG have no idea how the system works and their recommendations clearly show that.

Some of the issues that we feel the KPMG audit is incorrect in are as follows:

- The VFMA does not document any actual value to injured and disabled workers which is the main purpose of a properly managed compensation system.
- The VFMA fails to research or understand the present experiences of injured workers with lived experience.
- The VFMA misrepresents the national and international experience in this area.
- The VFMA ignores the facts that the vast majority of WSIB decisions reviewed by the WSIAT are overturned.

We have reviewed and fully endorse the June 5th submission (attached) by the Mr. John McKinnon on behalf of the Ontario Legal Clinic's Workers Compensation Network.

Sincerely,

Eugene Lefrancois
President

Darryl Wilson

Thunder Bay and District Injured Workers Support Group

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

Re: WSIB Dispute resolution and appeals process value-for-money audit consultation

Dear Mr. Lang:

I am writing to provide feedback on the dispute resolution and appeals process value-for-money audit consultation.

This consultation should be scrapped and independent consultations on these issues be held.

The value for money audit on the dispute resolution and appeals process done by KPMG is flawed. Some key issues include:

- It does not document any actual value to injured and disabled workers, the main purpose of the WSIB.
- It fails to research or understand the present experiences of injured workers with lived experience.
- It misrepresents the national and international experience in this area.
- It ignores the facts that the vast majority of WSIB decisions reviewed by the WSIAT are overturned.

I/we support the submission by the Ontario Legal Clinics' Workers Compensation Network of June 5th (attached).

Thank you.

Darryl Wilson

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

Recommendations from the recent value-for-money audit

A recent value-for-money audit conducted by an external firm reviewed the efficiency, and effectiveness of our dispute resolution and appeals process and included a number of recommendations for us to improve those processes.

We have six categories of questions about the audit recommendations that we would like your feedback on to help us successfully implement our planned changes.

Recommendation 1.1: We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals.

The WSIA (**sec 122(1)**) allows us to offer mediation services when we think it would be most appropriate. Considering this recommendation, we are evaluating a mediation-arbitration model of alternative dispute resolution for certain appeal scenarios, similar to the model used in family law cases in Ontario. Mediation-arbitration is a hybrid dispute resolution process that combines the features of both mediation and arbitration. In this process, a mediator helps the parties reach an agreement for settlement, and if the parties are unable to reach an agreement, the mediator then acts as an arbitrator and makes a binding decision, similar to what an Appeals Resolution Officer does today.

To be eligible for mediation-arbitration, we acknowledge that both parties, or at least the appellant, must agree to the process and sign a mediation-arbitration agreement as outlined in the WSIA(**sec 122(3)**). This agreement should include the terms and conditions of the process, including the scope of the mediator's authority and the specific steps that will be taken within specified timelines if the parties are unable to reach an agreement.

Certain issues related to medical compatibility or initial entitlement are not appropriate for mediation-arbitration. Issues related to cooperation or re-employment are more suitable.

We're interested in hearing from our stakeholder community about the factors we should take into account when implementing this alternative dispute resolution model.

For example:

Recommendation 1.1: Our alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

The WSIA(**sec 120(2)**), outlines that the workplace parties must indicate in writing why the decision is incorrect or why it should be changed. Understanding that and what each party wants (i.e., the proposed remedy) is foundational to both formal and informal methods of resolving disputes in a timely and quality manner. We already ask these questions on our intent to object and appeal readiness forms, however, the parties do not always complete the information. In implementing this recommendation, we will make it mandatory to provide complete information through the current processes or through alternative dispute resolution.

Recommendation 1.1: We should adopt set timeframes for the reconsideration process.

The audit recommends we adopt a 30-calendar-day time limit through legislative change. We will review the proposal for legislative changes with the Ministry of Labour, Immigration and Training and Skills Development. Ultimately, the Government of Ontario has jurisdiction over changes to the WSIA. However, we can implement timeframes that apply after we receive an intent to object form. For example, we could change the process so that once an intent to object form is submitted, a response on the reconsideration must be made within 30 calendar days and we could grant an additional 30 calendar days if any supplemental information is required and then allow 30 calendar days to complete the alternative dispute resolution and reconsideration processes and communicate the decision back to the person with the injury or business.

i. What appealable issues do you think are appropriate for this mediation-arbitration model? A. ***Return to Work – Suitable Work – Failure to Cooperate – Material Changes compliance***

ii. What principles should guide the mediation-arbitration approach? ***Standard rules of mediation and arbitration.*** What else should we consider? ***Given the complexity of the challenges, a greater timeframe for resolutions is suggested.***

Example – (WSIB example **>** ***"***once an intent to object form is submitted, a response on the reconsideration must be made within ~~30~~ **60** calendar days and we could grant an additional 30 calendar days if any supplemental information is required and then allow 30 calendar days to complete the alternative dispute resolution and reconsideration processes and communicate the decision back to the person with the injury or business".

iii. If mediation does not resolve the issue, what factors should be considered to determine whether an oral hearing or a hearing in writing should be used for the arbitration component by the Appeals Resolution Officer? ***You defined this as a "mediation / arbitration" process. If mediation fails the issue should be ruled on as part of the arbitration process. (Still appealable to the WSIAT)***

iv. To ensure expediency, what would be a reasonable timeframe for the mediation component? Is 30 calendar days reasonable? ***As above – 60 days***

v. How might alternative dispute resolution be used by front-line decision-makers? If there is a dedicated team of front-line operational experts delivering alternative dispute resolution, how much should other front-line decision-makers be trained in the approach? ***You need to establish clear definitions of what claims can be referred and then train all adjudicators in the basics. The front-line adjudicators can then transfer the matter to a member of the newly created team with advanced level mediation and arbitration training for disposition.***

vi. What factors should we consider in making the above information mandatory to initiate the dispute resolution and appeals process? ***Give participants the right to appeal to the WSIAT to provide arguments on why they should be excluded.***

vii. What factors should we consider when implementing 30—calendar-day timeframes for each step in the above reconsideration process? ***Change to 60 days***

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

Currently, once the time limit to object to a decision has been met, people with injuries and businesses have no time limit as to when they can submit the appeal readiness form. This means that an appeal readiness form can be submitted years after the original decision was made, and as mentioned above, without enough information about their desired outcome (i.e., the proposed remedy). As a result, it takes us more time and effort to address the reconsideration which makes it difficult for us to offer consistent service for all claims

i. If we were to implement a new one-year time limit from the decision date to submit an appeals readiness form on January 1, 2024, how should we manage appeals from before this date where an appeal readiness form has not yet been submitted?

    a. Should appeals from before this date be exempt from the requirement to send an appeal readiness form within one-year? ***No***

    b. If we were to make appeals from before this date exempt from the requirement to send an appeal readiness form within one year, what would a reasonable time limit be? Would one year from the new effective date be reasonable? ***If you allow exemptions, it should provide 6-months for compliance to the new standard. It will clear backlogs.***

ii. Under what extenuating circumstances should we consider extending the one-year time limit for submitting the appeals readiness form? ***This should be done on a case-by-case basis and only in extreme circumstances (death in the family – major illness – change in representation for uncontrolled reasons)***

iii. Is January 1, 2024, a reasonable start date for the new one-year appeal readiness form time limit? ***No*** How much time would you need to make sure you have enough notice for a start date? ***1-year from the date the new decision is implemented.***

The current criteria we consider for a time limit extension is in the **Appeals practices and procedures** document and below:

1. Whether the person received actual notice of the time limit.
2. The person was experiencing serious health problems.
3. Someone in the person's immediate family has experienced serious health problems.
4. The person had to leave the province or country due to an illness or death in their family.
5. The person has a condition that prevents them from understanding or meeting the time limit.
6. The person objected to other closely related issues within the time limit, and it would be impossible to address all of the issues separately.

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

Since the start of the pandemic in 2020, we have been very flexible in determining the method of resolution for appeals. We have worked directly with the parties to best accommodate their needs either online, in person, or in a hybrid manner for oral hearings. We conducted a survey in 2022 on online oral hearings and it showed that they were positively received and that we should continue to offer them. Our current oral hearings are online. We make exceptions for in-person oral hearings in unique cases impacted by things like accessibility needs or technological challenges.

i. What other factors should we consider in determining whether the oral hearing should be offered in person or online? ***Virtual meetings are fine BUT if the either party involved requests an in-person meeting there should be a clear set of standards developed to decide if the request is warranted.***

THE WSIB'S DISPUTE RESOLUTION AND APPEALS PROCESSES

Recommendation 3.1: We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

We have an expedited appeal process for return-to-work decisions. Currently, the following decision types have a 30-calendar-day time limit to appeal and are considered for an expedited appeal:

- job suitability decisions where functional abilities or level of impairment are not in dispute
- lack of cooperation on a return-to-work plan from the person with the injury or business or during a training program
- suitable occupation and/or training plan decisions
- re-employment decisions

We do not use the expedited process if there are decisions involving other issues coupled with the above (i.e., those with a six-month time limit).

We are considering adhering to the 30-calendar-day time limit and expedited process when there are multiple issues (i.e., both those within the 30-calendar-day and the six-month time limits). This would mean that the return-to-work issue would be expedited through the appeals process independently regardless of whether it is coupled with other issues or not.

i. What factors should we consider in expediting return-to-work issues when there are multiple issues in an appeal? ***Change the time-frame to (a hard) 60 days***

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.

ii. Case Managers have 30 calendar days to implement appeals decisions from the Appeals Services Division or WSIAT. Decision implementation timeframes depend on how much of the required information is available on the claim file. If the Case Manager needs more information from the workplace parties,

implementation may take longer than 30 calendar days. ***Change the time-frame to (a hard) 60 days***

Currently, the Appeals Resolution Officers' decisions sometimes lack instructions and the information required to implement their decision. We will review the way Appeals Resolution Officers' decisions are written to make sure they include directions for their decision to be implemented including any supplementary information needed. The decisions will also address the issue and entitlements requested by the parties as identified on the Appeal Readiness Form or the benefits that flow from the decision as part of the parties' proposed resolution to the appeal.

iii. What factors should we consider in reinforcing the 30-calendar-day timeline for appeal implementation? ***Change the time-frame to (a hard) 60 days***

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

We are assessing examples of decisions we make that rely on standardized calculations to determine if we should exclude them from our internal appeals process. This might include certain permanent impairment rating (quantum) decisions, and their non-economic loss monetary award calculations; certain loss-of-earnings benefits calculations and decisions; and certain personal care allowance decisions.

i. If we were to exclude decisions that rely on standardized calculations from our internal appeals process, what are some factors we should consider? ***This introduces a new process into the system. The WSIB should have an actuarial department that can determine standardized calculations and render decisions accordingly.***

ii. Are there other decision types that we should exclude from our internal appeals process? ***Every decision from the WSIB should be appealable.***

iii. Sometimes in different claims for the same person, an issue in dispute may be active with WSIAT while another issue is active with us. Should there be options to request for us to exclude some decisions from our internal appeals process to pursue the holistic resolution of the issues for the person or business at the WSIAT? ***What does this mean – "to pursue the holistic resolution of the***

issues" Unfortunately, there may be times when multiple appeals are in process. This should result in the WSIAT decisions being rendered first and then sent back to WSIB to see if the WSIAT decision impacts the other appeal(s) in the worker's / company's file. –

Under what circumstances would this be best? ***See above***

What else should we consider? ***Perhaps it would be wise to itemize the appeals in a written process and advise the parties of the order and have them sign-off on the schedule. It may also be advisable to implement timelines for this process, so the appeals do not take years to resolve. In some cases, the appellant, after due consideration, may need to choose which appeal is more important to them and "drop" other appeals as a result.***

Thank you

Roger Tickner, **CRSP, Paralegal, CMP, RPT**

President – Tickner Brooks Professional Corporation

416-891-7120 (roger@ticknersafety.com)

July 7, 2023

Via email: corporate_secretarysoffice@wsib.on.ca

Mr. Jeffery Lang, Chair
Workplace Safety and Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Mr. Lang

RE: KPMG Value for Money Audit (VFMA) Dispute Resolution, Appeals and Appeals Implementation Process

UFCW Locals 175 & 633, represents more than 70,000 workers across the province of Ontario in most workplace sectors, notably retail, industrial, healthcare and hospitality. We strive to provide our members with the highest quality service and assistance, including strong collective agreements that improve the conditions for our members. One of the key services we can provide our members is our Workers Compensation Department. Comprised of highly experienced, dedicated, and passionate staff who provide intake support, phone assistance, case management, return to work (RTW) support, appeals representation at both ARO/WSIAT and beyond.

Our Compensation Department has traversed the various changes, additions and reforms the WSIB has forced them through over the years. They have seen various internal/external reports authored – Demers, Speers-Dykeman; as well as the annual Value for Money Audits. Many of these audits come and go without incident or dramatic change. More importantly, rarely has an audit necessitated stakeholder consultation. And that should say a lot.

Past precedent has shown us that the WSIB consultation process is largely window-dressing as the decisions and drafts have already been approved and the stakeholders waste their time developing thoughtful and researched responses that are basically ignored.

This new consultation on the Dispute Resolution, Appeals and Appeals Implementation Process Value for Money Audit (VFMA) appears to be no different. We know this because we have been advised that the initial VFMA report produced by KPMG is already with the Minister of Labour, Immigration, Training and Skills Development (MLITSD). Plus, the KPMG final report has clear approval from WSIB management.

Therefore, this consultation is placating us that our opinions matter and has little to do with what we feel is concerning or unreasonable. We know this because, per the other consultation happening currently with

the Practices and Procedures, many of KPMG recommendations are already being proposed within that document.

Nevertheless, we felt it worth our while to waste some time on presenting our grievances, concerns and suggestions as the proposed changes that are being presented simply do not reflect the access to justice and fairness that injured workers need.

The intention of the VFMA is to seek out programs that may not be meeting the effectiveness and efficiency that WSIB requires to stay financially viable. Arguably, there does not appear to be any concern with this yearly audit; however, the 2022 VFMA recommendations from KPMG does not reflect an understanding of the compensation system and the dire effect on injured workers' due to, what we perceive, as the auditors overreach.

Auditors, by definition, are looking to verify accuracy of financial records and ensure compliance; this has no bearing on how injured workers should be compensated nor how the system should run. If the audit was to accomplish anything it should have reviewed how the WSIB processes claims, trains staff, maintains staffing and leads their teams to find the inefficiencies and effectiveness of the Appeals Branch. The recommendations made by KPMG are based on flawed assumptions, misused jurisdictional scans and a falsified crisis in the Appeals process.

These recommendations will only serve to suppress injured workers claims.

As to this consultation, it appears to have broken down the KPMG report and posed a variety of questions; these are addressed below. However, there are a few details from the original KPMG report that deserve some thought and commentary.

First, the Report speaks in several parts about a Quality Assurance (QA) function – the gatekeeper – that manages checks of the appeals process throughout the appeals process. To date, we have received no details of what this means in terms of the process and they we would deal and communicated with these individuals. Understanding this function is paramount to organizations being able to develop changes to their internal process and representative's case management.

Second, the KPMG report also advises that the WSIB needs to "encourage early communication and collaboration between front-line decision makers and disputing parties, including communication with parties about possible early resolution, tying this back to the ARF and the sought outcome proposed by the disputing parties." Besides offering recommendations and questions about ADR, we would like to hear more from WSIB about how they plan to fix their two-way communication problem. Further, the Report identifies another communication effort that the WSIB continues to dismiss over the last several years and that is worker/representative access to the portal for tracking appeals status, uploading documents and communication.

Lastly, previous meetings, communications and the Report speak to a holistic approach to resolving an individual's injury claim. This is an encouraged and well received notion. The current issue with this notion is the process the WSIB has for representatives to become the representative on file. When engaged by an injured worker, we must have them sign on our own internal waivers and authorizations; our authorization package also includes the WSIB Direction of Authorization form. These must all be returned within 30-days according to the proposed changes of the KPMG report. As discussed later, this poses serious concerns due to mailing delays, transfer of documents and contact. Further, should a member have multiple claims we must go through this process for every single prior claim of the member. To facilitate a more holistic

management of a worker's multiple claims, it would alleviate a great deal of paper work and tracking if a Direction of Authorization form was applied to the worker not just individual claims.

Yours truly,

Sarah Neath,
Coordinator and Worker Representative
UFCW Canada Locals 175 & 633
TEL: 519-651-6711

c.c. Mr. Monte McNaughton, Minister of Labour, Immigration, Training and Skills Development
WSIB VFMA feedback: appealsfeedback@wsib.on.ca

Recommendation 1.1: We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals.

The WSIA (sec 122(1)) allows us to offer mediation services when we think it would be most appropriate. Considering this recommendation, we are evaluating a mediation-arbitration model of alternative dispute resolution for certain appeal scenarios, like the model used in family law cases in Ontario. Mediation-arbitration is a hybrid dispute resolution process that combines the features of both mediation and arbitration. In this process, a mediator helps the parties reach an agreement for settlement, and if the parties are unable to reach an agreement, the mediator then acts as an arbitrator and makes a binding decision, similar to what an Appeals Resolution Officer does today.

To be eligible for mediation-arbitration, we acknowledge that both parties, or at least the appellant, must agree to the process and sign a mediation-arbitration agreement as outlined in the WSIA(sec 122(3)). This agreement should include the terms and conditions of the process, including the scope of the mediator's authority and the specific steps that will be taken within specified timelines if the parties are unable to reach an agreement.

Certain issues related to medical compatibility or initial entitlement are not appropriate for mediation-arbitration. Issues related to cooperation or re-employment are more suitable.

We're interested in hearing from our stakeholder community about the factors we should take into account when implementing this alternative dispute resolution model. For example:

Recommendation 1.1: Our alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

The WSIA (sec 120(2)), outlines that the workplace parties must indicate in writing why the decision is incorrect or why it should be changed. Understanding that and what each party wants (i.e., the proposed remedy) is foundational to both formal and informal methods of resolving disputes in a timely and quality manner. We already ask these questions on our intent to object and appeal readiness forms, however, the parties do not always complete the information. In implementing this recommendation, we will make it mandatory to provide complete information through the current processes or through alternative dispute resolution.

Recommendation 1.1: We should adopt set timeframes for the reconsideration process.
The audit recommends we adopt a 30-calendar-day time limit through legislative change. We will review the proposal for legislative changes with the Ministry of Labour, Immigration and Training and Skills Development. Ultimately, the Government of Ontario has jurisdiction over changes to the WSIA. However, we can implement timeframes that apply after we receive an intent to object form. For example, we could change the process so that once an intent to object form is submitted, a response on the reconsideration must be made within 30 calendar days and we could grant an additional 30 calendar days if any supplemental information is required and then allow 30 calendar days to complete the alternative dispute resolution and reconsideration processes and communicate the decision back to the person with the injury or business.

I. What appealable issues do you think are appropriate for this mediation-arbitration model?
II. What principles should guide the mediation-arbitration approach? What else should we consider?
III. If mediation does not resolve the issue, what factors should be considered to determine whether an oral hearing or a hearing in writing should be used for the arbitration component by the Appeals Resolution Officer?
IV. To ensure expediency, what would be a reasonable timeframe for the mediation component? Is 30 calendar days reasonable?
V. How might alternative dispute resolution be used by front-line decision-makers? If there is a dedicated team of front-line operational experts delivering alternative dispute resolution, how much should other front-line decision-makers be trained in the approach?
VI. What factors should we consider in making the above information mandatory to initiate the dispute resolution and appeals process?

VII.	What factors should we consider when implementing 30—calendar-day timeframes for each step in the above reconsideration process?

Recommendation 1.1

General
The Appeals Process is an integral system that injured workers need in order to obtain fair, detailed, and rational decisions from the WSIB. This process needs to remain accessible and open so that the sharing of information is non-adversarial and decisions are made with access to justice in mind.

What WSIB has failed to do over the years is to present themselves as an unbiased, worker-centric, neutral third-party. When injured workers receive negative decisions from WSIB the perception is that the two disputing parties are the injured worker and WSIB; with some involvement from Employers when they appeal or participate. When Employers do participate, the new perception is it is the Employers and WSIB against the injured worker. With this perception in mind, it becomes difficult when we start throwing around words like mediation, arbitration, and hybrid processes.

Recommendation 1.1: ADR
For this model to work, the WSIB needs to fully understand what mediation is – the intervention into a dispute by an impartial and neutral third-party who has no authoritative decision-making power to assist disputing parties involuntarily reaching their own mutually accepted settlement of the issue in dispute. Plus, the consultation proposes a hybrid mediation-arbitration,

> In this process, a mediator helps the parties reach an agreement for settlement, and if the parties are unable to reach an agreement, the mediator then acts as an arbitrator and makes a binding decision.

There are many concerns in this statement, as we do not have a lot of faith in the ability of eligibility adjudicators and/or case managers to act as mediators, let alone arbitrators; nor write a binding decision. Further, the consultation notes *WSIA Sec. 122(3)* as their authority to commence mediation-arbitration. However, *WSIA Sec. 122(3)*, states

> *Role of mediator*
> *(3) The mediator shall not participate in any application or proceeding related to the matter that is the subject of mediation unless the parties to the application or proceeding consent.*

This is in direct contradiction to the recommendation to have mediators to act as arbitrators when decisions cannot be reached.

Further, mediators and arbitrators are highly trained, certified, and experienced coming from years of legal and labour or employer litigation. It is unclear what training the WSIB could provide their front-line staff with that would provide injured workers with the assurances that the decision-makers are knowledgeable, unbiased, and fair. This recommended model does not match the current appeals system, nor the proposed process with recommendations from KPMG.

We need to continue to remember the intention of the Workers Compensation system, as designed by William Meredith – no fault compensation, security of benefit, collective liability, exclusive jurisdiction, and administration by an independent board. In addition, we need a decision-making process that is inclusive, equal, flexible, impartial, and of quality; thereby, injured workers would receive fair, accountable, informed

decisions which come about with open two-way dialogue. Injured workers are not reaching out to the WSIB to broker a resolution because in many cases, the negative decisions result in extensive and ongoing lost time, unemployment, and poverty. Obligating them to time limits and complex ADR will result in disadvantages, compromise, and forced compliance by injured workers.

Therefore, an approach to this phase of the WSIB appeals system must be met with *greater access* to Case Managers and Eligibility Adjudicators. Simply stated, there needs to be open communication with the Board staff. This is simply not occurring. Representatives, injured workers, and doctors often never receive return calls or if they do, it is days, weeks or months before contact is made.

Giving the front-line staff the ability to manage their files efficiently – be it more staff or less claims assigned – would achieve much of what the Audit found to be lacking in the resolutions and appeals process. If all parties could look at this process as a way to find solutions instead of only building towards hearings it would alleviate the number of claims that go to Appeals.

Recommendation 1.1: Intent to Object

We appreciate that the *WSIA Sec. 120(2)* states that parties must put in writing why the decision is incorrect and what should be changed, currently in the form of the Intent to Object (ITO). For many years, we have not found this to be reasonable because as representatives we do not have access to the claim file, as it is the ITO that triggers Access. Therefore, with our code of conduct responsibilities in mind, how can we advise the best approach to resolution for our client/members without the full file? Understanding what the injured worker wants is foundational but requiring that information at the early stage of an adverse decision is not logical. Making it mandatory to receive information about desired outcomes and remedies is perfectly fine, but binding us to 30-days simply does not work.

Recommendation 1.1: Time frames

In order to meet the proposed 30-days to complete the ITO, consider the many factors on how an injured work completes this if they are seeking representation from compensation groups (OWA, Legal clinics, etc.) or even unions. We can speak to unionized injured workers.

Often many members are unaware of our department but they have access to unit stewards and/or their union representative who can connect us. First, currently, WSIB is mailing all decisions which can take days or weeks to reach workers, especially in more rural areas. Take out weekends, and the ticking clock is running out. Once they contact us, we still need to go through an intake process, acquire authorizations (medical waivers, legal waivers, and Direction of Authorization) and have all this returned and uploaded to the WSIB. Many members have limited WIFI, lack computer skills and/or have problems with internet access; so, getting the completed information faxed or emailed can be a barrier. Therefore, when you take out weekends, within 20-days we must make the turnaround to meet the 30-day time limit.

We appreciate that 6-months does not appear to be efficient or meet immediate needs to receive health care and return to work services, but the time frame is working. And to be clear, going from 6-months to 30-days is just not realistic. If WSIB truly reviewed the parameters of KPMGs jurisdictional scan than they will see that they cherry-picked these time frames and are not applying them in the same fashion that works under the provincial systems such as Alberta and Newfoundland.

Posed Questions:

I. What appealable issues do you think are appropriate for this mediation-arbitration model?

As stated above, we have great concerns with adopting a mediation-arbitration model. Specifically, because the defined parties are not always clear, as WSIB is one of the parties and contrarily, is also responsible for unbiased decision-making. The current system ostensibly serves at a type of hybrid mediation-arbitration model. Eligibility Adjudicators and Case Managers represent the mediator (albeit without training or skill) and then the ARO represents the arbitrator – the clear end point to a binding decision. Therefore, the current model is not deficient per se, it is the management of teams, training/education, accountability and how work is being produced that needs to be addressed.

II. What principles should guide the mediation-arbitration approach? What else should we consider?

- Neutrality/Impartiality
- Fairness
- Access to justice
- Identifying interests
- Communication
- Human needs
- Knowledge/Competency
- Trust
- Flexibility
- Respect

III. If mediation does not resolve the issue, what factors should be considered to determine whether an oral hearing or a hearing in writing should be used for the arbitration component by the Appeals Resolution Officer?

The criteria that determine an oral versus written hearing has been established in the Appeals Practices and Procedures document for years. In addition, should a party believe that an alternate method of resolution is required we can get a reconsideration of the decision. Overall, this decision-making practice is not of concern. The better question is, what is the criteria to have an *in-person* hearing and when will they return?

IV. To ensure expediency, what would be a reasonable timeframe for the mediation component? Is 30 calendar days reasonable?

We believe the current, legislated time limit of 6-month remains fair and reasonable. In terms of "mediation," which is essentially just case management, then identifying time frames may be beneficial after some restructuring of internal processes of the WSIB are addressed. This can begin with eligibility adjudicators and case managers returning calls, actioning reconsiderations, ITOs, letters and inquiries. Reviewing new information actually needs to be done instead of injured workers/representatives receiving "cut n' copy" letters that say they got the information but no new information was provided to change the decision. These template letters are received when new or unseen medical is provided. Rationales for decisions need to be clear and not just regurgitation of the undisputed facts of the claim.

V. How might alternative dispute resolution be used by front-line decision-makers? If there is a dedicated team of front-line operational experts delivering alternative dispute resolution, how much should other front-line decision-makers be trained in the approach?

Instead of ADR at the front-line, we need to look at resolution options. Claims need to be viewed as fixable and not just rubber-stamped through to the ASD. Therefore, if any level of staff in the WSIB are required to perform some type of mediation then it stands to reason that all staff must be trained. That said, simply offering a workshop or day training is not

sufficient to ensure that all front-line staff have the competency to make mediation-type decisions. The Law Society of Ontario often offers Professional Development courses that sometimes can be offered to non-members of the bar. Plus, Canadian Universities have courses on mediation and arbitration that should be required by your dedicated team of front-line operational experts.

VI. What factors should we consider in making the above information mandatory to initiate the dispute resolution and appeals process?

Time. The WSIB will require time to approve and provide appropriate training that meets a professional standard. Additionally, Employers, HR, Unions, Legal Clinics, Compensation Firms, etc. also require time to upgrade and/or provide skills training for their staff in ADR.

VII. What factors should we consider when implementing 30—calendar-day timeframes for each step in the above reconsideration process?

Our position remains that these 30-day time frames are not fair, practical, or reasonable for injured workers to have access to justice and ability to appeal their decisions to the best and full degree.

Should you disregard the message being sent from injured workers and compensation representatives, without a doubt, a phasing-in period will be needed for all parties. This answer would be intertwined with a later question about Appeals Readiness Forms that are outstanding (ex., organization backlogs). Many organizations with backlogs or waitlists will need to know how older claims will be dealt with in order to see and plan how entering the "new system" will look like.

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

Currently, once the time limit to object to a decision has been met, people with injuries and businesses have no time limit as to when they can submit the appeal readiness form. This means that an appeal readiness form can be submitted years after the original decision was made, and as mentioned above, without enough information about their desired outcome (i.e., the proposed remedy). As a result, it takes us more time and effort to address the reconsideration which makes it difficult for us to offer consistent service for all claims

I. If we were to implement a new one-year time limit from the decision date to submit an appeals readiness form on January 1, 2024, how should we manage appeals from before this date where an appeal readiness form has not yet been submitted?
   a. Should appeals from before this date be exempt from the requirement to send an appeal readiness form within one-year?
   b. If we were to make appeals from before this date exempt from the requirement to send an appeal readiness form within one year, what would a reasonable time limit be? Would one year from the new effective date be reasonable?
II. Under what extenuating circumstances should we consider extending the one-year time limit for submitting the appeals readiness form?
III. Is January 1, 2024, a reasonable start date for the new one-year appeal readiness form time limit? How much time would you need to make sure you have enough notice for a start date?

The current criteria we consider for a time limit extension is in the Appeals practices and procedures document and below:

1. Whether the person received actual notice of the time limit.
2. The person was experiencing serious health problems.
3. Someone in the person's immediate family has experienced serious health problems.
4. The person had to leave the province or country due to an illness or death in their family.
5. The person has a condition that prevents them from understanding or meeting the time limit.
6. The person objected to other closely related issues within the time limit, and it would be impossible to address all of the issues separately.

Recommendation 1.2: 1-year ARF

I. If we were to implement a new one-year time limit from the decision date to submit an appeals readiness form on January 1, 2024, how should we manage appeals from before this date where an appeal readiness form has not yet been submitted?

You have workers that are unrepresented, on wait lists, waiting for medical appointments and specialists, etc. and, as per *WSIA Sec 120 (1)*, they have met their legislated time limit to appeal. Therefore, all claims prior to the implementation of this new process should be considered in the "current" stream.

We appreciate that under *Sec 159 (2)(e)*, WSIB has the power to "review and approve major changes in its programs" which partially justifies the changes and recommendations stemming from VFMAs that WSIB is implementing. However, the same section, *159 (2) (a.1)* states that the powers of the Board are to "establish policies concerning the interpretation and application of this Act" which would not give the Board entitlement to apply new time frames without full legislated approval and amendments.

a. Should appeals from before this date be exempt from the requirement to send an appeal readiness form within one-year?

YES.

b. If we were to make appeals from before this date exempt from the requirement to send an appeal readiness form within one year, what would a reasonable time limit be? Would one year from the new effective date be reasonable?

No, one year from effective date is not reasonable. As some of the Senior Appeals Directors are aware, many organizations and unions have backlogged claims and/or waitlists of claim files. This is the direct result of internal structural changes the WSIB made under David Marshall in 2012; a change that resulted in their own backlog that required outsourcing, according to Frank Veltri.

Many of the worker compensation groups do not have the resources to source out claims, shut the door to new claims or deny representation to the ones that have been waiting in queue. For unions, we have a duty of fair representation which puts us in a more precarious position. Granted, we are not legislated or bound by collective agreements to offer services for workers compensation support; however, we do it because it is the right thing to help injured workers when they are dealing with the tough scenario of a workplace injury.

Further, injuries are commonly intertwined with return-to-work efforts which would continue to fall within under the union's responsibility; and, therefore, require our representation.

Further, due to an inability to meet the demands of a backlog and new incoming claims under tight time limits, unions may be forced to cease offering their services. This would push injured workers to abandon their claims, self-represent, find outside assistance from legal clinics and paralegals/lawyers – which many cannot afford. Perhaps as a preemptive measure to these changes, the WSIB may want to recommend a further change to the *WSIA* and amend *Sec 176 (1*) to state that the Office of the Worker Adviser *could* represent members of a trade union.

II. Under what extenuating circumstances should we consider extending the one-year time limit for submitting the appeals readiness form?

There are several scenarios where a one-year time limit may not be met – for old or new claims, which include but are not limited to:

- Seeking referrals to specialists, including OHCOW
- Waiting for diagnostic testing
- Awaiting surgical intervention
- Lack of a primary giver/seeking a family doctor
- Completing programs of care
- Seeking representation
- Compiling medical information
- Participating in a return-to-work plan
- Working through a Work Transition Plan

III. Is January 1, 2024, a reasonable start date for the new one-year appeal readiness form time limit? How much time would you need to make sure you have enough notice for a start date?

As stated earlier, we do not feel that a start date can be established until amendments have been made to the *WSIA*. Should that be waived or ignored, and implementation is to begin, further understanding of what will be done with older claims that have not been finalized or ready for the Appeals Service Division need to be communicated. Therefore, giving time to establish and plan for changes/modification to internal processes must be given to organizations, clinics, and unions.

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

Since the start of the pandemic in 2020, we have been very flexible in determining the method of resolution for appeals. We have worked directly with the parties to best accommodate their needs either online, in person, or in a hybrid manner for oral hearings. We conducted a survey in 2022 on online oral hearings and it showed that they were positively received and that we should continue to offer them. Our current oral hearings are online. We make exceptions for in-person oral hearings in unique cases impacted by things like accessibility needs or technological challenges.

i. What other factors should we consider in determining whether the oral hearing should be offered in person or online?

Recommendation 2.3: Method of Resolution

Based on the current environment following the pandemic, there is no reason to not return to in-person being the default method for oral hearings. The survey is correct, most – if not all – parties want to have the options of all methods – telephone, video, written and in-person. This variety allows us and injured workers to manage our own calendar, location, and accessibility concerns.

Currently, the Workplace Safety and Insurance Tribunal (WSIAT) is in phase 2 of a gradual resumption of in-person hearings. They are holding in-person hearings in Toronto and London, as they have been able to modified the hearing rooms to meet distancing needs. The WSIB should be attempting to modify their existing hearing facilities to help facilitate in bringing back the opportunity for in-person hearings. The WSIB can easily look to the WSIAT's flexible criteria of factors that indicate the need for an in-person hearing, which are:

- Compliance with any COVID guidelines/health and safety needs
- Technological barriers
- Accommodation for a Human Rights Code related need
- Unable to participate in a videoconference due to health issues
- Self-represented party with technological barriers
- If suitable hearing space is available
- Complexity of the issues or the evidence and an in-person hearing is more appropriate
- Principles of natural justice and conducted in a fair manner
- Any other relevant and valid reasons, including personal circumstances

Recommendation 3.1: We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.
We have an expedited appeal process for return-to-work decisions. Currently, the following decision types have a 30-calendar-day time limit to appeal and are considered for an expedited appeal:

- job suitability decisions where functional abilities or level of impairment are not in dispute
- lack of cooperation on a return-to-work plan from the person with the injury or business or during a training program
- suitable occupation and/or training plan decisions
- re-employment decisions

We do not use the expedited process if there are decisions involving other issues coupled with the above (i.e., those with a six-month time limit).

We are considering adhering to the 30-calendar-day time limit and expedited process when there are multiple issues (i.e., both those within the 30-calendar-day and the six-month time limits). This would mean that the return-to-work issue would be expedited through the appeals process independently regardless of whether it is coupled with other issues or not.

i. What factors should we consider in expediting return-to-work issues when there are multiple issues in an appeal?

Recommendation 3.1: Return-to-Work (RTW)

We understand the "Better at Work" model has been a gold standard for WSIB for some years now. It has had positive results in getting the appropriate workers back to work without wage loss. It does, however, prematurely rush workers that require more medical care and recovery time before attempting a return to any type of work tasks. RTW is also the union's primary objective, when it is appropriate. We both want to see workers working; however, we differ on the speed at which this should occur.

A 30-day time limit, as currently legislated, for RTW decisions is accurate as for many workers a month without pay is too long to continue to support themselves and their families. Thereby, the decision types listed above are accurate to expedite.

That said, we have a deep concern that the WSIB is proposing to fracture off decisions in a claim due to the duration of their appeal rights. Without a doubt, the case managers and RTW Specialists should be engaged in the early stages of a lost time claim to assist in correcting the situation and getting workers back to work. Nevertheless, if the decision remains upheld to deny then expediting it to appeals serves no purpose if there are additional outstanding issues within the same claim.

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.

Case Managers have 30 calendar days to implement appeals decisions from the Appeals Services Division or WSIAT. Decision implementation timeframes depend on how much of the required information is available on the claim file. If the Case Manager needs more information from the workplace parties, implementation may take longer than 30 calendar days.

Currently, the Appeals Resolution Officers' decisions sometimes lack instructions and the information required to implement their decision. We will review the way Appeals Resolution Officers' decisions are written to make sure they include directions for their decision to be implemented including any supplementary information needed. The decisions will also address the issue and entitlements requested by the parties as identified on the Appeal Readiness Form or the benefits that flow from the decision as part of the parties' proposed resolution to the appeal.

i. What factors should we consider in reinforcing the 30-calendar-day timeline for appeal implementation?

Recommendation 3.2: Implementation

If the WSIB continues to utilize the third-party access to CRA Option Cs; as well as assisting in being the bridge to information needed from EI, Service Canada, and company insurance STD/LTD plans; then the 30-day time limit should be attainable.

That said, in the past 1-2 years, we are seeing requests for information that are essentially a "laundry list" of information needed, such as, Option Cs, doctor's addresses, consent to request further medical, driver licenses, job search, concurrent employment, etc. In most cases, this laundry list is requested when there is a short period of loss of earnings allowed. This brings about the perception that further medical and job search information will be used to deny further entitlement.

Discussions are necessary earlier on in the Appeals process to make sure all parties know which remedies are being sought. This becomes important if there is a disagreement on the benefits flowing such as NELs, Work Transition, LOE, etc. Many WSIAT/ARO decisions punt back benefits flowing to Operations and we then see denials of further benefits resulting in a reciprocal appeals process.

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

We are assessing examples of decisions we make that rely on standardized calculations to determine if we should exclude them from our internal appeals process. This might include certain permanent impairment rating (quantum) decisions, and their non-economic loss monetary award calculations; certain loss-of-earnings benefits calculations and decisions; and certain personal care allowance decisions.

i. If we were to exclude decisions that rely on standardized calculations from our internal appeals process, what are some factors we should consider?
ii. Are there other decision types that we should exclude from our internal appeals process?
iii. Sometimes in different claims for the same person, an issue in dispute may be active with WSIAT while another issue is active with us. Should there be options to request for us to exclude some decisions from our internal appeals process to pursue the holistic resolution of the issues for the person or business at the WSIAT? Under what circumstances would this be best? What else should we consider?

Recommendation 4.2: Standardized Calculations

We can appreciate that the WSIB is trying to alleviate some appeals moving through ARO. That said, it is the legislated process. The *WSIA Sec. 119(3)* provides that, "the Board shall give an opportunity for a hearing." Therefore, the WSIB has no authority under the statute to refuse to hear certain appeals, such as NELs and SIEF.

To a degree these are 'standardized calculations' but each decision and the evidence/medical used to make these determinations can be quite nuanced. This is especially important if there are cross-appeals occurring within the file.

Fast tracking these, deemed, standardized claims to WSIAT disregards the potential holistic nature of injured workers claims that was also proposed in the KPMG recommendations. Fracturing off issues, as with RTW, will create more appeals as each individual issue will be in separate streams, negating the holistic approach you profess to aspire toward.

WSIB

Dispute Resolution and Appeals Process Value-For-Money Audit Consultation

Unifor National Health, Safety and Environment Department

Email appealsfeedback@wsib.on.ca

Comments Due Date: July 21, 2023

UNIFOR
Health, Safety and Environment
Santé, sécurité et environnement

Unifor is pleased to offer stakeholder comments in response to the **Ontario Dispute Resolution and Appeals Process Value-for-Money Audit (VFMA) Consultation**

Unifor represents over 160,000 workers across Ontario in 247 local unions and 1425 bargaining units and in many sectors, including manufacturing, forestry, mining, healthcare, retail, gaming, education, and emergency services. We believe that workers play a vital role in the shaping of just, safe and equitable society.

The compensation system's dispute resolution and appeals process should focus on justice to injured workers and not cost savings. Quite simply, the recommendations contained in the Value-For-Money Audit will make it harder for injured workers to access compensation.

Unifor urges the government not to proceed with the recommendations of the Value-For-Money Audit. The Audit prioritizes cost savings over access to justice and the procedural fairness rights of injured workers. The recommendations contained in this Audit go well beyond what might be considered value for money and seek to meaningfully constrain the rights of injured workers, in a system which already struggles to treat injured workers with dignity and uphold their rights in front-line decision-making. If followed, these recommendations will interfere with injured workers' access to justice in the WSIB system.

Injured workers are eagerly waiting for the government to make good on the promise to increase wage loss benefits to 90%. This report may be a pretext to try and limit past promises. Injured workers should be compensated to a more just benefit level, which ideally should be 100% of wage loss coverage. Injured workers, and unions across this province will not be silenced by these "invented crisis" antics.

In addition to the sweeping over-reach of the report, the lack of meaningful engagement with injured workers groups, unions, and other stakeholders, and the lack of regard for the significant burden that workers face when they are injured at work, Unifor has specific concerns about the following recommendations included in the report.

Recommendation 1.1 Mediation and Early Resolution
The audit recommends establishing alternative dispute resolution systems to resolve claims before they go to appeal, including a recommendation to introduce "incentives or disincentives" for workers to engage in early dispute resolution.

Unifor strenuously disagrees with this recommendation. Injured workers have the right to appeal decisions of the WSIB: fundamentally, the legislation contemplates that WSIB decision-makers can get it wrong, and mistakenly deny workers compensation, medical treatment, and return to work services that they are entitled to by law. This right should not be watered down by the WSIB.

Alternative dispute resolution turns on the idea that parties can resolve disputes on terms that are agreeable to them but may not provide any one party with their full entitlement under the law. In the context of the WSIB, alternative dispute resolution systems will create undue pressure on injured workers to take a settlement in order to access some portion of what they are entitled to, rather than withstand an appeal process that is confusing and cumbersome to access their full legal entitlements.

Alternative dispute resolution and mediation processes also contemplate that parties will use a neutral and independent third party for fair, impartial resolution of disputes. The WSIB cannot act as a neutral third party or mediator where it is also a party to a dispute with an injured worker and often bears significant financial liability in the resolution of claims. Any dispute resolution system where the WSIB is both an interested party and the mediator or arbitrator is fundamentally unfair to injured workers and will be perceived as unfair by injured workers and the broader worker community.

Further, the specter that workers will be punished for exercising their legally protected appeal rights through ‘disincentives’ is of significant concern to Unifor. Any scheme that tries to bully injured workers into accepting less than they are entitled to under the law in the name of early resolution efforts is fundamentally unjust.

In Unifor’s experience the number of appeals is directly related to the quality of decision-making at the front line of the WSIB. Rather than trying to entice workers to accept a fraction of what they are entitled to as an attempt to reduce the administrative load of appeals, the WSIB should focus on ensuring that its front-line decision makers are trained to provide decisions that are fair, reasoned, and responsive to the evidence provided. This will go farther to reducing the appeals load of the WSIB without infringing upon the procedural fairness rights of injured workers.

Recommendation 1.2 Timelines for Submission
The audit recommends compressing the timelines for appeal submissions, including instituting a one-year timeline for the submission of the completed Appeal Readiness Form (ARF).

Unifor strongly objects to the shortening of any timelines suggested by the Value for Money Audit, the introduction of new timelines where they previously did not exist. The preparation of a medical appeal in a worker’s compensation matter is an incredibly complex and time-consuming project that often requires objective medical evidence prepared by one or more specialists. It can take injured workers months or years to even be referred to the specialists who can provide the medical evidence necessary for their appeals, and much longer for those specialists to prepare the evidence. Injured workers are powerless to jump wait-lists for service, medical tests, or results, and they do not have the power to compel medical doctors to prepare reports on a timeline acceptable to the worker or the WSIB.

In some cases, illnesses and injuries fluctuate or worsen with time. In addition, workers are usually involved in the WSIB system as a result of an accident or injury that has introduced significant chaos into their lives. Often managing complex and concurrent physical and mental health conditions, injured workers may simply not have the capacity to prioritize the paperwork demands and short timeframes for appeals at the WSIB while managing the incredible upheaval that a workplace injury or illness can wreak on a person’s life.

To implement this recommendation will mean reducing the quality of evidence that WSIB decision-makers have available to them in appeals. It will tie injured workers’ hands behind their back and impede their ability to provide the evidence that best represents their circumstances. Finally, it means that many injured workers will not have their appeal heard at all because they are unable, through no fault of their own, to provide the medical evidence that is required for their appeals.

The implementation of this recommendation would result in the WSIB making more decisions that are simply wrong. It would result in fewer injured workers receiving the supports they need and are entitled to through the WSIB system. The WSIB should not implement this recommendation.

4.2 Final Decisions of the WSIB

The auditors suggest that the WSIB should 'exclude' decisions from internal appeals processes where those decisions are based on standardized calculations as these appeals are 'redundant'.

Unifor strongly disagrees that there are any cases where internal appeals are clearly or categorically redundant. Such a suggestion reveals the extent to which the Auditors were unfamiliar with the experiences of injured workers and their advocates.

Although formulas exist for the calculation of some entitlements, it is common to see these calculations mis-applied, or applied on the basis of incomplete or incorrect information. The internal appeal processes afforded to injured workers is enshrined in the statute that underlies the worker's compensation system as an important procedural fairness right for injured workers.

As with the recommendations on timelines, implementing this recommendation will limit the ability of injured workers to access the medical, financial, and return-to-work services they are entitled to under the law.

Conclusion

The changes included in the value for money audit are sweeping, overbroad, and dismissive of the important legal rights put in place to protect injured workers. Most of these changes seek to reduce the administrative burden on the WSIB at the cost of meaningful, dignified access to services and to justice for injured workers.

The WSIB system already struggles from a lack of perceived legitimacy among the injured worker community. To implement the recommendations in this report would be to add more barriers to injured workers accessing the services and financial supports they are entitled to under the WSIA. It would reduce access to justice and procedural fairness. The recommendations contained in the Value for Money Audit should be rejected by the WISB in their entirety.

We thank you for considering our commentary on the consultation. For questions concerning this document, please contact Vinay Sharma (416) 271-1218.

Yours truly,

Vinay Sharma
National Health, Safety and Environment Director

KPMG and WSIB Not in injured worker's best interest.

Opening Statement

KPMG performed an audit in November of 2022 of the WSIB. The outcome of this audit found some flaws in the current WSIB system. And there are many!!!

The entire audit should be discarded for some of the reasons we are bringing forward today. The WSIB, did not provide to KPMG all the legislative policies and procedures set out by the WSIA. The WSIB allowed KPMG to perform an audit that became one sided for use by the WSIB to implement its own changes. Contrary to the policies that are already in place.

Introduction

How this VFMA audit by KPMG affects our members;

In general our members are stoic workers. They simply wish to do their job and go home. They typically do not seek assistance or do they rarely even attempt to make a WSIB claim. If they do seek our assistance with a claim, its typically only when the current WSIB system has failed them. More often it is because they are unaware of WSIB's procedures or meet the criteria within a certain policy.

It is unreasonable to assume that our members or quite frankly any worker understand the WSIA or Policy and Procedure of the Act. Many of our members, have only a high school education and there are many having language barriers. Our members go to work to provide for their families. They are doing various physically demanding jobs in a variety of industries that often result in musculoskeletal conditions. This is the sacrifice they make for the employer.

This region's largest employer is proficient with claim suppression. They utilize the first aid nurses and company doctors to keep many workplace injuries from being reported. This makes the WSIB process even more difficult for the average worker to navigate as the workers feel the employer is "taking care of them"

Meaning, many of our members simply give up in pursuing entitlement or do not pursue at all.

KPMG and WSIB's recommendations;

When there is a denied claim, the KPMG audit is recommending a worker or the employer a abides by a new one month time limit to object to a decision by the WSIB.

Currently Section 120 of the Act outlines the process for returning to work or a labour market re-entry within 30 days of a decision. For all other cases, the WSIB allows 6 months to object to a decision made by the board.

Section 120(2) speaks to the Notice of objection and that this must be in writing and must indicate why the decision is incorrect or why it should be changed.

Stating why a party is objecting to a decision must have an objective opinion or medical substantiation justifying that objection. Otherwise, the claim moves forward to the Appeals Resolution intake team.

Given our regions medical system and current state of limited access combined with our Canadian Postal system moving at a snails pace, how can either party give a reason to object to a decision within 30 days without objective evidence or medical evidence to support the objection?

In nearly all our claims within Local 444 there is little to no lost time with the employer. Meaning, injured workers that are at work have limited time to get in and see a family doctor or specialist.

As stated earlier, there is a 6-month time limit to object to a decision Section 120 (1)(b). Even 6 months to gather all the relevant, objective evidence, medical documentation is barely enough time to give reason to object. Workers are expected to gather any necessary objective evidence, test results, clinic reviews, treatments within the current 6 months. We find it very adversarial for the WSIB to support the recommendation by KPMG to impose a 30-day time limit to object.

The Board under Policy 11-01-02 must act as an inquiry system rather than an adversarial system.

The recommendation by KPMG disregards this policy by not allowing all parties enough time to present all relevant information and voids Policy 11-01-03 Merits and Justice.

The KPMG audit showed flaws in the current system. It has ignored the fact that there are not enough frontline decision makers. Further to that, these decision makers are making decisions with little to no experience in workplaces. They do not fully understand each workplace job duties or grasp what the workers do on a daily basis.

The Report

- The report places the interests of the WSIB and corporations over the injuries suffered by workers
- Use of legal jargon that is not accessible for ordinary injured workers
- Disregards the objecting parties time and resources needed for Merits and Justice
- KPMG reviewed other jurisdictions – that leads to inaccurate results. Compensation systems have different laws, policies, regulations, and procedures, making direct comparisons between systems is unsound.
- In the province of Ontario, decision makers already violate the rule of natural justice (*nemo judex in causa sua*) no one is judge in his/her own cause or case. Yet as KPMG pointed out that in the province of Alberta Under Section 9.4 (6)(b) and 9.4(7) Alberta workers compensation act stipulates that anyone involved in the original decision cannot be part of a review body. Evidence that other jurisdictional practices do not necessarily apply to this province.

- Many of the KPMG recommendations violate and ignore the Act. The Board does not acknowledge this. Instead, the Board states that it will consult the MOL to change the Act. The Board also states that it will consider policy changes using Sections 131 and 159 of the Act as guidance.
- The Act states that an annual audit is required; however, it does not mandate that the audit and its recommendations be implemented.

No legislative authority:

WSIB cannot unilaterally introduce new time limits – only the government can modify the Act; therefore, any unilateral changes to time limits by the WSIB would be illegal. It must get the approval of the Lieutenant Governor in Council. Nothing in the act authorizes the WSIB to have practice, procedure, policy implemented that isn't authorized by WSIA.
WSIB fails its legislative authority. Section 161(2)

Section 131(4) requires the decision maker to give reasons for denying the claim. The recommendations of implementing a one-month timeline ignores Policy 11-01-02 (decision making) the decision maker will not be given enough time to gather all relevant and necessary information to make a fair and just decision. Policy 11-01-03 Merits and Justice allows the decision maker to gather all relevant legislative and policy provisions to similar situations. This is very necessary in this process as a WSIB decision maker sits in judgement of their own decision.

KPMG and the WSIB are recommending that the decision maker must decide the fate of its own decision or act as a mediator in its own decision. This is flawed as the decision maker is then incentivized to act on behalf of the board. Or to potentially mediate its own decisions.

KPMG audit failed to comply with the Public Accounting Act, 2004. Section (2)(1) spells out that the audit is conducted in fairness, completeness or reasonableness. Section 168(3) of the WSIA is clear that the VFMA is to evaluate the cost, efficiency, and effectiveness of the program under the WSIA and must be done an auditor licensed under the Public Accounting Act, 2004.

Not only did KPMG ignore the legislated mandate provided by the WSIA they also ignored the Public Accounting Act, 2004; The WSIB knew this as well.

Conclusion

While the VMFA might comply with section 2(3) of the Public Accounting Act, it does not excuse the lack of compliance with the WSIA and or rules of natural justice.

Given the fact that KPMG was not aware of or ignored WSIB's practices, policies and procedures, KPMG should be ineligible to perform audits on The WSIB.

There is little validity to this VMFA performed by KPMG! They either ignored the WSIA, or WSIB did not provide them with the practice policy or procedures that are currently in place. This does not comply with relevant legislation and several recommendations would result in a violation of the WSIA and rules of natural justice.

Our requests

We are asking that the report be discarded and any recommendations cease immediately.

We are also asking that the current time limits remain unchanged.

We are requesting that the requests for reconsiderations be consistent with Section 121 of the Act.

We further request that the WSIB avoids any arbitration system that is not authorized by the WSIA.

It is important to our members that the WSIB still recognize trade unions as representatives in our members claims.

Please consider the injured workers perspective in adopting any changes to the current WSIB or in the WSIA all together. A reminder that not all of workers in Ontario have access to representation. In many cases your current system fails people to the point of starvation and bankruptcy. They simply went to work and got hurt. Your INSURANCE Board was put in place to aid them when they do get hurt. They lost the right to sue employers years ago and now you are trying to make it impossible to collect simple health care for a workplace injury.

Thank you for your time and consideration on this issue.

7/12/2023

USW District 6 Submission for WSIB's ASD VFMA Consultation

Submitted by Andy LaDouceur USW D6 Health, Safety and Environment Coordinator and Sylvia Boyce USW Canadian National Office Health, Safety and Environment Department Leader

Introductory Remarks:

The United Steelworkers (USW) is the largest private sector union in both Canada and North America, representing approximately 1.2 million active and retired workers. USW District 6 is the largest of United Steelworkers' 13 districts with over 79, 000 members and approximately 50, 000 retirees located in Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island. Our union represents workers in every sector the Canadian economy.

It has been a long-standing practice in Ontario to consult the public regarding proposed legislative, regulatory and policy changes, and we appreciate the opportunity to participate in this process. While the opportunity is appreciated, we have concerns regarding the recommendations in the VFMA and the WSIB's responses, as well as the proposed questions for this consultation. In order to express these concerns, our submission will go beyond the scope of the questions posed by the WSIB as much as the VFMA exceeded its legislated mandate.

Background:

Value for money audits have been mandated by the Workplace Safety and Insurance Act since 1998, which stipulates that,

> "Value for money audit
> **168** (1) The board of directors shall ensure that a review is performed each year of the cost, efficiency and effectiveness of at least one program that is provided under this Act. 1997, c. 16, Sched. A, s. 168 (1).
>
> Same
> (2) The Minister may determine which program is to be reviewed and shall notify the board of directors if he or she selects a program for review. 1997, c. 16, Sched. A, s. 168 (2).
>
> Same
> (3) The review must be performed under the direction of the Auditor General by one or more public accountants who are licensed under the *Public Accounting Act, 2004*. 1997, c. 16, Sched. A, s. 168 (3); 2004, c. 17, s. 32; 2004, c. 8, ss. 46, 47 (2)."

The Appeals Service Division VFMA was completed in November of last year, and on June 8, 2023, the WSIB announced a consultation process with submissions due by July 21, 2023. There are six categories of questions posed as part of the consultation process.

Responses to consultation questions:

Recommendation 1.1: We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals.

i. What appealable issues do you think are appropriate for this mediation-arbitration model?

ii. What principles should guide the mediation-arbitration approach? What else should we consider?

iii. If mediation does not resolve the issue, what factors should be considered to determine whether an oral hearing or a hearing in writing should be used for the arbitration component by the Appeals Resolution Officer?

iv. To ensure expediency, what would be a reasonable timeframe for the mediation component? Is 30 calendar days reasonable?

v. How might alternative dispute resolution be used by front-line decision-makers? If there is a dedicated team of front-line operational experts delivering alternative dispute resolution, how much should other front-line decision-makers be trained in the approach?

It is our position that the answer to the second question lays the foundation for the process and should be answered first, and that since there is no reference to arbitration in the WSIA then there should be no reference to it in this consultation. The principles that should guide the mediation approach are that any decisions from this process must be consistent with the WSIA and applicable WSIB Policies. Section 16 of the WSIA stipulates that,

> "An agreement between a worker and his or her employer to waive or to forego any benefit to which the worker or his or her survivors are or may become entitled under the insurance plan is void."

There is nothing to suggest that an agreement of that nature made through WSIB mediation would be binding if any waiver of entitlement existed.

Additionally, the right to a hearing cannot be replaced by mediation if it is unsuccessful in resolving all the issues given that there is no such clause in sections 119 or 123 and that's why reference to binding arbitration is not appropriate. This is also indicated in s. 122(2) as there are valid reasons for expediting the decision process in RTW issues but no reason to only have a hearing for failed mediation relating to those issues; all issues must proceed to a hearing should mediation efforts be unsuccessful and the right to appeal to the Tribunal must remain in those cases.

There is absolutely no indication in the WSIA that mediation decisions are exempt from the merits and justice clause or the application of the benefit of doubt (sections 119(1) & (2) respectively). Any authority granted to the WSIB under s. 131 of the WSIA is still subject to the rest of the WSIA and nothing indicates that the WSIB has the authority to alter its legislative duties. Therefore, all mediation decisions or agreements would be subject to those sections of the WSIA.

Mediation is a substitute for the appeal process, when successful based on the applicable sections of the WSIA and WSIB policies, but it is not meant to replace front-line decision making described in sections 118 and 119. We must infer from the wording of the WSIA, especially the reference to an objection to a decision relating to RTW in s. 120(2), and the order of the sections in the Act, that for mediation services to be offered that there must be an issue in dispute from a decision of the WSIB. This would eliminate the need to train front-line decision-makers for roles as mediators.

As for any time limits in the mediation process, it is curious that both the auditors and the WSIB keep suggesting 30 days. This short time limit indicates that neither the WSIB nor the auditors have any understanding of the workload placed on injured worker representatives or the amount of preparation required for hearings or mediation. The time limit should be somewhat flexible in that they allow for time extension requests and should also be reflective of the complexity of the issues.

The Tribunal has the authority to offer mediation services as per s. 130 of the WSIA and have a practice direction[1] that could be both informative and instructive in response to the above questions. It has information regarding issues that are suitable for mediation and when all issues are not resolved there are examples of what other services mediation can provide. There is no need to start the process of developing mediation services from the beginning when there is a model to follow that should have been at least mentioned by the auditors or the WSIB.

Arbitration has not been authorized by the WSIA, and neither is waiving entitlement to benefits. Additionally, the audit fails to show how this would improve the efficiency, cost, or effectiveness of the ASD. Therefore, we recommend abandoning any arbitration and following WSIAT's model for mediation.

Recommendation 1.1: Our alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

vi. What factors should we consider in making the above information mandatory to initiate the dispute resolution and appeals process?

Section 120(2) of the WSIA reads as follows,

> "The notice of objection must be in writing and must indicate why the decision is incorrect or why it should be changed."

Indicating why the decision is incorrect or why it should be changed has nothing to do with proposing a remedy and it does not require a detailed submission. WSIAT's Notice of Objection[2] has boxes that address the reasons for the objection as "law and policy were not properly considered" and "the evidence was not properly considered" in addition to having a field where other reasons for the objection can be provided.

Indications regarding the reason(s) for the objection can be vague as per the definition of indicate[3], and proposed remedies should avoid any exclusion

[1] WSIAT Practice Direction: Mediation https://www.wsiat.on.ca/en/practiceDirectionsAndGuides/mediation.html
[2] WSIAT Notice of Objection form https://www.wsiat.on.ca/en/forms/wsiat001.pdf
[3] https://www.merriam-webster.com/dictionary/indicate#:~:text=1,sign%2C%20symptom%2C%20or%20index%20of

of entitlement to applicable benefits. In fact, the standard remedy sought by the injured worker would be entitlement to any and all applicable benefits. There might be decisions that allow certain entitlements while denying others, like granting initial entitlement and health care benefits for an injury but denying loss of earnings benefits, however that does not mean the remedy would not remain entitlement to all applicable benefits (which in such a case would mean entitlement to LOE). Again, there is no waiver of entitlement so the injured worker and/or their representative should not be expected to provide a detailed remedy that could inadvertently exclude entitlement to certain benefits since the Board has exclusive jurisdiction to decide such matters.

Nothing in the VFMA shows that providing a detailed submission as part of the objection would affect the cost or effectiveness, and while it may seem efficient that should not be confused with expedient. Efficiency has more aspects than saving time, and quite frankly rushing to provide a submission without seeing the case at hand (i.e., the WSIB file) is neither efficient nor effective. KPMG states that the rules of natural justice were adhered to in their report, however a fundamental principle of natural justice is to know the case before you expressed as *audi alteram partem* and their recommendation fails to even consider this principle.

An approach similar to WSIAT's Notice of Objection would accomplish the goals of the audit recommendation without ignoring the issues identified above. Therefore, we recommend that the WSIB include the same boxes for objection reasons and have a box for the remedy being entitlement to all applicable benefits for worker appeals.

Recommendation 1.1: We should adopt set timeframes for the reconsideration process.

vii. What factors should we consider when implementing 30—calendar-day timeframes for each step in the above reconsideration process?

The WSIA states that the WSIB can reconsider a decision "at any time that if it considers it advisable to do so". Mandatory reconsiderations do not allow for consideration of any factors or even if it is advisable to reconsider. Rushed decisions do not allow for full consideration of any additional evidence or arguments presented. A timely resolution or decision is desirable, but it should

not compromise a decision-maker's ability to fully consider all relevant facts, circumstance, arguments, etc. relating to the claim and mandatory reconsiderations with strict time limits would only incentivize the decision-maker to uphold their original decision.

Any reconsideration decision time limit should allow for such other times as may be necessary in the circumstances. There should be an option for the adjudicator to simply state that they do not believe a reconsideration is advisable and refer the issue to Appeals for a decision instead of refuting an objecting party's argument to uphold a decision that they have no intention of altering. WSIAT's threshold test[4], is similar to the ASD test for reconsideration and should be used to guide front-line decision-makers. The VFMA again fails to demonstrate how this recommendation would improve efficiency, cost, and effectiveness of the ASD.

We recommend that there be no mandatory reconsiderations, and that requests for reconsiderations be given serious consideration. Reconsideration thresholds similar to WSIAT's, or the ASD should be used by the front-line decision-makers.

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.

i. If we were to implement a new one-year time limit from the decision date to submit an appeals readiness form on January 1, 2024, how should we manage appeals from before this date where an appeal readiness form has not yet been submitted?
   a. Should appeals from before this date be exempt from the requirement to send an appeal readiness form within one-year?
   b. If we were to make appeals from before this date exempt from the requirement to send an appeal readiness form within one year, what would a reasonable time limit be? Would one year from the new effective date be reasonable?

ii. Under what extenuating circumstances should we consider extending the one-year time limit for submitting the appeals readiness form?

[4] https://www.wsiat.on.ca/en/practiceDirectionsAndGuides/reconsiderations.html

iii. Is January 1, 2024, a reasonable start date for the new one-year appeal readiness form time limit? How much time would you need to make sure you have enough notice for a start date?

The current criteria we consider for a time limit extension is in the **Appeals practices and procedures** document and below:

1. Whether the person received actual notice of the time limit.
2. The person was experiencing serious health problems.
3. Someone in the person's immediate family has experienced serious health problems.
4. The person had to leave the province or country due to an illness or death in their family.
5. The person has a condition that prevents them from understanding or meeting the time limit.
6. The person objected to other closely related issues within the time limit, and it would be impossible to address all of the issues separately.

The rationale provided by the KPMG and endorsed by the WSIB for implementing a time limit of this nature involves the same issues regarding a proposed remedy. We maintain that the standard proposed remedy is entitlement to any and all applicable benefits. It also overlooks the duty of the WSIB to gather the necessary information and blames a lack of information on the delayed appeal without acknowledging the responsibility of the WSIB. WSIB Policies recognize that as the agency with exclusive jurisdiction and the responsibility to administer the WSIA, they are required to gather the information.

Policy 11-01-02 states,

> "As an inquiry system (rather than an adversarial system), the WSIB gathers relevant information, weighs evidence, and makes decisions."

When relevant information is missing, it is not because of a lapse of time between the original decision and the appeal, it is because the front-line

decision-maker failed to gather that information as required by WSIB Policy and the WSIA.

> Policy 11-01-03 stipulates that,
> "Decision-makers rely on employers, workers, and health care practitioners to report relevant information, but ensure that all information necessary to make a decision is on file."

Again, that policy requires the decision-maker to ensure that all information necessary is on file. Blaming the worker, their representative, or the passage of time shows that the WSIB is ignoring their responsibility simply because KPMG lacks the knowledge to know better.

A simple solution to the lack of information would be to have the WSIB gather all information as though they were going to allow entitlement to any and all benefits before they even make a decision. Then if a benefit is denied, but later granted on appeal, that information will already be on file. This solution would also be consistent with the WSIB's Policies and their legislative duty, as well as providing consistent service for all claims. There is nothing to substantiate that a one-year time limit to submit the ARF would improve efficiency, cost, or effectiveness of the ASD.

WSIB's website has information regarding some occupational disease cohorts[5] in various workplaces showing that there are over 2 000 denied claims which would be potential appeals. Implementing a time limit to submit an ARF would create time limit issues in the vast majority of those clusters, and quite frankly the WSIB knows this. This would allow the WSIB to deny benefits once again, but this time it would be based on an arbitrary time limit and not the merits and justice of the case as required by s. 119 of the WSIA.

Given the history of the WSIB, we believe that it is well established that they like using arbitrary numbers like when the COPD apportionment stopped[6], adjudication of McIntyre Powder claims[7] pending the regulatory change to Schedule 3, the transition rules for chronic stress claims[8], etc. Nothing in the criteria for time limit extension in the Appeals practice and

[5] https://www.wsib.ca/en/occupational-disease-cohort-statistics
[6] https://www.wsib.ca/en/chronic-obstructive-pulmonary-disease-discontinuation-smoking-offset-non-economic-loss-benefits
[7] https://www.wsib.ca/sites/default/files/2022-02/adjudicativeapproachmcintyrepowderclaims20200623_1_1.pdf
[8] https://www.wsib.ca/en/operational-policy-manual/chronic-mental-stress

procedure document would address issues created by imposing a time limit to submit the ARF. This time limit issue would affect more than just the clusters listed on WSIB's website and would only serve to unjustly deny benefits and/or services based on an arbitrary time rather than the merits and justice of the claims as required by s. 119 of the WSIA.

In the case of the cessation of COPD NEL benefit apportionment for smoking, the WSIB justifies their decision to use an arbitrary date based on WSIAT Decisions consistently rejecting the practice of apportionment beginning on a certain date. However, that does not mean that the practice of apportioning benefits was correct before that date. In fact, the WSIB was challenged by the USW regarding their decision to conduct a scientific review to answer a legal question.

The USW informed the WSIB that s. 47(2) of the WSIA requires using the prescribed rating schedule when determining a worker's NEL, and apportionment is part of that determination so it must be consistent with the prescribed rating schedule. The prescribed rating schedule requires that conditions be distinct and measurable, and since the damage done from smoking cannot be distinguished from the damage caused by workplace exposures to dusts and fumes the formula used by the WSIB to apportion benefits was not consistent with the legislation. This clearly demonstrates that the WSIB is comfortable using arbitrary time limits to deny a worker their rightful entitlement to benefits.

Currently the exposure limits for diesel exhaust are being lowered and the science regarding the carcinogenic nature of that exposure has evolved. Claims of that nature that are now being reconsidered could, in many cases, be subject to a time limit issue in the future if this recommendation is adopted. We contend that nothing in the exposure limit regulations under the Occupational Health and Safety Act guarantee no ill effects or eliminate exposures at or below their legislated limits as significant contributing factors in claims, and imposing an arbitrary time limit would only add to the injustices experienced by workers.

From the questions above relating to this, and most recommendations from KPMG for that matter, it seems as though the WSIB has already decided to implement a new 1-year time limit to submit the ARF. The WSIB has stated that their authority to do so comes from sections 131 & 159 of the WSIA in the VFMA and references s. 131 in the consultation information provided

online. While we do not dispute that s. 131 provides the WSIB with the authority to develop its own practice and procedure, or that s. 159 provides the WSIB with the authority to develop policy; however, nothing in either section (or any other section of the WSIA for that matter) authorizes the WSIB to have a practice, procedure or policy that isn't authorized by or consistent with the WSIA.

Currently there is not a time limit to proceed with an appeal (i.e., submit an ARF) and there is not any mention of denying a hearing in s. 119(3) due to the WSIB's practice and procedure or any policy. Section 119(3) stipulates that,

> "The Board shall give an opportunity for a hearing."

There are no exceptions listed or any limitations regarding having the hearing (s. 119(3) allows for different hearing formats). The only time limits relating to appeals are prescribed by s. 120 stating that,

> "A worker, survivor, employer, parent or other person acting in the role of a parent under subsection 48 (20) or beneficiary designated by the worker under subsection 45 (9) who objects to a decision of the Board shall file a notice of objection with the Board,
>
> (a) in the case of a decision concerning return to work or a labour market re-entry plan, within 30 days after the decision is made or within such longer period as the Board may permit; and
>
> (b) in any other case, within six months after the decision is made or within such longer period as the Board may permit."

There is nothing to suggest that other time limits could affect the right to a hearing guaranteed by s. 119(3). Simply put, the WSIB does not have the legislative authority to implement a binding time limit that could be used to deny a hearing so long as the current legislated time limits (30 days for RTW/LMR and 6 months for all other issues) to object to the decision are met.

We recognize that WSIAT has a similar practice with respect to their 2-year time limit to submit the Confirmation of Appeal form, but asserting an authority that isn't authorized by the WSIA based on one section of the Act authorizing an administrative justice body to develop its own practice and procedure while ignoring other more explicit directions in legislation does not

make it right. It should be noted that we are aware of at least one case where WSIAT's authority in that regard was challenged. However, the Vice-Chair Registrar extended the deadline in that particular case and thereby avoided addressing the larger issue of the legislative authority to deny the right to a hearing based on their own practice and procedure.

We recommend that this recommendation, along with the majority of the KPMG report, be abandoned.

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

i. What other factors should we consider in determining whether the oral hearing should be offered in person or online?

In-person hearings should be the default with limited criteria for written or virtual/electronic hearings. As the adage dictates "*Justice must not only be done, but it must be seen to be done.*" An in-person hearing gives the worker the sense that they have had their day in court, so to speak, and that is how they see justice being done. With written and/or virtual/electronic hearings there is not that feeling of having a day in court even if the outcome is favourable. The best way to decide on the type of hearing is to ask the injured worker their preference, since some workers might prefer an online hearing while other workers might not like technology.

We recognize that there might be more of a cost associated with in-person hearings, but cost should not be the only factor considered. The efficiency and effectiveness of all forms of hearing are not necessarily equal. All forms might be equally efficient once scheduled, but only a hearing of the worker's choice will be the most effective from their point of view.

While there was nothing in the VFMA mentioning cost, efficiency, or effectiveness regarding this, or any, recommendation from KPMG, it was noted on page 31 that in their jurisdictional scan that,

> "we noted organizations including WCB Alberta and the Office of Industrial Relations in Queensland, Australia allow disputing parties to select their choice of hearings during the resolution process."

Our version of having the injured worker choose is to recognize that they have the most to lose in the appeal process no matter who disputes the issue.

It is our recommendation that the WSIB provide injured workers with their preferred hearing format, and only use written appeals on a limited basis where the worker is not able to participate in a hearing.

Recommendation 3.1: We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

i. What factors should we consider in expediting return-to-work issues when there are multiple issues in an appeal?

The actual recommendation from KPMG in the VFMA on page 34 misquoted s. 120 of the WSIA stating that,

> "The WSIB should ensure that RTW decisions meet the expedited decision timeline of 30 days as required in section 120 of the WSIA."

There is no legislated requirement for WSIB to make a decision in 30 days; in fact, there is not a time limit in the WSIA for any decision from the WSIB. Time limits in s. 120 of the WSIA apply to the objecting party, and not the WSIB.

Section 120 of the WSIA (cited above and reproduced below for ease of reference) states,

> "A worker, survivor, employer, parent or other person acting in the role of a parent under subsection 48 (20) or beneficiary designated by the worker under subsection 45 (9) who objects to a decision of the Board shall file a notice of objection with the Board,
>
> (a) in the case of a decision concerning return to work or a labour market re-entry plan, within 30 days after the decision is made or within such longer period as the Board may permit; and
>
> (b) in any other case, within six months after the decision is made or within such longer period as the Board may permit."

Clearly, a consideration in this regard should include the fact that KPMG does not understand the legislation or the process at WSIB.

In the consultation online, the WSIB is stating that they are considering dealing with all issues in the expedited process as a holistic approach even when there are issues that do not fall under the current 30-day objection time limit.

However, the management response in the KPMG VFMA was,

> "Return to work issues are the priority and shall be expedited in any claim regardless of whether they exist on their own or are bundled with other issues."

This reply indicates that the WSIB has already decided to implement the recommendation that all issues be expedited when there is an issue that falls under the current 30-day time limit for objection, and therefore, responses in this consultation will not matter because the WSIB has already decided.

It seems that the readiness of the parties is not factored in when considering use of the expedited process. While natural justice was mentioned in the VFMA and is referenced in WSIB Policy 11-01-02, a fundamental principle of natural justice does not appear to be factored in this recommendation. The right to a fair hearing is a fundamental principle of natural justice that requires adequate notice, fair disclosure of all evidence and the opportunity to be heard and present the case. Rushing to a hearing does not consider this principle of natural justice and an arbitrary time limit eliminates consideration of the complexity of individual cases.

An expedited process should be optional for those ready to proceed and the injured worker being the party with the most to lose or gain in an appeal should have the right to choose.

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.

i. What factors should we consider in reinforcing the 30-calendar-day timeline for appeal implementation?

The information provided in the consultation again blames the lack of information on anyone other than the front-line decision-maker responsible for gathering that information. It also mentions the proposed resolution, which is

not required by the WSIA and has all the problems mentioned above. The ARO has the jurisdiction to decide all disputed issues and should not rely on an objecting party to determine the remedy of an appeal. Such a proposal amounts to an abdication of the exclusive jurisdiction to decide all questions under the WSIA prescribed by s. 118.

There is no reason for one decision-maker to have to tell another how to implement a decision. If a person in the appeals implementation division does not know how to implement a decision, then they are clearly not the right person for that job. If an ARO does not know how to write a clear decision, then they are not fulfilling their legislative duty under s. 131(4) to provide the reasons for the decision.

Our previous recommendation regarding getting all the information prior to any decision being made would resolve any delays associated with a lack of said information.

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

i. If we were to exclude decisions that rely on standardized calculations from our internal appeals process, what are some factors we should consider?

ii. Are there other decision types that we should exclude from our internal appeals process?

iii. Sometimes in different claims for the same person, an issue in dispute may be active with WSIAT while another issue is active with us. Should there be options to request for us to exclude some decisions from our internal appeals process to pursue the holistic resolution of the issues for the person or business at the WSIAT? Under what circumstances would this be best? What else should we consider?

Again, the authority to write policy or develop its own practice and procedure does not mean that the WSIB has powers not authorized by the WSIA, and the WSIA only authorizes a limited number of issues to be directly referred to WSIAT. Sections 31 and 59 of the WSIA are examples of issues that are not decided by the ASD, but there is nothing in the WSIA to suggest that the WSIB has the authority to exclude appeals for anything not specified

in the WSIA. Therefore, this is another recommendation that should be abandoned.

Currently, an objecting party can write to the Executive Director of the ASD and ask that the decision of the WSIB be made the final decision of the Board. This would allow the objecting party to avoid bifurcation of the appeal and is consistent with s. 123 of the WSIA. Any other option would likely fall short of being consistent with the legislation.

Other issues with the VFMA:

The WSIB skipped some recommendations and the ones selected for this consultation have other issues not specifically covered by the WSIB's consultation questions. Since the VFMA was submitted as a complete report, then having a consultation on select recommendations should not be a barrier to providing comments on all recommendations or other information not specified in this consultation. Additionally, since the WSIB's management response was essentially an endorsement of the entire report, then all issues need to be addressed.

There is absolutely nothing in the WSIA to suggest that the WSIB has to adopt the VFMA recommendations. In fact, s. 161(2) should have led to a number of the recommendations being rejected and others being altered as suggested above. Section 161(2) states,

> **"Duty to evaluate proposed changes**
>
> (2) The Board shall evaluate the consequences of any proposed change in benefits, services, programs and policies to ensure that the purposes of this Act are achieved. 1997, c. 16, Sched. A, s. 161 (2)."

The purpose of the WSIA is stated in s.1 as,

> "Purpose
>
> 1 The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:
>
> 1. To promote health and safety in workplaces.

2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.

3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.

4. To provide compensation and other benefits to workers and to the survivors of deceased workers. 1997, c. 16, Sched. A, s. 1; 1999, c. 6, s. 67 (1); 2005, c. 5, s. 73 (1); 2011, c. 11, s. 19."

There is no indication that the WSIB has fulfilled their legislative obligation prescribed by s. 161(2) with respect to the VFMA recommendations.

If the WSIB actually fulfilled their legislative duty as per s. 161(2) then they would have recognized the pitfalls of adopting such a short time limit to object and submit an ARF. They would realize that it changes the system from adjudicating cases based on individual merits and justice, as per s. 119 of the WSIA, to a time limit based adjudicative body which was not the intent of the Act. There should not have been an endorsement of the KPMG's recommendation from WSIB's management without fulfilling their legislative obligations.

From 1915 until 1998 there were no time limits to object to a decision and the system worked fine without them. Then from 1998 on the time limits of 30-days for RTW as well as LMR and 6-months for all other decisions worked for the majority of cases. The introduction of time limits in 1998 resulted in representatives objecting to all decisions that denied benefits to protect the right to appeal and to avoid a time limit appeal.

With the proposed time limits of 30-days to object and 1-year to submit an ARF there will be frequent time limit appeals instead of the occasional ones encountered in the system as it is now. Having to frequently appeal time limits because of their short nature does not allow for a fair hearing and would not improve cost, efficiency, and effectiveness of the ASD. Additionally, as previously submitted, those time limits violate the rules of natural justice.

Had the WSIB evaluated the consequences of the recommendations then they would have realized that their statement regarding a barrier free, non-bureaucratic system based on KPMG's recommendations being implemented

should not have been made because it could not be any further from the truth. Arbitrary time limits of such a short nature, like 30-days, are a barrier to access justice and create a bureaucratic system that focuses on time limits rather than the merits and justice of each claim.

The WSIB's prediction of less involvement of representatives will not be a result of the injured workers or employers feeling welcome and comfortable navigating the process but will happen because representatives will not be able to keep up with the short time limits to object on top of their current caseload. There is currently a wait list at the OWA, and many Unions have a backlog of appeals as well, the VFMA recommendations will only make matters worse. Creating additional issues with obtaining representation does nothing to improve the cost, efficiency, or effectiveness of the ASD.

It also seems that in their responses to KPMG, the WSIB management completely overlooked s. 131(4) requiring the decision-maker to give their reasons for denying the claim. In far too many cases the reason is vague like 'having regard for the Medical Consultant's opinion' without any details as to what question was posed or what information was relied on to come to that opinion in the case. This lack of detail makes it impossible to do more than indicate why the objecting party disagrees with the initial decision. Blaming injured workers or their representatives for delays that are largely created by front-line decision-makers isn't a good management tactic and does nothing to improve the system.

We are aware of cases where after the representative received and reviewed the file and it was not until after that the real reasons for the denial became apparent. In one case, it was noted that the adjudicator requested medical records from a hospital that was not even in the same city as the injured worker which was not information available based only on the decision letter. Another case where the adjudicator asked the medical consultant if the injured workers current condition was compatible with the accident and the doctor correctly stated it wasn't; the issue there was that it was an old injury, and the current condition was a deterioration of their injury so of course it wasn't compatible with the initial accident but was still a result of the injury, which again wasn't part of the decision letter. There was even a case of traumatic hearing loss that had been denied several times over during a couple decades that amounted to the different adjudicators all applying the wrong policy in that claim; all adjudicators applied the noise-induced hearing loss policy and because there wasn't bilateral hearing loss denied a claim for a

traumatic hearing loss that was reported as a result of an explosion that only affected one side of the worker. There are several other examples that can be provided to demonstrate the importance of objecting to a decision so that a review of the file can reveal where the argument lies to present a case at appeals or even reconsideration.

All these issues, combined with the fact that the VFMA did not comply with s. 168 of the WSIA regarding cost, efficiency, and effectiveness shows that the governing piece of legislation was ignored or at least overlooked in many of the recommendations. Neither the WSIB nor any auditor contracted to conduct a VFMA has the authority to ignore the WSIA. Therefore, the entire report must be discarded, and almost all recommendations should be abandoned.

Other specific issues not covered by this consultation include:

- the suggestion that there be incentive/disincentive schemes,
- focus on return to work and rehabilitation,
- electronic forms that need to be complete before they can be submitted,
- WSIB management referring to injured workers and employers as customers,
- WSIB management's prediction of less need for oral hearings,
- suggestion that WSIB have a roster of representatives,
- labour being consulted and named in the VFMA but almost nothing reflecting their concerns,
- lack of recognition of the differences in legislation when utilizing the jurisdictional scan,
- not adhering to the *Public Accounting Act, 2004*,
- the few points or recommendations in the VFMA that are valid, and

- the relationship between the WSIB and KPMG as well as KPMG's recent media attention.

Incentive/Disincentive Schemes:

To be blunt, the WSIB should be ashamed of themselves for not educating KPMG as to why such schemes are not authorized by the WSIA. The very agency charged with administering benefits prescribed by the Act failed to recognize that they cannot provide extra benefits (i.e., incentive) or decrease benefits (i.e., disincentive) to encourage settlement of an appeal (same issues mentioned above regarding s. 16 of the WSIA). This demonstrates the auditors' lack of understanding of the system that they are reviewing and the WSIB's willingness to go along with almost anything suggested by KPMG.

There are implications that this could also be a violation of the Charter that requires everyone to have equal benefit and protection under law in section 15. Those who settle early would receive a greater benefit than those who did not. This creates an inequality based on a willingness to settle in order to receive some sort of incentive, and possibly forgo rightful entitlement to benefits. While there could be cost savings with such schemes, they could not be viewed as effective, and any efficiency would be dependent on willingness to comply.

It is our position that this further supports the need to discard the entire VFMA and abandon almost all its recommendations.

Focus on RTW and rehabilitation:

Return to work and rehabilitation from physical injuries are important issues dealt with by the WSIB, but that does not encompass all their work and resulting appeals. Focusing exclusively on the leading practices (according to an auditor who failed to provide any evidence to substantiate that claim) that has demonstrated a lack of knowledge regarding worker's compensation and overlooks other important claims such as: occupational disease (including NIHL), stress, fatal injuries, NEL benefits, and employer accounts. There is not a one size fits all solution, and the KPMG failed to recognize the complexity of individual claims in the VFMA.

A one-year time limit to submit an ARF for occupational disease claims will make it impossible to get the evidence required to argue the case. It takes the WSIB almost a year, and sometimes more, to provide a decision in those claims. Requiring an ITO in 30 days to be followed up by the ARF within a year does not allow for enough time to refer the file for a medical opinion from OHCOW. The WSIB ought to be aware of the budgetary constraints OHCOW has that in turn results in fewer occupational medical consultants, nurses, hygienists, etc. available to assist workers and their representatives. These workers deserve the right to have another medical opinion (other than the one provided by WSIB's consultant) and the opportunity to present the best case they can without any arbitrary time limits.

Putting pressure to submit an ITO within 30-days on workers with stress claims only adds to that stress. When you consider the time that it takes to mail a decision, and the need to work up the courage for the injured worker to open the mail from the WSIB, along with the busy schedule of worker representatives, then the 30-days is no longer actually 30-days. The WSIB should not be implementing time limits that compound a worker's injury, and that is the likely outcome of a 30-day time limit in stress claims.

Focusing on one specific area, to implement rules for all claims is not efficient or effective and there are absolutely no cost savings without denying appeals based on an arbitrary time limit. The cost savings should never be at the expense of an injured worker's rightful entitlement to benefits or their legislated right to an appeal. Again, this only substantiates the need to discard the VFMA and ignore almost all its recommendations.

Electronic forms:

Requiring an electronic form to be fully completed before it can be submitted only serves to put those unfamiliar with technology, or the form itself, at a disadvantage. The ITO is an electronic form and if it were to require detailed reasons before it could be submitted, then the 30-day time limit might not be met which in turn could be used to unjustly deny the right to appeal. Nothing in the WSIA requires such a form and there is not a requirement to submit anything electronically. The recommendation was specific to ARFs and that too has the same issues identified for ITOs. Technology is a convenience, but only when it is functioning properly. Reliance on technology

could create more problems than it solves and would leave too many injured workers out.

Once again, this only substantiates the need to discard the VFMA and ignore almost all its recommendations.

No customers in the compensation system:

Aside from their spokesperson or media releases, when the WSIB is trying to sell their side of a story, there really is not anything that the WSIB sells to have customers. The saying that the customer is always right would present challenges, and especially when the WSIB is referring to both the employer and the injured worker as their customer, because it is not a matter of any one party being right, it is a matter of the WSIB making the right decision. The number of appeals would show that there are many who believe the WSIB is often wrong. Whatever the WSIB thinks that it is selling, it would seem that injured workers and their representatives are not buying it.

Customers have a choice, but employers and injured workers covered by the WSIA do not have any choice. WSIB is not part of the service industry, they are an administrative justice body providing no fault workplace injury insurance. The historical trade-off has no customers, and there is no mention of customers in the WSIA for good reason – it is offensive to injured workers. The WSIB needs to stop trying to change terminology listed in the legislation and should be mindful of the fact that injured workers are not dealing with them by choice.

WSIB's prediction re. oral hearings:

The statement predicting that there will be fewer oral hearings from the agency that has ultimate control over the type of hearing only shows that the WSIB wants to reduce oral hearings. This was based on what the WSIB thinks will improve the system, but past efforts to improve the system have not resulted in fewer appeals. Additionally, it is the WSIB who sets the criteria to determine if an appeal will proceed via written submissions and those criteria have been the driving force reducing oral hearings. As submitted above, for justice to be seen to be done there should be more oral hearings and especially in-person hearings.

Roster of representatives:

KPMG has no business making this type of recommendation and the WSIB should not be interfering with the choice of representatives available to either injured workers or employers. A VFMA is to focus on a program provided under the WSIA as per s. 168 and while representatives are mentioned in the WSIA they are not a program provided by it. With the exceptions of the OWA and OEA, there is not any cost to the WSIB for representatives and their effectiveness as well as efficiency should be determined by those utilizing their services.

The fact that KPMG suggest a quality assurance team, notes the number of claims overturned (30% by the ASD in 2021), and in their jurisdictional scan section mentions decision-makers who are legally trained professionals whose contract renewal is dependent on competency (see page 44) yet they make no recommendation regarding the level of training or evaluation for WSIB decision-makers. ARO's are part of the ASD, which is the subject of the VFMA, and there is only a recommendation regarding having specialists for mental health claims (see page 27), but representatives are not a program provided by the WSIA and KPMG took the liberty to exceed their legislative mandate. This all adds up to bias and indicates incompetence.

There is no justification for KPMG to ignore information that they found in their jurisdictional scan regarding decision-makers that could be very applicable to the VFMA, only to make recommendations based on anecdotal evidence regarding representatives that exceeds their legislative mandate, which leads to the conclusion that they are biased. KPMG had their team of employees as well as one lawyer on the interview panel for stakeholders and that lawyer is an employer lawyer which supports that they had an unbalanced view.

Any lawyer should be aware that they all have the same educational requirements and are mandated to pass the bar exam, yet despite all that they are not equally skilled. The recommendation regarding training requirements as well as evaluation by the WSIB would not prevent representatives from having different skill levels. It would give the WSIB another way to unjustified influence the outcome of appeal and create a system that lacks independent representative as they would essentially be employees of the WSIB. KPMG's

recommendation has no cost analysis and no proof that it would improve efficiency or effectiveness as required by s. 168 of the WSIA.

We recognize that the WSIB provided some information regarding their lack of jurisdiction on this issue, but they still agreed with the observations and committed to make reasonable efforts to have the Law Society use the recommendation from a VFMA that exceeded its mandate and provided no justification for that matter, to try to influence the Law Society. It is not part of the WSIB's legislated mandate and therefore they should not try to influence the Law Society for any reason.

Policy 11-01-02 states in part that,

> "As an inquiry system (rather than an adversarial system), the WSIB gathers relevant information".

The significance of the system not being adversarial, and the inquiry as well as decision-making authority of the WSIB is explained in their document titled *A Protocol for Occupational Disease Policy Development and Claims Adjudication* on pages 36 and 37 under the heading 'burden of proof.

While that document has occupational disease in the title, the WSIA makes it clear in s. 15 that occupational diseases are adjudicated using the same principles employed for physical injuries. The section regarding the burden of proof would apply to all claims and it states,

> "The adjudicator's responsibility is to investigate and find the necessary evidence to make a decision (Workplace Safety and Insurance Act [WSIA]). The adjudicator cannot refuse to make a decision because there is not enough evidence. Neither the worker nor the employer has to prove his or her case. The adjudicator makes a decision based on whatever evidence is available or can be found. This principle is not new to the WSIB and grows out of the concepts that:
>
> - the WSIB is an investigative as well as a decision-making body, and
> - the adjudicator is responsible for ensuring that the necessary information is gathered to make the best possible decision.
>
> An adjudicator must apply the principle of burden of proof to any claims decision[9]."

[9] https://www.wsib.ca/sites/default/files/2019-03/protocoldraft05.pdf

This would mean that any differences in claim outcomes is reflective of the skill of the adjudicator and should have absolutely nothing to do with the expertise of the representative or an unrepresented injured worker.

There is absolutely no evidence to support KPMG's recommendation regarding representatives. Additionally, it exceeds the KPMG's mandate provided in s. 168 and fails to comment on cost, efficiency, and effectiveness. Therefore, the WSIB should not agree with the observations and definitely should not be trying to have it implemented.

Labour consultation:

The recommendation regarding the WSIB portal access and requiring specialized training for AROs who adjudicate claims related to mental health reflect the input from labour, but there isn't much else in the VFMA that would be a labour recommendation. Listing the names of the people consulted without stipulating the issues that they identified is misleading (whether intentional or not). It is also frustrating to spend that time trying to help the auditors understand the issues only to have them take a position that would make appeals all about time limits, which was never a real issue. Given the lack of justification for the auditors' recommendations, combined with the departure from the WSIA, then it would seem that the only logical conclusion is that the auditors are biased.

This further demonstrates the need to discard the VFMA and ignore almost all its recommendations. We would also submit that it justifies excluding KPMG from being eligible to conduct any future VFMAs. WSIB should have never endorsed their recommendations, nor should they have accepted this VFMA that fails to meet its mandate prescribed by s. 168 of the WSIA.

Jurisdictional scan legislative differences:

The VFMA only provides the time limits to object to a decision, and for Alberta it is a year from the date of the initial decision to request a review. What it fails to acknowledge is that in addition to a year to request

reconsideration, there is a 2-year time limit to report an injury[10]. In Ontario workers have 6-months to report an injury and then in most cases, with the exception of RTW/LMR decisions, 6-months to object. Depending on the time it takes the WSIB to decide the claim, usually within a matter of a couple of weeks for physical injuries, then that is a little over a year to file and object. Whereas workers in Alberta would have 3-years combined to file and object.

Sections 9.4 (6)(b) and 9.4 (7) of the Province of Albert Workers' Compensation Act stipulate that anyone involved in the original decision cannot be part of the review body (see footnote 10), but in Ontario the decision-maker sits in judgment of their own decision which basically violates the rule of natural justice *nemo judex in causa sua* (no one is judge in his/her own cause or case). There are also sections that address provisional relief to the injured worker in sections 9.4 (8) and 13.1 (2.4) (see footnote 10), but no such provisions exist in the WSIA.

The percentage of claims noted to be resolved at the different levels of appeal does not indicate how they were resolved (i.e., was the initial decision overturned or upheld). There is no information regarding the volume of appeals, and no justification for sharing only the selected information noted in the VFMA while excluding the differences provided above. This missing information shows that this is not likely a fair comparator and that KPMG just does not understand the workers' compensation system. That is why their review is to focus on the cost, efficiency, and effectiveness of the program offered under the WSIA.

British Columbia was another comparator used and in s. 151(3) it provides an injured worker 1-year from the date of injury to file a claim, but that time limit is expanded to 3-years in s. 151(4)(c) in their Workers Compensation Act[11]. The Review Division referenced appears to be the equivalent of WSIAT here, and yet the KPMG did not even look at comparing the ASD with WSIAT. Time limits to object in BC are more than the 30-days recommended by KPMG, and no justification was provided for choosing this comparator or for recommending such a short time limit.

---

[10] See section 26 https://kings-printer.alberta.ca/1266.cfm?page=w15.cfm&leg_type=Acts&isbncln=9780779842049

[11] https://www.bclaws.gov.bc.ca/civix/content/complete/statreg/901199259/1241438022/965723187/?xsl=/templates/browse.xsl

The New South Wales State Insurance Regulatory Authority (SIRA) was another comparator chosen by the KPMG without any real justification. SIRA handles 3 different types of insurance claims:

1. motor vehicle accidents,
2. workers compensation, and
3. home building compensation scheme.

With respect to their workers compensation act[12], appeals and/or benefits are affected by certain common law doctrines that have no effect in Ontario. Sections 151N and 151O allow contributory negligence and assumption of risk to be factors in appeals which could reduce benefits payable to the injured worker. Part of the historic tradeoff in Ontario was the abolishment of the common law doctrines of voluntary assumption of risk, and the fellow servant rule (i.e., contributory negligence of a coworker) in s. 116 of the WSIA.

Workers in New South Wales have 1-year to file a claim[13] and as noted in the VFMA there is no time limit to request an internal review of the decision. It is expected that such a review in New South Wales would be conducted by someone other than the original decision-maker, and it is noted that these decision-makers are legally rained as well as highly experienced practitioners whose contract is dependent on performance. Some of these substantial differences were not noted and again this is not a fair comparator.

Queensland Office of Industrial Relations is another comparator that has multiple functions:

1. Workplace Health and Safety Queensland,
2. Electrical Safety Office,
3. Workers' Compensation Regulator, and
4. Industrial Relations.

Queensland does not have a no-fault compensation system and contributory negligence can defeat any claim for compensation according to s. 305G[14]. Their legislation also imposes a burden of proof on the worker in s. 305E[15], where no such burden exists in Ontario as submitted below. This is not a fair

[12] https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-1987-070#sec.151N
[13] https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-1987-070#sch.6-sec.11-oc.4
[14] https://www.legislation.qld.gov.au/view/html/inforce/current/act-2003-027#sec.305G
[15] https://www.legislation.qld.gov.au/view/html/inforce/current/act-2003-027#sec.305E

comparator and there is no justification provided for choosing Queensland Office of Industrial Relations.

All comparators lacked information regarding key performance indicators or any information to substantiate that certain sections of their system outperform our system in Ontario. Nothing in the report, including the jurisdictional scan, supports the claim that these are leading practices. There was no analysis consistent with s. 168 of the WSIA. Additionally, no reasons were provided for recommending the 30-day time limit to object when it is not common to the jurisdictions reviewed and hasn't been shown to improve the ASD. Again, the VFMA should be discarded and most of the recommendations ignored.

Public Accounting Act, 2004:

Section 168 of the WSIA is clear in that the VFMA is to evaluate the cost, efficiency, and effectiveness of one program under the WSIA and must be done by an auditor licensed under the *Public Accounting Act, 2004*. Not only did KPMG ignore the legislated mandate provided by the WSIA, but they also ignored the *Public Accounting Act, 2004* which states that,

> "Public accounting services
>
> **2** (1) For the purposes of this Act and subject to any limitations that are prescribed, the practice of public accounting means providing, on a basis that is independent of the person for whom the services are being provided, either of the following services:
>
> 1. Assurance engagements, including an audit or a review engagement, conducted with respect to the correctness, fairness, completeness or reasonableness of a financial statement or any part of a financial statement or any statement attached to a financial statement, if it can reasonably be expected that the services will be relied upon or used by a third party.
>
> 2. Subject to subsection (3), compilation services, if it can reasonably be expected that all or any portion of the compilations or associated materials prepared by the person providing the services will be relied upon or used by a third party. 2004, c. 8, s. 2 (1).
>
> Inclusion of opinion in assurance engagements
>
> (2) Assurance engagements described in paragraph 1 of subsection (1) may or may not include the rendering of an opinion or other statement by the person who is providing the services. 2004, c. 8, s. 2 (2).

Exception to public accounting

> (3) If the compilations or associated materials prepared by the person in providing compilation services that otherwise fall within paragraph 2 of subsection (1) contain a notice in the prescribed form that provides that any assurance given by the person is limited to the accuracy of the computations required in order to complete the compilation, the provision of the compilation services does not constitute public accounting for the purposes of this Act. 2004, c. 8, s. 2 (3)."[16]

While the VFMA might comply with s. 2(3) of the *Public Accounting Act, 2004* it does not excuse the lack of compliance with the WSIA or the compliance with section 2(1) and 2(2) of the *Public Accounting Act, 2004* which are essentially required by s. 168(1) of the WSIA.

The VFMA fails to comply with the relevant legislation and several of its recommendations would result in a violation of the WSIA and/or rules of natural justice. Therefore, the report must be discarded and any actions to implement the unjust recommendations must cease immediately.

VFMA valid points/recommendations:

The recommendation to expand access to the WSIB's online portal is a valid one that reflects the principles of equal access for authorized representatives noted in s. 57(3) of the WSIA and WSIB Policy 21-02-04. WSIB chose not to have this recommendation be part of the consultation, and there are issues with their response in the VFMA. WSIB stated that efforts were underway to implement that recommendation for employers, but for representatives their reply was that they "will also explore opportunities to allow access for representatives, contingent on appropriate enterprise prioritization and allocation of funding." This implies that representatives are not a priority and that they might not spend the money to allow access that would be consistent with the legislation and policy mentioned above. Fairness and equal access should be the considerations and not the WSIB's priorities or willingness to spend the money.

ARO specialization was part of the VFMA, and mental health was specifically mentioned, but the WSIB did not include that in the current consultation. Instead, the WSIB wants to focus on developing specialization in alternative dispute resolution services (e.g., mediation) that is not being

[16] https://www.ontario.ca/laws/statute/04p08#BK2

utilized while ignoring the need for specially trained AROs in mental health to adjudicate appeals from what has amounted to thousands of denied chronic stress claims. This prioritization of ADR is stated as an effort to reduce the number of appeals, but if the front-line decisions were of a higher quality, then that would produce the desired outcome (it should be noted that these poor-quality decisions are made under the supervision and potentially the direction of WSIB management). Benefits and services for injured workers should be more of a priority for the WSIB than reducing their workload by trying to reduce appeals.

KPMG's conclusions presented on page 5 had several valid points, but their recommendations in that regard would not resolve the issues. We agree that:

- Fragmentation of issues should be avoided, and a more holistic approach is preferable,
- There are unnecessary administrative delays assigning an appeal to an ARO,
- Enforcement of decision implementation is lacking,
- An effective and accountable quality assurance is also lacking, and
- The delay in decision-making creates a litigious environment that is counter to the policy statement regarding WSIB being an inquiry system and not adversarial.

A 30-day objection time limit and 1 year to submit an ARF will not change any of the above issues.

WSIB has stated that there should be a holistic approach and they could have tried to improve this without any outside recommendations, but time limits do not help with that issue. Time limits in the recommendations are aimed largely at objecting parties and not the WSIB's administration following the objection, so that will not resolve the issue. There is no time limit in the WSIA for WSIB to implement a decision, or to make a decision for that matter, so it is very one-sided to only impose time limits with the threat of penalty (i.e., no appeal) while the WSIB takes no responsibility for the issues

they create. This is not the first time that quality assurance in decision-making has been raised and given the WSIB's history it likely will not be the last as they have had plenty of opportunities to implement such a program.

In fact, the WSIB lobbied the government to have WSIAT bound by WSIB Policy in an effort to avoid decisions being overturned instead of improving the quality of WSIB decisions. Attached is a copy of the WSIAT's response to a freedom of information request regarding the status of decisions (and another document that recreates the WSIAT information in a clearer format). It shows that a large percentage of appeals to WSIAT are allowed, demonstrating that the WSIB has a lot of room for improvement in the quality of their decisions (some important reasons for WSIB appeal decisions being overturned were captured in IAVGO publications[17, 18]).

As mentioned above and in the VFMA, 30% of the front-line decisions are overturned on appeal. The attached information shows that 64% of decisions from the ASD were overturned by WSIAT. If we assume that 70 out of 100 (the 70% of front-line decisions) were appealed to WSIAT (when in fact the number would likely be less) then 64% of 70 would mean that another 45 (44.8 rounded up) decisions would be overturned, leaving 25 unchanged and providing an estimate that disputed WSIB decisions would be correct approximately 25% of the time (lower numbers of appeals out of those 70 would produce a higher percentage but it would be based on untested decisions). This is why the appeals system is much more important than implementing and protecting time limits. The time limits will only serve to deny a party their right to appeal, which in turn denies the opportunity to have their case heard by WSIAT and that amounts to a denial of justice.

We believe that it is worth mentioning that the Supreme Court of Canada in implementing what is referred to as the Jordan Rule[19], to guarantee the right to a trial in a reasonable time, as prescribed by s. 11(b) of the Charter[20], does not count defense delays. This recognizes the rule of natural justice to be able to present one's case. Despite this rule of natural justice, and the Supreme Court of Canada recognizing the importance of being prepared

---

[17] Bad Medicine: A report on the WSIB's transformation of its health care spending

[18] No Evidence: The decisions of the Workplace Safety and Insurance Board (final report)

[19] https://www.canlii.org/en/ca/scc/doc/2016/2016scc27/2016scc27.html

[20] https://laws-lois.justice.gc.ca/eng/const/page-12.html#h-45

for the case before you, the WSIB is willing to deny injured workers and their representatives ample time to be ready to proceed with an appeal. The WSIB's support for an unfounded recommendation regarding such a short time limit defies logic, reason, natural justice, the intent of a Supreme Court of Canada ruling that balances the right to a trial in a reasonable time with the right to present the best defense, and any of the valid points made in the VFMA.

The VFMA fails to provide solutions for these valid issues, as demonstrated above, and the WSIB has not done any better over the years. We reassert that there are many valid reasons to discard the VFMA and ignore the majority of the recommendations with the exceptions noted herein.

KPMG's recent media attention:

The Silicon Valley Bank and Signature Bank audits have received a lot of media attention, and the undeniable fact is that KPMG did those audits just shortly before the banks failed[21, 22]. There is also mention of the financial statements in one article indicating that KPMG did an audit more in line with accounting principles and still did not note any potential issues or ongoing concern as it is referenced in the media. This combined with their deeply flawed VFMA demonstrates that KPMG has some consistency when it comes to being wrong.

WSIB and KPMG relationship:

Remarks from the WSIB captured in a previous KPMG VFMA for occupational disease[23] demonstrate that there is too much trust between the two entities and that they do not appear to be honest with each other. On page 14 of that report the WSIB provides an untrue excuse to depart from Policy (see the second full paragraph on that page) as the only true reason would be found in Policy 11-01-03 under the heading 'Exceptions to relevant policies' which states,

---

[21] https://www.reuters.com/business/finance/kpmg-stands-by-audits-silicon-valley-bank-signature-bank-ft-2023-03-14/

[22] https://www.bnnbloomberg.ca/kpmg-goldman-sachs-faulted-in-investor-suit-over-svb-failure-1.1905602

[23] https://www.wsib.ca/sites/default/files/2019-05/wsib_occupational_disease_and_survivor_benefits_program_vfma_report.pdf

> "There may be rare cases where the application of a relevant policy would lead to an absurd or unfair result that the WSIB never intended. Therefore, a decision-maker may depart from a policy if it can be shown that the case has exceptional circumstances that justify doing so.
>
> The decision-maker must clearly identify the exceptional circumstances and explain in the decision why the relevant policy is not applicable."

While the WSIB told KPMG that,

> "To supplement the inability to update policies in an effective manner, the WSIB currently uses Adjudicative Support Documents (ASD) in place of outdated policies... However, without updating the policies, decisions may be over-turned by the Workplace Safety & Insurance Appeals Tribunal (WSIAT). The tribunal, is legally required to rely on WSIB policy not ASDs."

There is nothing in the WSIA that grants the WSIB the authority to disregard its own policies and Policy 11-01-03 requires the WSIB to apply all relevant policies except in the circumstances noted above. KPMG apparently had no idea that the WSIB was being disingenuous in their statements.

The reference to adjudicative support documents did not specifically mention Policy 16-02-11 but it is the only current WSIB Policy for occupational disease claims that the WSIB refuses to apply. Policy 16-02-11 states that,

> "All primary cancers associated with the esophagus, stomach, small bowel, colon and rectum are included in the classification of gastro-intestinal cancers.
>
> Based on medical studies, claims are favourably considered if the following circumstances apply
>
> - there is a clear and adequate history of occupational exposure to asbestos dust, and while such occupational exposure cannot be quantitatively described, it should be of a continuous and repetitive nature, and should represent or be a manifestation of the major component of the occupational activity,
>
> AND
>
> - there is a minimum interval of 20 years between the first exposure to asbestos and the diagnosis of gastro-intestinal cancer.

> No distinction is given to the site of the cancer in assessing the merit of the claim."

Clearly the Policy is intended to allow claims for gastro-intestinal cancers related to asbestos exposure, but the WSIB uses another document and ignores the rules regarding exceptions to relevant policies to deny more claims. Rather than acknowledging that this practice violates Policy and that there is nothing in the WSIA that intended for WSIAT to be the only decision-makers bound by Policy, the WSIB provided KMPG with unsubstantiated excuses.

On page 15 of that report, WISB blames their inconsistencies in occupational disease adjudication on factors other than their own capabilities and provides an excuse for some of their more recent cluster claim reviews as, "undue political influence in cluster case management (e.g. General Electric and McIntyre Powder)." If the WSIB had properly handled those clusters in the first place, then there wouldn't be a need for politicians to get involved, therefore the WSIB needs to take ownership of their inadequacies. Again, KPMG apparently had no idea that the WSIB was simply blaming others for their mistakes.

There is nothing in the WSIA that requires the VFMA to include WSIB's response to any recommendations. The fact that this has become common practice, combined with the disingenuous statements made by the WSIB, demonstrates that the relationship between the auditor and the WSIB is not strictly a professional one. This is not an audit; it is a joint project to erode the rights of injured workers.

WSIB's replies to the VFMA report and the work to start implementing recommendations begins (e.g., starting a consultation for the Appeals Practice and Procedure document) without fulfilling their mandate under s. 161(2) and before any stakeholder consultation begins, shows that they are biased in favour of the KPMG. This relationship must end, and the bad practices should never be started with another auditor. This VFMA needs to be discarded and the work to implement any recommendations stopped. KPMG should be considered ineligible to conduct any future VFMAs based on their poor performance, including their lack of compliance with s. 168 of the WSIA.

Summary and Conclusions:

We recommend the following:

1. Mediation can be offered following an initial decision and should follow the model employed by WSIAT.

2. Arbitration is not authorized by the WSIA, and neither is waiving entitlement to benefits, so there should be no arbitration.

3. The WSIA requires an indication as to why the decision was incorrect or should be changed, but not a full submission, and there should be no requirement to propose a restrictive remedy to avoid any semblance of waiving entitlement. Compliance with s. 120 of the WSIA in this fashion is authorized by the WSIA.

4. There should be no mandatory reconsiderations, but requests for reconsideration or discretionary ones consistent with s. 121 of the WSIA should continue.

5. Time limits currently prescribed by the WSIA should remain unchanged and having no time limit to submit an ARF should continue.

6. Injured workers, in consultation with their representative (if any), should be given the choice of hearing format.

7. An expedited process should be optional for those ready to proceed with their appeal.

8. WSIB ought to gather all the information prior to any decision being made to resolve any delays associated with missing information following an appeal.

9. There should be no alteration of appealable issues to the ASD.

Our overall conclusion is that all other VFMA recommendations should be ignored and the VFMA should be discarded for the reasons provided above. WSIB should not respond to the auditor's recommendations prior to any public consultation. KPMG should be ineligible to conduct any future VFMAs.

Respectfully submitted on behalf of USW District 6 by,

Andy LaDouceur & Sylvia Boyce
(3 pages enclosed)

Workplace Safety and Insurance Appeals Tribunal

505 University Avenue 7th Floor
Toronto ON M5G 2P2
Tel: (416) 314-8800
Fax: (416) 326-5164
TTY: (416) 314-1787
Toll-free within Ontario:
1-888-618-8846

Web Site: www.wsiat.on.ca

Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

505, avenue University, 7e étage
Toronto ON M5G 2P2
Tél. : (416) 314-8800
Téléc. : (416) 326-5164
ATS : (416) 314-1787
Numéro sans frais dans les limites de l'Ontario : 1-888-618-8846

Site Web : www.wsiat.on.ca

Ontario

CONFIDENTIAL

May 2, 2023

ON

Dear

RE: Your letter dated April 17, 2023

This is in response to your letter dated April 17, 2023 regarding statistics on rates of overturning or upholding of Board decisions. Your letter has been referred to me as WSIAT's Freedom of Information (FOI) Coordinator.

In your letter you requested statistics on how many Board decisions appealed to the Tribunal are upheld or overturned in whole or in part and if these statistics are publicly available. You also asked that if the data had been rendered into percentages, you would also appreciate those statistics.

As the WSIAT only recently began tracking outcomes, we have not yet made this data publicly available. I can share the data from the last two quarters in 2022 and the first quarter of 2023 for your information (see chart on page 2 of my letter). You can obtain information in relation to outcome prior to July 2022 by searching the WSIAT's decisions which are publicly available. All of the WSIAT's decisions are available on the WSIAT's website and on CanLII.

.../2

Final Decision Outcome	2022 (July 1-December 31)	% of Final decisions	Q1 2023	% of Final decisions
Allowed	614	64%	219	49%
Allowed in Part	158	17%	117	26%
Deemed Abandoned	1	0%	0	0%
Denied	179	19%	112	25%
Withdrawn	4	0%	2	0%
Total	**956**	**100%**	**450**	**100%**

The WSIAT is entitled to seek compensation for obtaining information pursuant to the *Freedom of Information and Protection of Privacy Act* (FIPPA). The WSIAT is responding to this request for information free of charge as a courtesy. You should also be aware that any further FIPPA request should be accompanied by the five dollar ($5.00) FIPPA fee. Please note that in responding to FIPPA requests, the Tribunal is entitled to charge for search time, photocopying and other processing costs at the rates permitted under FIPPA.

Yours very truly,

Sarah Schumacher

Sarah Schumacher
FOI Coordinator/Counsel to the Chair

SJS/ds

Overturn Rates at WSIAT

I received a response to my FOI request dated April 17, 2023. The response from WSIAT is dated May 2, 2023. The request was for statistics on rates of WSIAT overturning Board decisions in whole or in part.

WSIAT informs me that they only recently began compiling such data.

I do not have a functioning scanner, so I am reproducing the data below. A scan of the full letter will follow.

WSIAT Overturn Rate of Board Decisions per FOI Request Dated 17/April/23 as of 2/May/23				
Final Decision Outcome	**2022 (July1-December 31)**	**% of Final decisions**	**Q1 2023**	**% of Final decisions**
Allowed	614	64%	219	49%
Allowed in Part	158	15%	117	26%
Deemed Abandoned	1	0%	0	0%
Denied	179	19%	112	25%
Withdrawn	4	0%	2	0%
Total	**956**	**100%**	**450**	**100%**

I will forego commentary until later. The numbers speak for themselves.

Please distribute this information.

4/May/23

UNITED STEELWORKERS
USW
AMALGAMATED LOCAL
2020

July 20, 2023

The United Steelworkers Local 2020 is an amalgamated Local with more than 64 Units and more than 2400 members from various sectors, as well as many pensioners. Our workplaces encompass everything from office and technical to mining and everything in between. Our workplaces are very diverse, and we deal with a multitude of injury types.

We have reviewed the proposed recommendations to the Workplace Safety and Insurance Board's appeal process, and we strongly believe they will have a significant impact on our members ability to access compensation and will create undue hardship to many workers seeking resolution.

Reducing the time limit for submitting an intent to object to 30 days is also unreasonable. If a worker is seeking medical documentation, legal advice, or representation, it could take longer than 30 days to find the required assistance and support. We are not in favour of this timeline being reduced.

If the board is looking at finding efficiencies in the process, we believe focusing on the length of time it takes for an appeal to be heard and having a decision rendered would be advantageous. This process can take from 6-12 months. Improving this part of the process would most likely prove much more beneficial.

The recommendation to expand access to the WSIB's online portal is a good one that would allow for equal access for all authorized representatives. If any expansion of the WSIB online portal were to occur, it would be very important to include access to workplace party representatives. This would indeed allow for a more efficient way to access information.

From what we understand, 92% of appeals were resolved at the board within 6 months in 2022. It also appears that worker appeals have decreased by 37% from 2000 to 2021. Based on this information, there seems to be no good reason to increase barriers to Ontario workers right to appeal. These changes will surely prove to limit workers access to compensation.

United Steelworkers Local 2020 strongly oppose the recommendations of KPMG to the board. Every year our office continues to see our members injured. Many of which are gradual onset injuries as well as occupational disease injuries from workplace exposures. In most of these claims, Board decisions are overturned on appeal.

The current appeal process allows our office the time to conduct research and complete the work involved in proving the workplace significantly contributed to a worker's condition. Unfortunately, this process can often take years to complete. The proposed reduction of timelines falls short of acknowledging that good scientific evidence and research take time.

USW Local 2020, 66 Brady Street, Sudbury, ON P3E 1C8
Telephone: 705-675-2461, Fax: 705- 675-1039
www.uswlocal2020.ca e-mail: 2020admin@uswsudbury.ca

We agree with recommendations provided by one of our fellow USW locals in that the Workplace Safety and Insurance Board should:

1) Work collaboratively with workers, representatives, and employers to ensure all relevant information is available before a decision is rendered in a claim. This should include an accurate exposure profile, up to date job descriptions and functional analysis of the work, as well as any lost time benefit being claimed. This should mitigate any delays with implementation.
2) The current appeal process at the WSIB should remain unchanged. It allows organizations like ours to produce quality appeals for our members and their estates. Changing legislation would only create more appeals and would further backlog the Workplace Safety Insurance Appeals Tribunal. This hinders worker's access to justice.
3) The Workplace Safety and Insurance Board should audit claims through the lens of prevention. The Board has claim data, analytics, and medical information crucial to preventing workplace injuries in the province. Taking an active role in prevention and encouraging workplaces to achieve zero harm will lower workplace injuries and help to alleviate our already strained healthcare system.

Additionally, we have had the opportunity to read and consider the comprehensive submission prepared by Andy LaDouceur and Sylvia Boyce on behalf of District 6.

We agree entirely with USW District 6's detailed and thoughtful presentation. We adopt their positions, summary and conclusions as our own for the purposes of WSIB's stakeholder consultation.

We thank the Board for the opportunity to provide our feedback on the proposed changes. We are hopeful that the Board will reject the proposed changes to the WSIB Appeals process and by doing so protect workers' rights in respect to compensation. We are available to speak to our submission as required by contacting our office.

Sincerely,

Roger Morin
President
USW Local 2020

Lynn Heikkila
Health & Safety Worker Rep
USW Local 2020 Unit 6600

Stephanie Gunson
WSIB Representative
USW Local 2020

USW Local 2020, 66 Brady Street, Sudbury, ON P3E 1C8
Telephone: 705-675-2461, Fax: 705- 675-1039
www.uswlocal2020.ca e-mail: 2020admin@uswsudbury.ca

66 Brady Street
Sudbury ON P3E 1C8
Phone: 705-675-3381
Fax: 705-675-2438
Email: info@uswsudbury.ca

Friday, July 8, 2023

Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

To Whom it May Concern:

Re: KPMG Value for Money Audit – Dispute Resolution and Appeals Process

The United Steelworkers Local 6500 represents nearly 2700 production and maintenance workers employed at Vale Canada, as well as over 7000 pensioners formerly employed by INCO. Our workplaces consist of underground and surface mining processes, smelting processes/blast furnaces, crushing plants, railway transportation, chemical plants, and refineries. In fact, our members work in the largest integrated base metals operation in North America, if not the world.

For 60 years, our organization has advocated for improvements to health and safety legislation as well as rights for injured workers. Recently, in collaboration with the Ministry of Labour, Immigration, Training and Skills Development, we have seen a historic legislation change to allowable diesel emissions underground. This change will no doubt save lives and reduce harm to Ontario's underground workers.

The proposed recommendations to the Workplace Safety and Insurance Board's appeal process will not only limit Ontario's workers access to compensation but will create undue harm to thousands of workers seeking resolution. Unfortunately, our office has seen a steady increase in the number of claims related to mining, smelting and refining, most notably in occupational disease. A proposed, maximum time limit of one year is not sufficient time for our members to obtain the proper medical evidence and scientific literature, or even consult with a specialist in Northern Ontario. Imposing 30 and 90-day time limits will shift a case manager's work from claim adjudication to claim timekeeping.

The Board's own review of McIntyre Powder, for example, took nearly a decade of advocacy, research, and collaboration to bring meaningful change to workplace legislation. This work proved that employers were, in fact, harming their employees. The review provided closure and financial relief for estates dealing with workplace deaths. Imposing strict timelines only ensures workers and their representatives are appealing timeline constraints and not the issues at hand.

It is our understanding that 92% of appeals were resolved at the Board within 6 months in the first quarter of 2022. Furthermore, worker appeals have decreased by 37% from 2000 to 2021. There is no legitimate reason to increase barriers to Ontario workers' right to appeal, except to suppress and limit workers' access to compensation.

United Steelworkers Local 6500 strongly opposes the recommendations of KPMG to the Board. Our office sees hundreds of injuries to our members every year; the vast majority of which are gradual onset physical injuries (arthritis, carpal tunnel, hand/arm vibration) as well as occupational disease injuries from workplace exposures. In most of these claims, Board decisions are overturned on appeal.

The current appeal process allows our office the time to do the research and work involved in proving that the workplace ***significantly contributed*** to a worker's condition. At times, this can involve years of consulting with general practitioners, oncologists, ergonomists and occupational hygienists. Furthermore, the medical literature is ever evolving. The proposed recommendations fall short of acknowledging that good scientific evidence and research take time.

Research from the Occupational Cancer Research Center based at the University of Toronto has shown that underground workers are among the highest group of exposed workers to workplace carcinogens. We interpret this to mean that our members are more likely to contract an occupational cancer than any other worker in the province. This research took decades to produce and only now is our office seeing decisions from the Board that reflect the current science. The existing appeal process allows for current scientific research to be taken into consideration.

We would recommend the Workplace Safety and Insurance Board should:

1) ***Work collaboratively with workers, representatives, and employers to ensure all relevant information is available before a decision is rendered in a claim.*** This should include an accurate exposure profile, up to date job descriptions and functional analysis of the work, as well as any lost time benefit being claimed. This should mitigate any delays with implementation.

2) ***The current appeal process at the WSIB should remain unchanged***. It allows organizations like ours to produce quality appeals for our members and their estates. Changing legislation would only create more appeals and would further backlog the Workplace Safety Insurance Appeals Tribunal. This hinders workers' access to justice.

3) ***The Workplace Safety and Insurance Board should audit claims through the lens of prevention***. The Board has claim data, analytics, and medical information crucial to preventing workplace injuries in the province. Taking an active role in prevention and encouraging workplaces to achieve zero harm will lower workplace injuries and help to alleviate our already strained healthcare system.

We thank the Board for the opportunity to comment on the proposed changes. Should you have any questions, please don't hesitate to contact our office.

Sincerely,

Nick Larochelle
President
USW Local 6500

David Lisi
Health & Safety Chairperson
USW Local 6500

Sean Staddon
WSIB Representative
USW Local 6500

WORKERS' HEALTH AND SAFETY LEGAL CLINIC
180 Dundas Street West, Suite 2000, Box 4, Toronto, Ontario M5G 1Z8
Tel: 416-971-8832 • Toll free: 1-877-832-6090 • Fax: 416-971-8834
www.workers-safety.ca

21 July 2023

Via Electronic Mail

Dispute Resolution and Appeals Process Value-for-Money Audit Consultation
Workplace Safety and Insurance Board
200 Front Street West
Toronto Ontario
M5V 3J1

RE: Dispute Resolution and Appeals Process Value-For-Money Audit Consultation

To Whom It May Concern:

In previous correspondence I cautioned against a rushed consultation during the summer. My suggestion having been ignored, I am writing to provide submissions with respect to the above referenced consultation.

Who We Are

By way of background, the Workers' Health and Safety Legal Clinic ("the Clinic") is a community legal clinic funded by Legal Aid Ontario. Our mandate is to provide legal advice and representation to non-unionized low wage workers in Ontario who face health and safety problems at work. We have appeared before the Ontario Labour Relations Board on behalf of workers who were fired for raising occupational health and safety concerns. We have also assisted federally regulated workers with unlawful reprisal complaints before the Canada Industrial Relations Board.

The Clinic represents workers who are injured on the job with respect to their workers compensation claims before the Ontario Workplace Safety and Insurance Board ("the WSIB" or "the Board") and the Ontario Workplace Safety and Insurance Appeals Tribunal ("the WSIAT" or "the Tribunal"), workers who have reprisal claims under the Ontario *Employment Standards Act, 2000*, workers who have been discriminated against because of the workers' compensation claim, and workers who have been wrongfully dismissed.

Initial Consultation Considerations

The consultation to implement the recommendations from the value for money audit of dispute resolution and appeals attempts to address a problem not within the appeals system but with decision-making at the operational level.

The number of successful appeals both internally at the Board and the Tribunal has nothing to do with the appeals process but with front line decisions. The auditor's recommendations, which the WSIB adopted wholesale, is to re-write the appeals process.

The disappointment felt by worker side stakeholders is widespread and palpable. This consultation, which is not referenced on the WSIB's main website, has not been shared with injured workers, and conducted in the middle of the traditional summer vacation period, is not an open process. The WSIB made a deliberate choice in refusing to consult with stakeholders with respect to the validity of the auditor's recommendations.

It is through the exercise of the right to appeal that workers have been successful in overturning wrong decisions. Rather than finding alternatives internal to the WSIB - a critical self-analysis to fixing decisions without the need for appeal - this consultation proposes the imposition of impediments and more time limits in the appeals process.

It is wrong to impose deadlines in the appeals process. It is wrong to impose a mediation/arbitration step in the appeals process. It is wrong to end the practice of bookmarking appeals.

Questions Arising from Recommendation 1.1

What appealable issues do you think are appropriate for this mediation-arbitration model?

Like other aspects of the appeals system, guidance should come from the Tribunal. The determination of suitability is whether the Tribunal can resolve matters to the satisfaction of the parties.

If the role of these recommendations is to reduce the amount of appeals, without impacting a worker's right to appeal, the simple answer is to follow the Tribunal's Early Intervention Program. A separate and more importantly independent review should be able to achieve what the Tribunal currently does to reduce the amount of active appeals. The Tribunal has resolved approximately 8%[1] of decisions without the need for a hearing. Put another way, the Tribunal has been able to grant appeals just by looking at the file. The process is voluntary and parties can opt out at any time.

A confidential process with the ability to opt out without impacting the right to appeal is the only trustworthy model.

What principles should guide the mediation-arbitration approach?

If the WSIB chooses to follow a mediation-arbitration approach, it must be seen as independent and not simply an attempt to prevent a worker from appealing a decision. If there is skepticism it is because the WSIB has already attempted a "mediation" process. There would have to be a clear commitment to not repeating mistakes of the past.[2]

If mediation does not resolve the issue, what factors should be considered for the arbitration method of resolution?

[1] The author calculated this amount of decisions from the Tribunal's annual reports identifying the number of decisions that were a result of alternative dispute resolution.

[2] See for example *WSIAT Decision No. 398/97*, 1997 CanLII 14152 (ON WSIAT)

With respect, this is not a relevant consideration.

A commitment to independence in mediation/arbitration must include a repudiation of the auditor's suggestion to use "disincentives" to force workers into mediation – something not rejected in this consultation document.

If the stated goal is to reduce appeals, the method of achieving that goal is fixing front-line decisions and not creating (or forcing) workers through a mediation/arbitration model. A representative going through this process would be wise to opt out of arbitration as it is potentially contrary to ethical obligations to accept any binding arbitration that would abrogate the worker's right to appeal. In that context, the method of arbitration is irrelevant. I am aware of submissions from the United Steelworkers that references the success rate at WSIAT. There would be no good reason to allow a worker's appeal to get mired in arbitration when better options exist.

What would be a reasonable timeframe for the mediation component?
Every day that the worker is delayed in the mediation/arbitration process prolongs the worker's access to an Appeals Resolution Officer decision and a potential appeal to the Tribunal. With respect, throwing out numbers does not help. In reality, the WSIB should consider against a staffing backdrop the following:

1. How long will it take the WSIB to determine if the claim is suitable for mediation?
2. How long will it take a mediator to be assigned?
3. How long will it take, assuming a full caseload, for a mediator to review the file?
4. How long will it take the mediator to draft a proposal?
5. Will a mediator need approval from a manager?
6. How much time will a worker be given to consider said proposal? What if there are two parties involved?
7. How will counter proposals be considered – scheduled appointments or phone calls?
8. Can a mediator accept counterproposals or will that require managerial review?

I submit the more important question is why would a worker take this option when an appeal is likely to produce a better result?

How might ADR be used by front-line decision-makers? If there is a dedicated team how much should other front-line decision-makers be trained?
This question highlights a concern that the WSIB will provide less training than required to satisfy parties.

Although the audit makes reference to accrediting WSIB staff in ADR, there is no "certification" in Ontario. It would be better, in order to reflect the independence of the mediation process, to obtain the Qualified Mediator designation by ADRIO.[3] The best practice would be to obtain Chartered Mediator status with ADRIO.

The Need for Mandatory Information
The approach suggested should be rejected.

[3] The ADR Institute of Ontario.

The function of the compensation system is to provide benefits to workers. Again, WSIAT provides the simple answer – in the Tribunal Notice of Appeal a worker simply acknowledges that there is either an error in law/policy and/or fact. The suggestion that the Board institutes a requirement that workers invoke magic wording to satisfy the WSIB only creates a barrier. If a decision denies benefits, the obvious expectation with an appeal is to get benefits. This recommendation only serves to make it difficult for workers to exercise the right to appeal.

I reiterate that the WSIB cannot re-write the appeals process to stop workers from proceeding with their objections. Workers must retain the right to appeal WSIB decisions even with mediation/arbitration.[4]

What factors should the WSIB consider when implementing 30 day timeframes?
With the greatest of respect, this is unhelpful.

At present, a worker files an objection. When ready, an Appeal Readiness Form is filed. No analysis or evidence is provided to support the proposed 30 day process. Nothing in the consultation document suggests that this process will help workers get better decisions.

It is submitted that no such time frame should be imposed.

Questions Arising from Recommendation 1.2
If a One Year Time Limit Were Imposed
There is a small comfort in the use of "if" – "*if* [the WSIB] were to implement a new one-year time limit". Although not referenced or acknowledged, the demand that workers complete an Appeals Readiness Form in one year (or any time limit) would see the end of a 25 year system of "bookmarking" appeals. Since the introduction of the *Workplace Safety and Insurance Act, 1997* parties had time limits to follow. However, once the objection was filed the appeal was "bookmarked". In this consultation in the middle of summer holidays the WSIB seeks to eviscerate one of the few protection workers have in the process.

There is no merit to changing this practice. It only serves to take away a worker's right to control the process. This re-writing of the appeals process must be rejected.

There is no alternative suggestion. This consultation effectively asks stakeholders to negotiate against themselves and their clients' interests. The Clinic will not make recommendations to effectively negotiate against workers' interests.

Question Arising from Recommendation 2.3
Once again the worker community is being asked to negotiate against itself. The WSIB should return to in person hearings or in the alternative the preference of the worker. As the appeal has the biggest impact on the worker, their preference should be given preferential status.

I would note that the Ontario courts and the Ontario Labour Relations Board have or will return to in person hearings. If there is a preference it should be determined by the worker and not the financial self interest of the WSIB in having to lease space.

[4] For example *WSIAT Decision No. 21/02*, 2002 ONWSIAT 244 and *WSIAT Decision No. 996/08I2*, 2009 ONWSIAT 1978

Questions Arising from Recommendations 3.1 and 3.2
With respect, workers should not negotiate against themselves as if to offer the WSIB a slightly less worse alternative closer to current practices that what is proposed.

The changes proposed should be rejected.

Questions Arising from Recommendation 4.2
It is particularly perplexing to read the proposal to "exclude from [the Board's] internal appeals process". This is a complete abandonment of adjudication. It is clear from the Board and the Tribunal that appeals both internal and external result in overturned decisions even in "standardised calculation" type cases. Instead of fixing the problem, the Board proposes effectively giving up on these appeals.

To be clear, the Clinic submits that the WSIB should strive for better front line decision-making with a robust and independent internal appeal system. The fix is not, contrary to this recommendation, to simply dump these appeals at the Tribunal because the WSIB appears unwilling to critically examine why so many appeals are successful.

It is time the WSIB acknowledge that the problem is front line decision-making. These proposal do not address the real problem.

Conclusions
It is submitted the approach taken by the WSIB is flawed. The recommendations go beyond the financial and cost focus of a value for money audit.

The WSIB consultation fails to give stakeholders the opportunity to opine on the recommendations and their validity. Further, the recommendations are little more than the expression of an opinion without factual basis.

The problem remains the same, there are a high number of appeals. The Speer-Dykeman Report made reference to the need to address decision-making. Instead of focusing on poor decision-making, the WSIB inexplicably overhauls the appeal system to make life harder for workers and their representatives by taking any control workers have in the process away from them.

The approach suggested in this consultation is wrong and should be abandoned. Thank you for your consideration.

Yours truly,

John Bartolomeo

John Bartolomeo
Lawyer/Co-Director

WHSLC

WORKERS' HEALTH AND SAFETY LEGAL CLINIC

180 Dundas Street West, Suite 2000, Box 4, Toronto, Ontario M5G 1Z8
Tel: **416-971-8832** • Toll free: **1-877-832-6090** • Fax: **416-971-8834**
www.workers-safety.ca

19 June 2023

Mr. Jeffrey Lang, President and CEO
Office of the President
Workplace Safety and Insurance Board
200 Front Street West
Toronto, Ontario
M5V 3J1

RE: Dispute Resolution and Appeals Consultation
The Need for Changes

Dear Mr. Lang:

The recently opened, and with the greatest of respect, poorly advertised consultation of 08 June 2023 on dispute resolution and appeals services advises, "Over the next two years, we'll be making changes to improve our dispute resolution and appeals processes."

It is mystifying that the WSIB would commence a two-year process to implement massive changes not seen since the introduction of the *Workplace Safety and Insurance Act, 1997* with a consultation during the summer months when stakeholders are on holidays and the Ontario Legislature is not even sitting.

Despite being involved in the Value for Money Audit consultation and a regular attendee to Appeals Services Division Stakeholder meetings, I was not advised of the consultation. I would also point out that injured workers who will be directly impacted remain unaware that future appeals will be severely restrained by a new process effectively eliminating the worker's ability to bookmark appeals for later action.

I request, given the impact this consultation will have, that an independent third party conduct the consultation or, in the alternative, that the submission deadline be extended to 29 September 2023. There are many flaws in the entire process and cataloguing them all would prolong this letter and delay its delivery. However, I wish to highlight the following:

The Value for Money Audit was Not a Consultation
I was surprised that the auditors retained a third party employer side lawyer as their expert on workers' compensation. I am hard pressed to find an example of a situation where a presumably neutral consultation fails to make any effort to appear balanced. The lawyer's past employment history as being on the worker side might have been sufficient for the auditors but I feel

confident in writing that it was insufficient for actual worker side representatives to accept as sufficient neutrality.

Further, the recommendations were not discussed. Had any of those recommendations been placed squarely before the worker stakeholders I guarantee you would have received complaints minutes after the proposed recommendations were floated.

The Recommendations fail to address the Crux of the "Problem"
While I do not speak for all worker representatives, I am confident that most (if not all) representatives interested in making submissions do not accept the assumptions made by the WSIB as the basis for the consultation.

The function of the appeals process is to correct the errors made by initial decision-makers. As I am sure you are aware, the high overturn rate is not indicative of a poorly functioning appeals system but of a failure at the Operations Division to make correct decisions. This failure will be a significant portion of any submission by representatives who frequently represent injured workers.

The Deadline Double Standard
The lack of transparency of internal WSIB processes leaves representatives like myself frustrated that such a major consultation is being rushed during the summer vacation period.

I would note that the WSIB regularly invites submissions on short time frames with little understanding as to what, if any, commitment the WSIB gives to representatives and why more time can't be given. For example:

- The Serious Injury Program Consultation gave representatives one month to make submissions. The WSIB has had those submissions for seven months without a new policy being released or an update being given.
- The Second Phase of the Temporary Employment Agency Consultation gave representatives one month to make submissions. The WSIB has had those submissions for six months without a new policy being released or an update being given.

I would also note that hearings would already have been scheduled months in advance during this period. As well, holiday schedules would already have been arranged. This sudden and new consultation deserves more time and is unfair to stakeholders. Given that this process will take two years, there is no reason to refuse a deadline extension to a date outside the summer holiday period: 29 September 2023.

Further, given the intention to impose new time limits on injured workers – who should all have been notified – this consultation should be done by an independent third party to verify if the recommendations are even correct. If the WSIB can retain Jim Thomas for a policy consultation with independent hearings, a similar approach should be taken for this consultation.

Thank you for your attention to this matter.

Yours truly,

John Bartolomeo

John Bartolomeo
Lawyer / Co-Director

cc: Mr. Walsh, Chair, WSIB
Mr. Pokan, COO (A) and Advisor to the President & CEO, WSIB (via electronic mail)
The Hon. Monte McNaughton (via electronic mail)
Ms. Vaugeois, MPP (via electronic mail)

From: Anne-Marie Quan
Sent on: Sunday, July 23, 2023 6:43:21 PM
To: appealsfeedback
Subject: my disappointment with WSIB Consultation on dispute Resolution and recommendations for appeal processes

---

Good Afternoon WSIB

I am a supporter of the injured workers and I want that WSIB be run efficiently to help the workers, per its mandate.

I am concerned with your hiring KPMG's to do a "Value for Money Audit", and the findings they have presented to you.

Why did you see the need to spend an inordinate amount of money to hire a consultant to provide you with their recommendations when you already have a collective community based group of injured workers and organizations as Injured Workers Action For Justice (IWA4J) They are the ones navigating your current system, know the shortfalls, and can better provide you with ways to make the system more cost efficient and fair. They are the ones with lived experience, not the KPMG folks.

KPMG suggests a reduced timeline for workers to submit documentation.

Do you know how long it currently takes to get medical reports? Organizations are already short staffed, and your request sits in the queue until … And if there was a misunderstanding of what is required, that causes more delays. And KMPG wants to shorten the timelines.

- Is KPMG providing better technology to help those reduced timelines work?
- Are they going to provide computers and training for injured workers to be able to submit their claims online?
- Are they going to operate hotlines where workers can call in, and get help with filling out their documents?
- Are they going to provide service in the languages that the workers speak?
- Are they going to train the injured workers so they can articulate their case to WSIB?

I notice that many companies do not have a phone number to call in with their problem. Rather, you need to send an email request. You therefore hope that as a customer, you can explain the problem. The CSR then has to understand what you wrote, to be able to reply and resolve the problem.

- I just had a Tupperware experience where I waited 12 weeks to get a replacement lid for a juice container!

Has KPMG looked at your operations level to see redundancy?

- It takes 2 hands to clap. You are looking at tightening the process for workers. What about your processes? What weakness is there? Why are things happening the way they are?

I ask that you do not consider the KPMG recommendations – instead, reach out to the workers, and organizations like Injured Workers Action For Justice (IWA4J), to find ways to make the WSIB fair for workers, and cost efficient for you. The injured workers and those organizations are your SMEs.

July 21, 2023

Via Email: appealsfeedback@wsib.on.ca,
Corporate_SecretarysOffice@wsib.on.ca

Mr. Jeffrey Lang, President
Workplace Safety and Insurance Board
200 Front St W, Toronto,
ON M5V 3J1

RE: Dispute Resolution and Appeals Process Value for Money Audit Consultation

Dear Mr. Lang,

I am writing as an injured worker to strongly object to the recommendations made by KPMG in their Value for Money Audit on the WSIB Appeals System.. The introduction of the time limits recommended by KPMG will do nothing but hurt injured workers by denying them access to the appeals and creating chaos in a system that is already overburdened and under resourced.

Time limits disproportionately hurt injured workers, who by definition are people with disabilities. You should be focused on removing barriers to their participation, not making new ones. It is already extremely challenging for injured workers to appeal and navigate the system for a variety of reasons. The time limits being proposed are not realistic. How does an injured worker appeal in 30 days when they don't even receive the decision in that time frame or know that one has been issued? WSIB decision letters are notorious for going missing in the mail if they ever get in the mail in the first place. I'm still waiting on an initial decision letter from a claim made in 2008. The year before that another decision was issued that I did not see or even know of until years later when I requested that claim file. When you are busy struggling with your injury and the ill health it causes and all that goes with that, you don't have time to chase down a letter. These time limits ignore the very fact that injured workers are engaged with the system because they are injured. They are not well. That puts them at a huge disadvantage versus employers even before you consider the difference in knowledge regarding the system, language abilities, education and resources. There should be no time limits for injured workers.

Even if you do receive a decision within 30 days, which isn't 30 days when you allow for mailing times, you don't have time to seek legal advice, see a specialist and get medical reports or any of the things you need to do to make an appeal. Free sources of representation are limited and have long waiting lists. What about the time to get your claim file? The Office of the Worker Adviser takes a minimum 30 days to decide if they are even going to put you on their waiting list after they review your claim file. Waiting lists can be years long and will only grow with the introduction of new time limits. Too much time is already wasted in the system on making sure time limits are met. That time would be better used providing services to injured workers.

For an injured worker to meet a 30 day or even 90 day time limit, they are likely going to be left to do it on their own. While English is my first language, that is not the case for many in our province. While I may not have language barriers, I definitely face barriers as a result of my work acquired disabilities, not to mention I knew nothing about the workers compensation when I was first injured. The process keeps changing so I don't know if I would know what to do today. I have repetitive strain injuries (RSI) which are a leading cause of work related injury/disability. At a time of acute injury which is exactly when I would be dealing with the appeals system, I would not be able to use a computer or even write to submit an appeal. In the past, I struggled just to get family members to type for me. Trying to meet strict time limits exacerbates stress and exacerbates my injuries. I can't push myself to do things. I'm in pain just typing this. Deadlines have been to be found to be a major factor in the development of RSI. I struggle on multiple levels to meet deadlines again due to my work acquired disabilities. Forcing me or any other injured worker to meet strict time limits is punishing us and using our disabilities against us. Injured workers suffer all sorts of horrific, life altering injuries. Forcing them to appeal while dealing with that is just inhumane. Injured workers have already given up their right to sue in return for a system of fair and just compensation. There is nothing just about restricting our ability to appeal.

If you want to truly address the issues with the appeals system, introducing new time limits and restricting access to justice is not the way to do it. As we learn in health and safety, you need to look to the root cause and that root cause is the poor decision making at the WSIB. If good decisions were being made at the operating level, there would be no need to appeal.

From July 1, 2022 to Dec. 31, 2022, the Workplace Safety and Insurance Appeals Tribunal, overturned decisions from the WSIB, in 80% of hearings. We know this is not an anomaly because this year between Jan. 1, 2023 and Mar. 31, 2023 that number is 75%.

In 2017, the Industrial Accident Victims Group of Ontario (IAVGO) did a review of the 2016 WSIAT decisions and the findings paint a disturbing picture of WSIB decision making. From their report "No Evidence"[1], IAVGO wrote:

> The 2016 decisions of the Workplace Safety and Insurance Appeals Tribunal tell a stark and troubling story. In hundreds of appeals, Tribunal decision makers comment that the decisions of the Workplace Safety and Insurance Board are "unreasonable" and "arbitrary," ignore the "unanimous opinions" of doctors, are based on "not a single word of medical or other reliable evidence," and could place the worker at "medical risk."

In 175 decisions[2], WSIAT found that WSIB decisions were contrary to "all or all discussed medical evidence". As the evidence shows, the problem with the appeals system will not be rectified by implementing the recommendations made by KPMG, since they failed to recognize that the actual decision making at WSIB is the problem. Speeding up the appeals process by forcing injured workers to meet unrealistic time limits and putting the whole system in chaos trying to meet those time limits, does nothing to fix the bad decision making.

---

[1] http://iavgo.org/wp-content/uploads/2013/11/No-Evidence-Final-Report.pdf

[2] http://iavgo.org/wp-content/uploads/2013/11/IAVGO-March-10-2017-WSIAT-2016-review-chart.pdf

I again ask you to reject the KPMG recommendations. I agree the appeals system needs to be improved and that starts with addressing the poor quality decision making at the WSIB. Perhaps if adjudicators were taught to see injured workers as the victims of unsafe work that they actually are, instead of viewing them with suspicion and contempt we'd get better decision making. I've sat on the GO Train listening to new adjudicator trainees and were shocked at how biased against injured workers they were before even dealing with any claims. Either that was part of their training or they were hired that way. It was even more shocking to hear how they discussed the first injured workers they were assigned and how their ignorance and bias played out. Perhaps a good starting point would hiring injured workers to do anti-stigma/anti-bias training with adjudicators and teach them the reality of life as an injured worker. I would be interested in doing that because my injuries, the bulk of which came after I filed my first claim and the way I was treated by WSIB, irreparably altered my life and my health. The system is broken but it will only be made worse by implementing the KPMG Recommendations.

Yours Truly,

Catherine Fenech
cjfenech@gmail.com

cc: WSIB Board of Directors
Monte McNaughton, Minister of Labour

From: Christine Nugent
Sent on: Wednesday, July 19, 2023 3:15:42 PM
To: appealsfeedback
Subject: Proposed changes to WSIB Appeals process

Hello,

I am a volunteer with the Barrie District Injured Workers Group who has helped injured workers in our region with their appeals before the WSIB and WSIAT for over 10 years.

MPP Doug Downey and MPP Andrea Khanjin are aware of our work and the difficulty injured workers face with the complex WSIB system.

I have learned over the years how to help, with hardship and difficulties, many hours spent per worker injured or made ill on the job, with some success. I am a volunteer. This is not the way our society, this compensation system, should work. Workers deserve to be cared for without depending on the goodness of volunteers assisting.

The system has been in a crisis for workers for years now, especially those who face permanent injury or illness.

The surplus funds that the compensation system enjoys and is handing back to employers by this government has been done on the backs of injured workers through unjust denials which has increased the need for appeals and resolutions.

Workers will face impossible conditions if the recently proposed KPMG recommendations for changes to the appeals and resolution process are accepted by the WSIB and this government.

I have concerns about the proposed changes in the KPMG report which our group of workers and our umbrella organization the Ontario Network of Injured Workers Groups have studied and discussed.

We would like the consultation deadline extended so as to properly consult the worker representative community, many who may not be able to meet such a restricted time frame with summertime being not an opportune time.

I would like the consultation process extended to have time to meet with our Barrie MPPS so they can hear from the workers, their constituents, the difficulties they have faced with existing timelines and how impossible access to just compensation will be for workers and their representatives in the future.

The proposed changes include: adding 3 new time limits for injured workers within a 90 day period; cutting the time limit to object to decisions from 6 months to 1 month, and; cutting the amount of time for injured workers to find a legal representative.

As I have learned and have been in MPP offices to express, that the WSIB’s appeal processes are already administratively challenging for vulnerable injured workers, many of whom suffer from disabilities and hardships that impact their ability to participate in formal appeal processes.

By the time they reach our support group, meeting existing timeliness for appeals are challenging especially with the non-union workers in the Barrie area who know nothing of how to object to denials to unjust compensation decisions.

They face lengthy timeliness to get legal representation from the Office of the Worker Advisor which raises an important fact.

The KPMG value for money did not address staffing, the very issue that applies to the quality service the compensation system must provide.

The proposed, restrictive changes to WSIB's appeal processes threaten to severely limit vulnerable workers' participatory rights..

In the interests of fairness and facilitating participatory rights, I respectfully request that WSIB reject the proposed changes to the WSIB Appeals process at best and at least extend this restrictive consultation timeline by which our own MPP's will surely be denied important constituency input.

Thank you for your attention to this brief submission which is just in time due to our needing time as advocates to study closely the report which does not include the voices of the injured worker community.

Sincerely

Christine Nugent

Barrie District Injured Workers Group

From: Erika Caro
Sent on: Friday, July 21, 2023 8:12:14 PM
To: appealsfeedback
Subject: KPMG recommendations - consultation

Good Afternoon,

My name is Erika Caro, I am a resident of Ontario and I recently learned about the KPMG recommendations for WSIB decisions. I am extremely concerned about the WSIB consultation process and the eventual loss of appeal rights for injured workers.

The WSIB is providing barely any time to complete and submit responses to the consultation questions on the dispute resolution and appeals process. More concerning, is that this is taking place during the summertime – when many people are off work and on vacation. This is unacceptable and an unfair procedure for all workers in Ontario.

I would like to request the following:

1. That the deadline to make submissions be extended for 6 months;

2. The consultation should occur in a public setting and should be led by experienced workers' compensation advocates;

3. All injured workers should be notified of the consultation – the radical changes proposed will impact tens of thousands of injured workers, most of whom have no idea about this consultation. Plain and simple, that is wrong.

I look forward to hearing back from you as soon as possible.

Thank you for your attention and cooperation

Erika Caro

From: Greg Snider
Sent on: Thursday, July 13, 2023 9:49:39 PM
To: appealsfeedback
Subject: Feedback on the appeals and request for extension

As a worker in Ontario I am deeply concerned about the introduction of several new restrictions on appeals. I am very concerned that you hired a financial Audit company to review a judicial system, A quick review shows me that 79% of appeals that make it to the WSIAT are decided in whole or in part in favour of the worker and not the WSIB decision makers. If this is true. And we both know it is, then the obvious solution is for the WSIB to make better decisions, unless you are doing a financial audit. Under a financial Audit you want to find ways to save money. Making better decisions earlier doesn't save money. However, putting up barriers to people getting appeals to the WSIAT where 79% of decisions are going against WSIB would save money. BUT IS THAT JUSTICE

If there is a one month deadline on appeals and a decision is made by WSIB I might disagree with but don't currently have enough information on, would I not file an appeal in the one month so as not to lose my appeal. I can always withdraw it latter. It would be better then losing my right appeal. And if I need details on what I want from my appeal would I not just file an appeal for every possible outcome I might want.

I don't know any of this for sure as I am a worker and not a lawyer but I know several people who have been injured at work and I WANT A CHANCE TO GIVE FEED BACK. GOOD FEEDBACK.

BUT I HAVE A FAMILY AND VACATION PLANS. I need time to research. To talk with my co-workers who have accessed the WSIB program to find out about their lived experience.

ONE MONTH TO GIVE FEEDBACK AND IN THE MONTH OF JULY SEEMS TO VALIDATE MY CONCERNS. I think you can do better. If you believe that we live in a just society or even that we should live in a Just society you will extend this deadline until at least October.

Greg Snider

Greg Snider

13 Lyle Street, Thunder Bay ON P7A 6H3

Expos94@shaw.ca

July 6, 2023

Re: WSIB Dispute resolution and appeals process value-for-money audit consultation

To: appealsfeedback@wsib.on.ca

I will be answering your question.

What appealable issues do you think are appropriate for this mediation-arbitration model?

I must begin by stating that my responding to this question in no way supports any of the recommendations of the latest KPMG report. In fact, I find the report so seriously flawed, that WSIB should refuse payment to KPMG until it completes the work WSIB claims to have asked it to do.

Secondly, before answering your question I must address the inequity in the feedback format that you have established. To provide such a short timeline to receive feedback is problematic to Injured Workers and their advocates. Many of these citizens and their family members are working through significant life changes but would like to share their lived knowledge. Lived knowledge should be held in the highest regard by the WSIB. While many large employers can assign salaried human resources personnel or lawyers to answer these questions

To the question: What appealable issues do you think are appropriate for this mediation-arbitration model?

I don’t believe any cases should be completed where the WSIB gets to be arbitrator over their own decisions. Nor do I feel any lay person should be put in a position to mediate a settlement with a more knowledgeable WSIB employee

In 1.1 of your request for feed back you state

"Resolution 1.1 We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals."

Then in the first line under that resolution you state " The WSIA (**sec 122(1)**) allows us to offer mediation services when we think it would be most appropriate." What?????

When would it be appropriate? How about when WSIAT isn't overturning almost 80% of the decisions made in your current front-line and Appeals Services Division. Yes, you "should establish expertise".

When would it be most appropriate for WSIB to do mediation-Arbitration of its own program? It is never appropriate for an organization to do Arbitration on their own decisions. This is only made worse by the fact that many of the people they would be mediating with would be lacking in the required "expertise" to represent their own interest. Which is only made worse by the timelines placed on workers to obtain the required expertise in their entitlements under WSIB and in your alternate resolution process (Training you recognized you needed training in. Knowledge is power though isn't it). Which is only made worse by the current reality that 79% of decisions that are made by your internal review process that make it to the WSIAT being overturned to the benefit of the worker.

This last point is important as seems to show a bias against Injured Worker at the current internal review process. A bias which leads to many decisions ending up at the WSIAT when these should have been dealt with at the internal appeals process. To be clear: a wrong decision is made by the frontline worker, on internal review a second wrong decision is made and then upon a second internal review another wrong decision is made, but if a worker is persistent, doesn't give up, and takes it to the WSIAT (outside WSIB) eight out of ten times he will get the decision overturned. It should be of concern to everyone that you want to improve your "expertise of alternate Resolution Processes" when you are so lacking in "expertise" in Workplace Safety and Insurance Program.

How can KPMG do a Value for Money Audit and miss this glaring problem. But, to then suggest you give more power to an internal review process and the very employees who are struggling to make quality decisions is unacceptable. And is below what is acceptable for a Value for Money Audit.

I recommend WSIB not implement any recommendation from this KPMG report but rather require KPMG do a proper Value for Money audit. One that recognizes WSIB responsibility to providing Workers Compensation in Ontario.

Thank you,

Greg Snider

From: Thompson, Laura
Sent on: Sunday, June 11, 2023 3:35:58 PM
To: appealsfeedback
Subject: Feedback

Love all your suggested changes. The one about the 1 year deadline to move ahead with an appeal is my personal favorite. Employees usually meet the deadline to appeal and then do nothing, leaving us at a disadvantage on our ability to move forward on other issues arising from that decision.

Laura

Laura Thompson, Registered Paralegal, CDMP
Disabililty Management Specialist | *Specialiste de Gestion des limitations fonctionnelles*
Human Resources | *Ressources humaines*
Health Sciences North | *Horizon Santé-Nord*

From: Hollie Holden
Sent on: Friday, June 9, 2023 2:54:16 PM
To: appealsfeedback
Subject: Value - for - Money Audit

To WSIB / Workers Compensation,

In my opinion as an injured worker currently in appeals, you should consult with injured or ill workers, and their representatives.

These are the very people where the concerns are.

How would an outsider know what an injured / ill worker faces if they don't live that life?

The fact that no one in Premier Fords government wants to talk to, meet with, or even acknowledge injured / ill workers tells me there's something incredibly wrong.

Why would anyone go around the very core issue to another unrelated source for help? My view, all these action point to FRAUD.

If this was anything legit, then this wouldn't even be a matter of topic right now.

So on that note get rid of your Value for Money Audit, sit down with injured, and ill workers plus their reps, and ask the hard the question.

They will tell you what they need, and don't need, and suggest the best approach to the matter at hand.

Peace & Blessings,
Hollie Holden

LOOKING FORWARD TO

The CHANGE of

WSIB

(Workplace Safety and Insurance Board)

SUMMAY

For a long time, WSIB case managers have made a numerous amounts of wrong decisions and dragged injured workers into lengthy appeal procedures. This not only a waste of human and financial resources, but also causes secondary injuries to injured workers. Some injured workers suffer from mentally and physically because of this, and even choose to give up on their lives due to the unbearable psychological torture.

In response to long-standing calls for WSIB reform, WSIB commissioned KPMG to complete its audit in 2022, and put forward some reform proposals. These suggestions have positive effects, but they do not capture the core of WSIB's urgently needed reform.

Worker. An injured worker puts forward some new suggestions for the reform of WSIB from the perspective of workers, through his ten years of experience and research on a large number of work-related injury cases.

This article included three parts:

1. KPMG Audit Report on WSIB November 30, 2022.

2. Looking KPMG report from the perspective of workers.

3. The True Story of an Injured Worker Who Died on the Appeal Road

INDEX

The KPMG value-for-money audit was submitted in its entirety. The document has been omitted due to its length.

Looking KPMG report from the perspective of workers

Workplace Safety and Insurance Board (WSIB)

Value for Money Audit [VFMA]-Dispute Resolution and Appeals Process. Final report on November 30， 2022. By KPMG

In his 58-page report, KPMG mainly audited three different processes in the appeal, which includes the Dispute Resolution process, Appels Process and Appeals Implementation Process.

The objective of the VFMA was to ensure that the WSIB is providing efficient and effective administration of the dispute resolution, appeals and implementation process, and reaching fair outcomes for injured/ill people or businesses while enabling process compliance and adhering to the principles of administrative law and natural justice. For this purpose, KPMG proposed in the audit report to establish the OA (Quality Assurance) function and to establish a time limit for the appeal to submit the Appeal Readiness form (ARF), so that the above procedures can be effectively and timely implemented.

In the past 20 years, people who work in downtown have tried various methods to shorten commuting time and avoid traffic. Some methods have included using Navigation Apps such as google map to help fined the most efficient route, or the use of satellite GPS. However, there methods are not effective ways to deal with heavy traffic and long commute times. One of the most important problems is that they have no way to solve the increasing motor vehicles and traffic.

1. The KPMG report also wants to solve the bottleneck of appeals in WSIB cases by optimizing the appeal process, shorten the appeal time, improve efficiency and save costs. This is destined to not change fundamentally, because they have not grasped the core of the matter and the issue of the number of appeals, and analyzed the reasons for the large number of appeals.

The following information comes from the 2016 and 2021 case statistics of the Ontario Workplace Safety and Insurance Appeals Tribunal.

https://www.canlii.org/en/on/onwsiat/.

Case No: Year and Month Total Number of Cases Hearing in the Tribunal.

Allow: The number of cases WSIB lost outright in the Tribunal.

Part-Allow: The number of cases WSIB partially lost in the Tribunal.

No-Allow: The number of cases WSIB won in the Tribunal.

Cancel: The number of cases in which cases were dismissed in the Tribunal

Allow-R: A percentage of total cases WSIB lost outright in the Tribunal.

Part-A-R: A percentage of total cases WSIB partially lost in the Tribunal.

No-A-R: A percentage of total cases WSIB won in the Tribunal.

Cancel-R: A percentage of cases that be dismissed in the Tribunal.

Total A-R: A percentage of total cases WSIB lost in the Tribunal.

2016 年

2016	CaseNo	Allow	PartAllow	NoAllow	Cancel	Allow-R	Part-A-R	No A-R	Cancel-R	Total A-R
Jan	253	84	58	104	7	33.20%	22.92%	41.11%	2.77%	56.13%
Feb	281	99	69	108	5	35.23%	24.56%	38.43%	1.78%	59.79%
Mar	329	121	73	116	19	36.78%	22.19%	35.26%	5.58%	58.96%
Apr	281	99	63	104	15	35.23%	22.42%	37.01%	5.34%	57.65%
May	290	115	73	88	14	39.66%	25.17%	30.34%	4.83%	64.83%
Jun	328	138	67	114	9	42.07%	20.43%	34.76%	2.74%	62.50%
July	298	107	66	113	12	35.91%	22.15%	37.92%	4.03%	58.05%
Aug	277	103	51	113	10	37.18%	18.41%	40.79%	3.61%	55.60%
Sep	313	110	58	132	13	35.14%	18.53%	42.17%	4.15%	53.67%
Oct	312	108	71	117	16	34.62%	22.75%	37.50%	5.13%	57.37%
Nov	312	126	70	108	8	40.38%	22.44%	34.62%	2.56%	61.81%
Dec	344	141	62	130	11	40.99%	18.03%	37.79%	3.20%	59.01%
Total	**3618**	**1351**	**781**	**1347**	**139**	**37.34%**	**21.59%**	**37.23%**	**3.84%**	**58.73%**

2021 年

2021	CaseNo	Allow	PartAllow	NoAllow	Cancel	Allow-R	Part-A-R	No A-R	Cancel-R	Total A-R
Jan	189	76	48	54	11	40.20%	25.40%	28.60%	5.80%	65.60%

Feb	128	46	28	47	7	35.90%	21.90%	36.70%	5.46%	57.80%
Mar	193	72	68	45	8	37.30%	35.20%	23.30%	4.14%	72.54%
Apr	160	58	47	48	7	36.25%	29.38%	30.00%	4.38%	65.63%
May	213	89	59	53	12	41.78%	27.70%	24.88%	5.63%	69.48%
Jun	180	69	38	63	10	38.33%	21.11%	35.00%	5.56%	59.44%
Jul	169	64	46	44	15	37.87%	27.22%	26.04%	8.88%	65.09%
Aug	169	72	49	42	6	42.60%	28.94%	24.85%	3.55%	71.60%
Sep	184	71	45	61	7	38.59%	24.46%	33.15%	3.80%	63.04%
Oct	167	55	47	61	4	32.93%	28.14%	36.53%	2.40%	61.08%
Nov	163	70	44	45	4	42.94%	26.99%	27.61%	2.45%	69.94%
Dec	164	69	50	37	10	40.85%	30.49%	22.56%	6.10%	71.34%
Total	**2079**	**809**	**569**	**600**	**101**	**38.91%**	**27.37%**	**28.86%**	**4.90%**	**66.28%**

Statistically speaking, the WSIAT's case allow rate, In other words, the error rate of WSIB in WSIAT tribunal, should not be higher than 20% after the two-level review of the case by case manager and WSIB appeal. If the error rate is higher than 20%, it may be a technical and professional problem. If the error rate is higher than 40%, it is not only a professional problem. The error rate of WSIB is as high as 60%, which is incomprehensible. Be aware that WSIB Case Managers and Appeals Resolution Officer are highly paid professionals. Their average annual salary is more than $100,000. To put it in perspective, a child doing a coin flip to determine the trail has a higher success rate compared to what the WSIB Case Managers and Appeals Resolution Officers have been doing. These highly paid Case Managers and Appeals Resolution Officer hired by WSIB's human resources department have the error rate more than 60%! Isn't this absurd? I really do not know how the WSIB Human Resources Department does it.

KPMG's audit scope covers the following three areas:

1.) Dispute Resolution Process

2.) Appeals Process

3.) Appeals Implementation Process

These three aspects are all process issues. If WSIB cannot eliminate a large number of wrong decisions at the Case manager Level, it will not be able to solve a large number of appeal cases, even if the three processes of the appeal become more optimized and efficient, the appeal's bottleneck cannot be fundamentally resolved, and the huge waste of human and financial resources.

2. KPMG proposed QA (Quality Assurance) quality assurance function in the report, this concept is very good, but KPMG's QA only stays at the narrow level, and wants to set up QA to guarantee;

1.） Dispute Resolution Process

2.） Appeals Process

3.） Appeals Implementation Process

The above three processes went smoothly.

In the international SO9000 quality assurance system, QA has never belonged to the production department, but an independent organization. The function of QA is to test the production process according to the standard, analyze the problems in the production process, analyze whether these problems are a result in the production process or design problems, and timely feedback on production problems to the production department and design problems to the development department.

KPMG suggested setting up QA in the WSIB department is similar to abolishing the police and letting their family members supervise them to issue speeding tickets.
Destined the QA in the WSIB department such as the ears of a deaf person, Just decorations and does not get anything done at all.

3. Another suggestion made by KPMG in the report is to set a time limit for submitting the Appeal Readiness form (ARF). It is not fair to put a time limit on an individual’s case with no knowledge of the real situation and conditions of the injured workers. Did KPMG take into account the specific circumstances of the injured worker when making this recommendation?

A.
Many of the injured workers were immigrants, whose native language was not English or French, and who had never been involved in Canadian Workers Compensation and don't understand the workers' compensation process, let alone the workers' compensation law. Many WSIB documents use abbreviations, which means that injured workers who know some English cannot understand the content of the documents in a short time.

B.

Workers need a period of recovery after injury. During this time, the injured worker has to fight the pain. Some injured workers have post-traumatic stress disorder due to work-related injuries. To set a deadline for them to appeal is to force injured workers to learn Canadian workers' compensation procedures and laws during the treatment period, and to read hundreds of pages of appeal materials every day.
Whether a depressed patient can read hundreds of pages of documents every day, the average WSIB case materials are more than 5,000 pages, has KPMG considered the rationality and feasibility of this time limit?

C.
WSIB Case Managers made numerous of wrong decisions. These erroneous decisions need to be corrected through appeals. Office of the Worker Adviser (OWA), Industrial Accident Victims' Group of Ontario (IAVGO), Worker's Health and Safety Legal Clinic (WHSLC) and Injured Workers Community Clinic (IWC), which provide appeal help to injured workers, are severely understaffed, and the waiting list for new cases often takes more than a year and a half. Legally, WSIB does not pay lawyers in society to assist injured workers, which makes lawyers in society less enthusiastic about work-related injury cases. Putting a time limit on an injured worker's appeal would force an injured worker who does not understand the Workplace Safety and Insurance Act to argue in court with an employer's lawyer who has expertise, as let an ordinary person and a professional boxer have boxing match in the boxing ring, is it fair?

D .
Some employers do not support injured workers to claim compensation from WSIB, and will impose some restrictions on injured workers, such as; not being allowed to contact WSIB and injured worker representatives during working hours. The working hours of WSIB and injured workers' representatives coincide with those of injured workers, which means that injured workers can only communicate with WSIB and injured workers' representatives through letters during after hours of work. This also means that it takes a long time to communicate. The result of imposing time limits on appeals is that injured workers are not complete prepared to appeal, or that time limits are result to deprive them of their right to appeal, is this reasonable.

E.
WSIB Case Manager makes numerous amounts of wrong decisions, drags injured workers into lengthy appeals process. A case manager, who have professional knowledge can sit in office for eight hours a day to read case materials, an injured

worker, who never touch injury claim before, no knowledge of about injury claims. What time they use to learn about the workers' compensation process and the law. What time can they spend on preparing their appeal too?
Could WSIB, employers provide injured workers time to prepare appeal? Could injured workers prepare their own appeals at home no go to work?

In order to justly and reasonably optimize the appeal of injured workers, save financial resources, the following suggestions are given:

《1》To WSIB

1)

The WSIB should send the Workers' Compensation Booklet to the injured worker as soon as the Claim Number is established for each injured worker's claim. This manual contains:

a. Claims Procedure.
b. Rights and obligations of injured workers.
c. Contact addresses of agencies in society that provide assistance to injured workers. Such as IWC, OWA, WHSLC and IAVGO etc.
d. and legal information that injured workers need to know.

2)

The WSIB should expand the use of the online portal for employers and representatives. Open to employers and representatives to access and download relevant materials at any time, it is not mailed by WSIB when appealing. This saves human resources, litter paper waste and carbon emissions. More importantly, injured workers representatives and employers can keep abreast of the latest information and save time for appeals.

3)

Avoid abbreviations in WSIB files. If abbreviations appear in the document, the case manager is obliged to make a note where the abbreviation appears. The documents provided by WSIB to customer service should be easy to understand. Because the target audience is non-professionals. The WSIB's strategic objective is "Meeting Our Customers Needs and Expectations"

4)

An independent QA agency should counts WSIB appeals and tribunal's cases, statistical reports of QA will be provided to WSIB on a monthly basis. WSIB

retrains Case Managers and Appeals Resolution Officers with error rates higher than 20%, the error rate of trained Case Managers and Appeals Resolution Officers is still over 20%, WSIB should consider changing their jobs.

5)
WSIB Case Managers and Appeals Resolution Officers must review cases where they have made wrong decisions, and write reason reports. QA conducts random checks on the review reports of WSIB Case Managers and Appeals Resolution Officers.

《2》 Set up a QA department at the WSIAT level. The function of QA is:

1.
Statistics on error rates for Case Managers and Appeals Resolution Officers. Submit the statistical reports to WSIB CEO on a monthly basis.

2.
QA conducts random checks on the review reports of WSIB Case Managers and Appeals Resolution Officers, analyze the reasons for wrong decisions by WSIB Case Managers and Appeals Resolution Officers. Analyze whether these errors are avoidable or unavoidable. If it is a problem with WSIB, it will beefed back to WSIB as training materials. If it is a legal issue, it will submit it to the provincial government for resolution in the provincial council.

3.
If WSIB's Case Manager or Work Transition Specialist violates WSIB's procedures during the claim process, QA accepts complaints from injured workers and employers, and QA does not adjudicate cases for right or wrong. QA only reviews whether the procedures complies with the regulations. If QA finds that the Case Manager or Work Transition Specialist has violated the WSIB procedure, QA has the right to issue an order for the Case Manager and Work Transition Specialist to correct.

《3》 Establishment of the Ontario Service Center for Injured Workers

1.) IWC, OWA, WHSLC and IAVGO form a joint organization to provide services to injured workers— “Ontario Injured Workers Service Center“
The Ontario Injured Workers Service Center provides multi-lingual services to counsel injured workers and assist injured workers in their rehabilitation and return to work.

2.) Ontario Injured Workers Service. Register injured workers who need legal help and provide IWC, OWA, WHSLC and IAVGO lists of injured workers who need legal help in order of priority.

《4》. The legislative level of the provincial government should consider let lawyers in the society involving injury work case.

Due to the serious backlog of appeals case of injured workers, the legal institutions that assist injured workers are severely understaffed, and most of the injured workers do not have high incomes and do not have the financial conditions to hire lawyers. In this case, the provincial government should consider opening up Social lawyers step in. If WSIB loses the case, WSIB should pay the attorney's fees. After all, this is the result of WSIB's wrong decision.

WSIB Case Manager incredibly made of huge amounts wrong decision that had to be corrected through appeals. These not only resulted in a lot of wasted money, but also caused great emotional trauma to the injured workers, many of whom suffered from mental depression. Some injured workers committed suicide because they could not endure the lengthy appeal.

This is what's happening around us, read on Decision No. 566/21, 2022 ONWSIAT 213 (CanLII), https://www.canlii.org/en/on/onwsiat/doc/2022/2022onwsiat213/2022onwsiat213.html?searchUrlHash=AAAAAQAGNTY2LzIxAAAAAAE&resultIndex=1

We care about the Russo-Ukrainian war, we care about the shootings in the US, but we pay little attention to the damage done to injury workers in Canada by the WSIB's plethora of absurd conclusions. Workers who create wealth for our society every day survive work-related injuries only to die on the way to appeal WSIB. This has been going on for a long time. It is time for WSIB to make changes let the tragedy is no longer happening.

Hovey

2023-07-21

--SUMMARY--

Decision No. 566/21 **03-Feb-2022** **K.Jepson - P.Greenside - M.Ferrari**

- Consequences of injury (suicide)
- Dependency benefits (common law spouse)
- Psychotraumatic disability
- Loss of earnings {LOE} (employability)

The worker, a truck driver, injured his back in April 2005. He was granted a 17% NEL award for a permanent low back impairment. The worker made several attempts at returning to work on modified duties, which were not successful. LOE benefits were terminated in January 2006 on the basis that the worker had declined the employer's offer of suitable modified work. The worker requested entitlement for psychotraumatic disability or chronic pain disability, which was denied. In August 2018, the worker committed suicide. The worker's spouse appealed Appeals Resolution Officer decisions denying entitlement for pyschotraumatic disability or CPD, denying LOE benefits, and denying payment of survivors' benefits.

The appeal was allowed.

The worker had entitlement for psychotraumatic disability. The medical evidence demonstrated that the worker developed a non-organic reaction to his injury that first manifested as a pain condition and evolved into serious psychological conditions. Psychiatric reports attributed his psychological condition to the workplace accident and its sequelae, including his emotional response to the injury, extended disablement, and financial difficulties.

The evidence showed that the worker's psychological condition worsened in 2017 and 2018, and that this condition was a continuation of the psychological reaction to the injury. His condition was a significant contributing factor to his suicide. His spouse was entitled to survivors' benefits.

Given the worker's organic and non-organic disabilities, as well as the the numerous medical reports indicating that the worker was unable to work, the worker was not capable of performing the modified duties offered by the employer, or any type of work. He was entitled to LOE benefits.

15 Pages

References: Act Citation
- WSIA

Other Case Reference
- [w1322s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Documents No. 15-04-02, 15-05-01, 20-03-06

Style of Cause:
Neutral Citation: 2022 ONWSIAT 213

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 566/21

BEFORE: K. Jepson : Vice-Chair
P. Greenside : Member Representative of Employers
M. Ferrari : Member Representative of Workers

HEARING: April 19, 2021 and May 28, 2021 at Toronto
Teleconference

DATE OF DECISION: February 3, 2022

NEUTRAL CITATION: 2022 ONWSIAT 213

DECISION(S) UNDER APPEAL: WSIB ARO decisions dated May 22, 2013, February 23, 2017 and June 16, 2020

APPEARANCES:

For the worker: F. Goncalves, Paralegal

For the employer: Not participating

Interpreter: N/A

505 University Avenue 7th Floor
Toronto ON M5G 2P2

505, avenue University, 7e étage
Toronto ON M5G 2P2

REASONS

(i) Background

[1] The worker was employed as a truck driver. On April 4, 2005, the then 35-year-old was pulling on a skid when he slipped and fell backwards, injuring his back.

[2] The Workplace Safety and Insurance Board (WSIB) (the Board) accepted entitlement for a back injury. The Board later recognized that the worker had suffered a permanent impairment as a result of the workplace injury. In April 2006 he was granted a 17% non-economic loss (NEL) benefit award for a permanent low back impairment.

[3] In the weeks following the accident the worker was paid various periods of loss of earnings (LOE) benefits and was engaged in conservative health care treatment. Between July 2005 and January 2006 the worker made several attempts to return to work on modified duties but these were not successful. The Board paid periods of full LOE benefits as well as periods of partial LOE benefits. The Board terminated all payment of LOE benefits effective January 16, 2006 on the basis that the employer had offered permanent suitable modified work which the worker had declined.

[4] The worker sought entitlement under the Board's Chronic Pain Disability (CPD) policy. In October 2012 the Board denied that entitlement for CPD. The worker subsequently sought entitlement under the Board's Psychotraumatic Disability policy but this was denied in a decision rendered in August 2015.

[5] The worker continued to struggle with both back pain and psychological issues. On August 24, 2018 the worker committed suicide.

[6] The worker's common-law spouse requested survivors' benefits. The Board denied such benefits on the basis that the worker's suicide was not related to his workplace injury but instead to his psychological condition which the Board deemed non-work-related.

[7] The worker's spouse, as his estate representative, now appeals to this Tribunal. On behalf of the worker she seeks entitlement for psychotraumatic disability or, in the alternative, CPD, and retroactive payment of LOE benefits. On her own behalf she seeks an order for payment of survivors' benefits.

[8] Due to the COVID-19 pandemic the hearing was held remotely by way of teleconference. The worker's common-law spouse appeared along with her representative. We heard testimony from the worker's spouse and also considered the documentary evidence entered into the record, which included the complete Board file. The employer did not participate in the appeal.

[9] The matter was originally scheduled for remote hearing on April 19, 2021. However, it did not proceed on that day due to a widespread internet outage. The matter was re-scheduled and proceeded on May 28, 2021.

(ii) Issues

[10] The to be determined in this appeal are:

1. whether the worker should be granted retroactive entitlement for psychotraumatic disability or, in the alternative, for CPD;

2. whether the worker was entitled to full LOE benefits from July 7, 2005 to December 5, 2005 and from January 16, 2006 forward; and

3. whether the worker's common-law spouse is entitled to death benefits and survivors' benefits.

(iii) Applicable statutory framework

[11] Since the worker's injury occurred on April 4, 2005, the worker's entitlement to benefits is governed by the *Workplace Safety and Insurance Act, 1997* (the WSIA). All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[12] We refer to more specific provisions of the WSIA and Board policy in our analysis below of the specific issues.

(iv) The decision: overview

[13] We find that the worker developed a non-organic condition in response to the injury. While encompassing both non-organic pain and psychological elements, the worker's condition became predominantly psychological in nature. He has entitlement for psychotraumatic disability. The worker was not able to perform any accommodated work in 2005 and 2006 when it was offered, and thereafter he was not likely to be employable given his work-related conditions. The worker is retroactively entitled to full LOE benefits until the date of his death.

[14] The worker's psychological disability was a significant contributing factor in his suicide in 2018. The worker's spouse is entitled to survivors' benefits.

(v) Analysis

[15] The worker's common-law spouse testified in the appeal hearing. In the course of that testimony, she was questioned by both her representative and the Panel. The worker's spouse answered questions with credible detail. She was also frank in identifying points on which she was unsure of certain details or where there were gaps in her recollection. Her testimony contained no indications of effort to exaggerate or embellish. We accept that the worker's spouse was closely involved with the worker from the time of the injury and forward: they were together as a couple at the time of the injury and began co-habituating in or about 2008. The worker's spouse was in a position to observe the worker's behaviour and psychological condition. She testified about accompanying the worker to many medical visits – for example, to the hospital emergency department on a number of occasions. Although we have carefully considered the fact that the worker's spouse has a clear interest in the outcome of the appeal, we found her to be a credible witness and place weight on her testimony. Accordingly, for the foregoing reasons, where we refer to the spouse's testimony in our reasons below we should be taken to have found it to be generally accurate in relation to the evidence for which we cite it.

(a) Entitlement for psychotraumatic disability or CPD

1. The law: psychotraumatic disability and CPD

[16] Section 13 of the WSIA provides that a worker who sustains an injury by accident arising out of and in the course of their employment is entitled to benefits under the insurance plan. In this case, there is no dispute that the worker suffered an injury arising out of and in the course of

his employment. The Board has accepted entitlement for a back injury and a permanent impairment of the back.

[17] Entitlement for a workplace injury can include a psychological injury arising from a workplace accident. The specific guidelines for entitlement for psychotraumatic disability are set out in Board *Operational Policy Manual* (OPM) Document No. 15-04-02, "Psychotraumatic Disability." That policy provides that entitlement arises when a psychological disability or impairment results from a workplace injury. The policy elaborates on the nature of that causal connection. It states that entitlement for psychotraumatic disability may be established when the following circumstances exist or develop:

- Organic brain syndrome secondary to
  - traumatic head injury
  - toxic chemicals including gases
  - hypoxic conditions, or
  - conditions related to decompression sickness.
- As an indirect result of a physical injury
  - emotional reaction to the accident or injury
  - severe physical disability/impairment, or
  - reaction to the treatment process.
- The psychotraumatic disability is shown to be related to extended disablement and to non-medical, socioeconomic factors, the majority of which can be directly and clearly related to the work-related injury.

[18] Tribunal cases have consistently noted that under this policy there is no requirement that the workplace accident itself be traumatic or "psychotraumatic in nature" (see, e.g., *Decision No. 225/12*, 2012 ONWSIAT 2134, at paragraph [29]). This is reinforced by the wording of the policy itself. The second and third bullets in the entitlement criteria describe a secondary or indirect causation that does not turn on the nature of the injury itself. Entitlement under those criteria is based on a response to the injury and/or its sequelae.

[19] As with all issues of causation, the significant contribution test applies when applying the Psychotraumatic Disability policy. Thus, in the case where the psychotraumatic disability results from an emotional reaction to the injury, the severity of the impairment, the treatment process, or a reaction to extended disablement, those factors need not be shown to be the sole cause of the resulting psychological condition. The injury and its sequelae must only be shown to be significant contributing factors in the development of the psychotraumatic disability.

[20] The policy also provides a general guideline that in order for entitlement to be granted the psychological condition should have arisen within five years of the workplace injury or five years of the last surgical procedure.

[21] In the alternative to psychotraumatic disability entitlement, the worker seeks entitlement for CPD. OPM Document No. 15-04-03, "Chronic Pain Disability," sets out specific criteria for entitlement for CPD. There must be an initial workplace injury followed by persistent, genuine pain that persists beyond the usual healing time for the injury. The policy requires that the pain be inconsistent with organic findings and that the pain causes marked life disruption.

[22] Generally a worker can only have entitlement for one of the two types of non-organic conditions: psychotraumatic disability or CPD, but not for both. We discuss below our analysis of which type of non-organic condition is more applicable to the current case.

2. Development of a non-organic response to the injury

[23] The evidence demonstrates that the worker developed a non-organic reaction to his injury within the first few months following the accident. A July 11, 2005 assessment by the WSIB Regional Evaluation Centre (REC) found few significant organic findings but the worker was complaining of very significant pain. Diagnostic imaging of the worker's back indicated only mild to moderate degenerative changes and did not suggest significant underlying pathology. An August 31, 2005 Worker's Progress Report shows the worker reporting pain and constant discomfort, sleepless nights and that he needed help to "take care of even the simplest tasks."

[24] The worker was referred for assessment and treatment at the WSIB Functional Restoration Program (FRP). The December 2, 2005 FRP intake assessment report indicates that the assessors were concerned with the worker's "chronic pain presentation," noting that his disability questionnaire scores indicated he perceived himself in the severe range of pain limitations. The assessors further noted the worker's negative emotional stance and catastrophic approach to his injury, indicating he felt his back was "broken" or "immobilized." They also noted the worker was reporting being sad, stressed and anxious about his condition. The January 27, 2006 Final Report from the FRP indicates that the worker did not benefit from the program. His functional abilities did not improve significantly, and some actually deteriorated. The FRP team concluded that, on a physical basis, the worker was capable of working in a sedentary occupation. However, they also noted that the worker had non-organic, emotionally based barriers to recovery and return to work: the report highlights the worker's strong pain focus, entrenchment in seeing himself as severely disabled, and his pessimism regarding any likely recovery. The assessors stated that given these factors, "it is unlikely that he will co-operate or be successful." In our view, the FRP reporting demonstrates the entrenchment of the worker's psychological reaction to his injury and disability by that point in time, about eight months after the accident.

[25] The worker's non-organic response to the injury was confirmed by a Board doctor. After reviewing the medical reporting to date, including the FRP reports, a Board Medical Consultant, Dr. Germansky, provided an opinion on February 22, 2005 that the worker had developed a chronic pain condition and should be considered for entitlement under the CPD policy. Dr. Germansky reiterated that opinion on April 18, 2006. This medical opinion further confirms the worker's development of a non-organic condition in response to the injury. It is implicit in Dr. Germansky's opinion, in our view, that the worker's lack of success in the FRP was not simply malingering or lack of motivation to recover.

[26] The worker's estate is seeking entitlement for psychotraumatic disability or, in the alternative, for CPD. As we have noted above, workers generally cannot have entitlement for both non-organic disabilities simultaneously (see, e.g., *Decision No. 1791/07R2*, 2009 ONWSIAT 2214). Tribunal case law has held that it is necessary to determine the predominant nature of the disability. An injury is assessed and compensated under the CPD policy if the nature of the disability is most closely associated with pain which cannot be attributed to organic causes. If, however, the predominant character of the disability is most closely associated with a psychological condition then it is assessed and compensated under the Psychotraumatic Disability policy (see, for example, *Decision Nos. 881/98*, 1998 CanLII 16152 (ON WSIAT) and *1858/13*, 2013 ONWSIAT 2132). The assessment from the FRP and Dr. Germansky's opinion, together with the other early medical reports and investigations, indicate that the worker had developed a non-organic response to his injury. While these reports note that there was a

significant pain component to that response, in our view they also show that that pain response was intricately bound up with psychological and emotional issues. In addition, subsequent evidence shows that as the worker's non-organic condition evolved in such a way that, even though subjective pain continued to be a substantial issue, psychological/psychiatric symptoms became increasingly more predominant. In our view, the worker's non-organic condition is most appropriately assessed under the Board's Psychotraumatic Disability policy.

3. The development of the worker's psychological disability

[27] The medical reporting indicates that the worker suffered depression and anxiety in the months soon after the accident. A number of medical reports indicate that in or about November 2007 the worker had a significant panic attack for which he went to the hospital, the first of what would become regular, recurring panic attacks. However, the worker's spouse testified that the panic attacks actually started earlier than 2007, although they were not necessarily recognized as such until later. She recalled that when the worker made his second return to work attempt he called her from work and, after the worker's father picked him up and brought him home, he was "a mess." We understood the worker's spouse to mean the worker was emotionally distraught.

[28] The worker's spouse also testified that from relatively soon after the accident the worker was depressed about his disability and inability to work; she noted that his identity was bound up in working and "providing for" his family, notwithstanding that the worker's spouse herself has her own career.

[29] Asked whether the worker was receiving psychological treatment in 2006 and early 2007, the worker's spouse testified that she recalled the worker was seeing a psychiatrist during this period, although she did not recall the name. We note that an October 16, 2007 report from Dr. Hawas, a pain specialist, indicates that the worker was at that time already suffering from anxiety and was on the medication Lorazepam (an anti-anxiety medication) and Nortriptyline (an antidepressant). This provides some corroboration that the worker was already being treated for psychological conditions at least by October 2007, and, as per the worker's spouse's testimony, likely beginning earlier.

[30] There is no evidence that there was any event that triggered the onset of more severe panic attacks in November 2007. The worker's spouse testified that she was not aware of any such triggers and there is no reference to any even in the documentary evidence. Given the lack of any other cause or trigger, we find it probable that the acute panic attacks were a continuation and worsening of the psychological condition the worker developed in the months following the injury. That view tends to be confirmed by reporting from the worker's family doctor Dr. Pich, discussed below.

[31] From 2008 forward there is documentation of ongoing assessment and treatment of the worker's psychological condition. That reporting attributes the ongoing condition to the instigating event of the workplace injury, together with the ongoing pain condition and the financial and social sequelae of the injury.

[32] In April 2008 the worker was assessed by psychiatrist Dr. Legault, on referral from the worker's family doctor Dr. Pich, for "management of ongoing depression and anxiety symptoms." The background to these conditions, Dr. Legault reports, was the workplace injury and the symptoms dating from after the injury. The report indicates that the worker's financial

situation was "quite desperate as a result of the injury." The report also notes the worker had delayed a plan to move in with his girlfriend due to his altered financial circumstances. It does note, in addition, other stressors: his girlfriend's lost pregnancy and his father's Alzheimer's. The report details depression and anxiety since the injury and, in particular, that the worker had multiple visits to a hospital emergency in 2007 to deal with panic attacks. There was passive suicidal ideation but no intent. Dr. Legault's diagnoses were "quite significant clinical depression" with co-morbid anxiety attacks. She opined that the conditions were the result of the physical injury.

[33] Dr. Wadhwa, at the Trillium Health Centre Mood Disorders Clinic, assessed the worker on May 8, 2008. Dr. Wadhwa diagnosed Major Depressive Disorder and Panic Disorder. Like Dr. Legault, Dr. Wadhwa attributed the onset of these conditions to the workplace injury combined with the subsequent financial stress caused by a loss of income and ongoing back pain.

[34] The worker underwent a psychiatric assessment on October 1, 2012 on referral from Dr. Pich. The psychiatric resident, Dr. Miula, diagnosed Panic Disorder with Agoraphobia and Major Depressive Disorder. In this report the onset of the psychological conditions is implicitly linked to the workplace injury, ensuing pain, and other sequelae of the injury.

[35] In a July 7, 2013 letter Dr. Pich confirmed that the worker's depression and anxiety had begun with the injury in 2005, with the more severe panic attacks beginning 2007 and worsening since that time. This report confirms the worker had been under the care of several psychiatrists including Dr. Legault, Dr. Wadhwa, Dr. Sklar, and Dr. Miula (as resident for Dr. Shafro).

[36] Dr. Pilowsky assessed the worker twice at the request of the worker's representative: first in November 2016 and again in April 2018. The reports recount the worker's history to Dr. Pilowsky of the back injury triggering his difficulties, and the significant downturn in 2007 when he had his first major panic attack. The November 18, 2016 report indicates that these attacks then continued, with full blown attacks once or twice per week. In both reports Dr. Pilowsky diagnosed chronic Major Depressive Disorder, severe, Chronic Pain Disorder Associated with Both Psychological Factors and a General Medical Condition, and Panic Disorder. Both reports attribute the worker's psychological condition to the workplace accident and its sequelae, including the emotional impact of not being a wage-earner and the accompanying financial consequences.

[37] Beginning in late 2017 the worker appears to have suffered a further downturn in his psychological condition. November 2017 records show he was admitted at the hospital emergency department because he felt he could not breathe. In April and May 2018 the worker underwent psychiatric consultations performed by Dr. Karas. Dr. Karas noted the history of struggles with mental health dating from 2005, noting that the worker had been depressed since the workplace accident. Dr. Karas recorded that the worker believed the only way he would get relief was by a proper cardiology assessment, although other records from this period indicate that the worker underwent cardiac investigations and they were not seen as explanatory for his reported symptoms. Dr. Karas also reported that the worker felt that antidepressant medications actually worsened his symptoms (such as chest pain and palpitations), and the worker felt those medications had in fact caused him "irreparable damage." This is consistent with other reports that the worker was either unable to tolerate psychotherapeutic medications or, at least, had beliefs that they were harmful. The worker's diagnoses remained Panic Disorder, Agoraphobia, Major Depressive Disorder, and elements of Anxiety Disorder.

[38] In June 2018 the worker was seen again at the emergency department of Trillium Health Partners hospital for physical symptoms that included shortness of breath and chest pain. He was admitted to the hospital's Mental Health Services unit. A report from Dr. Wadhwa noted the long psychiatric history and indicated the worker was experiencing worsening anxiety and depression. A social work report, from the Trillium Health Partners Mental Health Services unit, dated June 27, 2018, documents that the worker reported that "every day is a struggle." He reported he felt he was a "guinea pig" for trying out medications, his brain was "doing weird things" and for the prior two months he had been feeling a "brain zap." He was demanding a CT scan of his brain. The same report indicates the worker said he had had suicidal ideation "for a long time" and "was having difficulty seeing light at the end of the tunnel." It appears the Trillium Health Partners Mental Health Services unit discharged the worker as they had exhausted what they could offer, particularly given the worker's belief or experience that psychotherapeutic medications made him worse.

[39] According to the Coroner's Investigation Statement (undated) the Coroner spoke with the worker's family doctor who reported the worker was seen August 10, 2018 but did not appear suicidal at that time. As described above, the worker took his own life on August 24, 2018.

[40] There is no persuasive evidence that the worker had emotional or psychological conditions prior to the 2005 workplace injury. That history is stated in numerous medical reports, and the worker's spouse also confirmed this in her testimony. While there are references to the death of some friends and family prior to 2005 (for example, in Dr. Miula's October 1, 2012 report) there is no evidence to suggest that the worker developed any psychological symptoms or condition in response to those events. To the extent that any pre-accident events may have made the worker more susceptible to developing a maladaptive response to this injury, the Thin Skull principal applies: the worker was fully employed at the time of the injury with no symptomatic pre-accident psychological condition and, accordingly, any pre-existing psychological susceptibility cannot deprive the worker of entitlement.

[41] In our view, the overwhelming balance of the medical reporting reviewed above demonstrates that the worker developed a non-organic reaction to his injury, first manifesting as a pain condition but fairly quickly evolving into serious psychological conditions: Major Depressive Disorder, Agoraphobia, Panic Disorder, and Anxiety Disorder. The psychiatric reports all attribute the worker's psychological condition to the 2005 workplace accident and its sequelae, including his pain as well as the financial consequences of the injury and the worker's prolonged organic back disability and inability to work. The ARO determined that the worker's extended disability was "related entirely" to his decision to reject suitable modified work. We come to a different conclusion. With respect to modified work, for reasons outlined below on our analysis of LOE benefits, we are not persuaded that the worker refused suitable modified work in 2005 or 2006, or that he could have found and sustained work on his own subsequent to that time. We have considered, but rejected, the finding that any refusal of suitable modified work was an intervening cause that rendered the workplace injury and its consequences no longer relevant as causal factors.

[42] There is reference in the medical reporting to non-work-related factors being additional stressors in the worker's life, namely, the worker's father suffering from Alzheimer's disease and his girlfriend (now spouse) suffering a miscarriage. However, we do not find the medical reporting indicates that any such factors were significant causal factors, particularly when weighed against the effect of the workplace injury.

[43] In summary, the balance of the evidence persuades us that the worker suffered a psychological disability that was caused by the workplace accident and workplace injuries through the causal mechanisms set out in the Psychotraumatic Disability policy: the accident and its sequelae, which included the worker's emotional response to the injury, extended disablement, and socioeconomic factors attributable to the injury, were significant contributing factors in the development of the worker's psychological disability. We find that the worker, through his estate, has retroactive entitlement for his psychotraumatic disability.

[44] The worker's psychotraumatic disability clearly became permanent. The worker underwent full, formal psychiatric assessments by Dr. Legault and then Dr. Wadhwa in April and May 2008 and was referred to a Mood Disorder clinic. Treatment, including adjustments to medications, was recommended. The worker was referred back to the Trillium Health Centre for further assessment by Dr. Miula in 2012, at which time there does not appear to have been any significant improvement in the worker's condition. When Dr. Pilowsky assessed the worker in April 2016, she opined that the worker's prognosis was poor. By at least that time, it was evident that the worker's condition had become resistant to treatment and was permanent. The worker's estate is retroactively entitled to a NEL assessment for his psychotraumatic disability, with the date of Maximum Medical Recovery (MMR) (or maximum psychological recovery, MMP) set as November 18, 2016, the date of Dr. Pilowsky's first assessment report.

(b) LOE benefits

1. LOE benefits from July 7, 2005 to December 5, 2005

[45] Pursuant to section 43 of the WSIA, a worker who has a loss of earnings as a result of workplace injury is entitled to LOE benefits. Pursuant to WSIA section 43(2) the amount of the LOE benefit is 85% of the difference between the worker's net average earnings at the time of the injury and the amount that they are "able to earn in suitable and available employment." In the early stages following an injury (prior to any consideration of labour market re-entry assessments or plans) a worker who is unable to work at their pre-accident job or suitable modified work is entitled to full LOE benefits provided that the worker is co-operating in health care measures and co-operating with the employer and the Board in any steps required to facilitate the worker's early and safe return to work (ESRTW). If a worker refuses suitable modified work offered at no wage loss then any loss of earnings following that refusal is not the result of the workplace injury under section 43(1) and therefore no LOE benefits are payable (see *Decision No. 2474/00,* 2004 ONWSIAT 1381).

[46] The employer offered modified duties that consisted of various administrative (non-driving) duties including data entry, photocopying, answering phones, sorting batching bins, and checking in drivers. The worker made several brief attempts at these modified duties but was unable to sustain them for any appreciable period of time.

[47] The Board determined the modified work was suitable given the worker's organic physical restrictions. Those organic restrictions were essentially standard back restrictions. The REC assessment recommended work in the sedentary demands category that allowed the worker to change positions frequently. These organic back restrictions, however, did not take into account the worker's non-organic conditions. The non-organic conditions –pain with some psychological overlay that included developing panic/anxiety symptoms – were the more significant barriers to a return to work.

[48] The contemporaneous reporting and other evidence shows that during the period of return to work attempts the worker was already experiencing emotional/psychological problems that prevented him from performing the modified work. For example, in a July 15, 2005 Board Memo the worker told the Board he was "hanging on a string" and "not stable." The worker's spouse testified about an episode where the worker was attempting the modified work and called in a type of panic asking to be picked up; upon arriving home he was very emotionally distraught. As reviewed above, the FRP reports document the worker's psychological reactions to his injury and non-organic presentation. In keeping with this, the worker's pain appeared to be worsening rather than improving. In a January 9, 2006 Board memo the worker is recorded as reporting to the Board the most severe pain episodes he had yet experienced. As also previously noted, Board Medical Consultant Dr. Germansky opined the worker was developing, or had developed CPD.

[49] At the same time, there are numerous reports from the worker's treating doctors at or around the time he was attempting his return to work which indicate that the worker was unable to work at all. These include the following:

- Form 26 reports from Dr. Harry, dated August 4, 2005 and again on September 7, 2005, indicating the worker is unable to work at all
- Reports from an emergency department visit on October 16, 2005; the fact that the worker attended the hospital emergency department indicates the severity of his condition (both organic and non-organic)
- A Form 26, from Dr. Pich (the worker's then new family doctor) dated November 10, 2005 indicating the worker was unable to work at that time
- A report from Dr. Pich dated July 7, 2013 indicating, in a summary of the worker's history, that he had been unable to work since 2006 and ongoing.

[50] We acknowledge that the worker was offered the FRP to address his pain condition and that the reporting from that program indicates he was not able to benefit from it due to his approach. However, we are not persuaded that the worker's approach to the program and inability to benefit from the program were due to malingering or a lack of desire to recover. Rather, the reports indicate that the worker's inability to benefit from the program was bound up with his non-organic response to his injury and disability. The FRP concluded that the worker was capable of returning to work from the perspective of purely physical and functional precautions. However, it is important to note that at that time no psychological or non-organic condition had been formally recognized by the Board. While noting the physical limitations the FRP opinions also confirmed that the worker's non-organic emotional and psychological reactions to his injury—in particular his strong pain focus, entrenchment in seeing himself as severely disabled, and his firm pessimism regarding any likely recovery—were significant barriers to his ability to work at that time. This is reflected in the conclusions of the January 27, 2005 FRP Final Report: the FRP assessors concluded that although capable of a sedentary position from a physical function perspective, the worker's emotional issues would mean that he would not likely "be successful." We interpret that to mean he would not likely be successful in an attempt to return to work, at least unless and until his psychological issues were addressed and improved.

[51] Dr. Pilowsky's November 2016 report indicates that when the worker attempted to return to work performing clerical duties he was "completely overwhelmed and would experience nausea and bouts of vomiting." This is consistent with the worker's spouse's testimony about his return to work attempts triggering emotional symptoms. This aspect of Dr. Pilowsky's report provides further evidence that the worker's barriers to returning to work in 2005 and 2006 were not exclusively or even predominantly physical – his emotional and psychological symptoms were having a significant impact. Indeed, we note that Dr. Pilowsky gave the worker a GAF score of 45-50 (albeit in 2016) and opined that the worker was disabled from any type of employment by virtue of his psychological condition. Dr. Pilowsky also describes how, at the time of his return to work attempts, the worker attempted to take OxyContin which was prescribed for his pain, but the medication "took a toll" on his mental functioning and he was unable to continue with it. This is consistent with other contemporaneous evidence indicating the worker was not able to tolerate narcotic pain medications, thus further complicating his attempts to deal with his chronic back pain. This, combined with his emotional and psychological challenges, further hampered his ability to perform accommodated duties in his return to work attempts.

[52] Taking into account the worker's organic and non-organic disabilities, and considering the numerous medical reports indicating that the worker was unable to work, we are persuaded that the worker was not capable of performing the modified duties offered by the employer in 2005 and re-offered in early 2006. He was not, in fact, capable of any type of work. We find that he did not refuse suitable modified work.

[53] The worker is entitled to full LOE benefits from July 7, 2005 to December 5, 2005, taking into account any partial or full LOE benefits periods already paid and earnings in that period (if any).

2. LOE benefits from January 16, 2006 forward

[54] Since the worker had a permanent impairment and, on our findings, was not able to return to work with the employer, he would have been entitled to labour market re-entry (LMR) services (now referred to in Board policy as Work Transition (WT) services). However, given the Board's determinations at the time, no re-training or work re-integration assistance was offered. Section 43 of the WSIA requires a retroactive determination of what the worker could likely have earned in suitable and available employment without training.

[55] The same reports cited above in relation to the worker's abilities to return to work at modified duties in 2005 and 2006 are relevant to the worker's ability to seek and find work with another employer from January 2006 forward: they indicate he was unable to work. The psychological reporting from 2008 forward, reviewed above, documents how the worker's condition did not improve. Thus, the 2005 and 2006 reports indicating the worker was unable to work have relevance for the worker's ability to seek work on his own.

[56] The worker had a 17% NEL benefit for a permanent low back impairment and, on our findings in this decision, an ongoing and ultimately permanent psychotraumatic disability. The 2005 and 2006 opinions cited above indicate the worker's conditions made him unemployable. Subsequent opinions also provided the same opinion. Dr. Pich was the worker's doctor from October 2005 forward and was very familiar with the worker's condition. Dr. Pich wrote the following in a January 28, 2009 report:

> [The worker's] pain and anxiety do cause substantial functional limitations. Due to the unpredictability of his panic attacks he has avoided social interactions and has largely stayed at home (e.g. on one occasion he fainted in a park due to a panic attack). He is unable to work as he is unable to concentrate on the worker he would have to do.
>
> ...
>
> His anxiety and panic disorder prevent him from socializing and interacting with others, while his chronic low back pain prevents him from doing any job requiring activity (he is not even able to stand or sit for more than a few minutes at a time due to pain).

[57] Dr. Pilowsky, consistent with Dr. Pich's assessment of the severity of the worker's condition, opined in her 2016 and 2018 reports that the worker was not likely to be employable. Like Dr. Pich, Dr. Pilowsky elaborated on the worker's psychological inability to deal with any type of demands or stress and his lack of stamina and confidence as factors creating hurdles to any type of employment.

[58] We find that the worker was unemployable. He did not receive any re-training or labour market re-entry assistance, and, in light of the numerous opinions indicating the worker was unable to work at all, we conclude that as of January 16, 2006 the worker was not likely to be able to earn any income in suitable and available employment as set out in WSIA section 43. There is nothing in the evidence to indicate that there was any significant improvement in his condition or other change between January 2006 and the worker's death. The worker, through his estate, is retroactively entitled to full LOE benefits from January 16, 2006 to the date of his death.

(c) Survivors' benefits

[59] Pursuant to section 48 of the WSIA, survivors' benefits are paid when the worker's death "results from" a compensable injury. Board policy on secondary conditions, contained in OPM Document No. 15-05-01, "Resulting from Work-Related Disability/Impairment," tracks that legislative language when it provides:

> If a worker commits suicide following a work-related injury, the WSIB must pay benefits to the worker's dependants if it is established that the suicide resulted from the work-related injury.

[60] OPM Document No. 20-03-06, "Benefit for Survivors," provides:

> Where a worker's death results from a work-related injury/disease and the deceased worker is survived by a spouse and one or more children, the spouse is entitled to
>
> - a lump sum payment, and
> - periodic (monthly) payments equal to 85 per cent of the deceased worker's net average earnings (NAE) at the time of the injury.

[61] The benefits payable under section 48, subsections (1) to (6), are payable to "a surviving spouse who was co-habituating with the worker at the time of the worker's death." Pursuant to section 2 of the WSIA, "spouse" includes a person with whom the worker is living in a conjugal relationship for at least one year or have at least one child together.

[62] The worker's spouse testified that she was living with the worker at the time of his death and there is no evidence to suggest otherwise. References to the worker's personal circumstances in a number of medical reports confirm the common-law relationship with her. For example, Dr. Pilowsky's November 2016 report indicates the worker was then living in a

common-law relationship and the couple had been living together for the previous seven years. The same report also notes that the worker had one biological child and two stepchildren; the worker's spouse explained in her testimony that when she and the worker met – which was just a few months prior to the workplace accident – she had two children, and she subsequently had a child with the worker. We accept that she meets the definition of spouse for the purposes of WSIA section 48 and that she was cohabitating with the worker at the time of his death as required by section 48.

[63] In this decision we have found that the 2005 workplace injury resulted in psychotraumatic disability, for which we have granted entitlement. The "Summary and Opinion" portion of the coroner's report begins as follows: "The decedent had a history of depression and anxiety. He was in possession of a hunting rifle." The coroner went on to describe how the worker died of a gunshot wound to the head. These statements are clearly intended to imply that the history of depression and anxiety were relevant to the worker's motivation to commit suicide.

[64] In our analysis above we have reviewed the evidence showing the worsening of the worker's psychological condition in 2017 and 2018. The medical evidence, coupled with the worker's spouse's testimony, demonstrates continuity of the worker's psychological condition from when it first developed in 2005 to the period of increased medical attention in 2017 and 2018. At that time the worker's worsening psychological condition led to several periods of hospitalization in the months leading up to the worker's suicide. As reviewed above, the psychiatric and social work reports from 2017 and 2018 (including reports from Dr. Karas, Dr. Wadhwa, and social worker C. White) show that during that period the worker continued to suffer from significant depression, anxiety and panic attacks. Moreover, there were some indications that his condition was worsening. At the same time, the same reports indicate that the worker was not able to tolerate medications which could have helped ameliorate his psychological symptoms. The reporting from that period also shows that the worker believed he had heart and/or breathing problems, although investigations failed to reveal any organic heart or breathing conditions. In our view, the psychological and psychiatric reports, as well as those from the other specialists assessing the worker for these complaints, either state or strongly imply that the symptoms the worker believed were heart or lung-related were more likely somatic symptoms flowing from his psychological disorders.

[65] The evidence indicates the worker was increasingly distraught about his physical and mental health in 2017 and 2018. His spouse's testimony confirms that. The worker's spouse testified that the worker began to demonstrate irrational behaviour at home, attempting to persuade her that he had bizarre conditions such as red and green coloured substances emanating from his body.

[66] On the day he took his own life, August 24, 2018, the worker's spouse testified that she found a suicide note the worker had left on a tablet. According to the worker's spouse, the note was long, indicating the worker felt that support systems had failed him and further stating that he simply could not continue with his pain and emotional distress.

[67] In our view, the cumulative medical evidence, together with the worker's spouse's testimony, clearly shows that the worker's psychological condition in August 2018 was a continuation and evolution of the psychological reaction to his injury he developed in 2005 and thereafter. The same evidence also shows that the worker's psychological condition was a

significant contributing factor to his suicide. Evidence such as the suicide note indicates that the worker's chronic pain from his back injury – interwoven with his psychological response to that pain – was also a factor although, in our view, his work-related psychological condition was the predominant factor leading to his suicide.

[68] In summary, we conclude that the workplace injury and its sequelae, in particular the worker's psychological condition that resulted from that injury, were significant contributing factors in the worker's death by suicide. Accordingly, pursuant to WSIA section 48 and the Board policies cited above, the worker's spouse is entitled to survivors' benefits.

DISPOSITION

[69] The appeal is allowed, as follows:

1. The worker, by his estate, has entitlement for psychotraumatic disability, which became a permanent impairment. He is retroactively entitled to a NEL assessment for his psychotraumatic disability, using an MMR date of November 18, 2016.

2. The worker, by his estate, does not have entitlement for CPD.

3. The worker, by his estate, is retroactively entitled to full LOE benefits from July 7, 2005 to December 5, 2005, taking into account any partial or full LOE benefits periods already paid and earnings in that period (if any).

4. The worker, by his estate, is retroactively entitled to full LOE benefits from January 16, 2006 to the date of his death.

5. The worker's common-law spouse is entitled to survivors' benefits pursuant to section 48 of the WSIA.

[70] The matter is returned to the WSIB for implementation of these determinations and further adjudication as necessary flowing from this decision, subject to the usual rights of appeal.

DATED: February 3, 2022

SIGNED: K. Jepson, P. Greenside, M. Ferrari

From: James Kafieh
Sent on: Thursday, July 20, 2023 3:13:03 PM
To: appealsfeedback
Subject: WSIB Review

Dear Sir/Madam,

Re: <u>WSIB Dispute resolution and appeals process value-for-money audit consultation</u>

I'm concerned about the WSIB consultation process and the eventual loss of appeal rights for injured workers.

The WSIB is providing barely any time to complete and submit responses to the consultation questions on the dispute resolution and appeals process. More concerning, is that this is taking place during the summertime – when many people are off work and on vacation. This is unacceptable.

I would like to request the following:

1. That the deadline to make submissions be extended for 6 months;

2. The consultation should occur in a public setting and should be led by experienced workers' compensation advocates;

3. All injured workers should be notified of the consultation – the radical changes proposed will impact tens of thousands of injured workers, most of whom have no idea about this consultation. Plain and simple, that is wrong.

I support the submission by the Ontario Legal Clinics' Workers Compensation Network of June 5th (found here). I look forward to hearing back from you as soon as possible.

Yours sincerely,

James Kafieh
Barrister & Solicitor
The Legal Clinic

WSIB Consultation

Dear Mr. Lang,

I have read through the questions put forward for the consultation regarding the KPMG Value for Money Audit and I would like to share my thoughts with you. I have spent most of my working life as an injured worker and everything has been a struggle. You shared at a meeting all that you had done to help this young man as he had lost both of his arms. That was a wonderful story to share and I ask what was the deciding factor that made you go the full way to help him and why is this not done for every worker? Finally, why are you trying to change the appeals system when WSIAT stats show that the problem is with the adjudication. From July 1 to December 31, 2022, out of the 956 hearings that the WSIAT held, 80.7% of the negative decisions were overturned; 64.2% in full and 16.5% in part. How is it possible that so many decisions that are made are completely wrong and yet you feel that you must attack the appeals process to fix a problem that is not there. I was listed in the KPMG Value for Money Audit Report as someone who they had spoken to and I assure you that they never contacted me.

I do not see this as a consultation but rather a fishing expedition where you are trying to see how much more you can get away with. Furthermore, I am appalled at the recommendations that the KPMG made under the pretext of the Value for Money Audit for which they have no authority to be making them. I am curious what guidelines were given to the KPMG from the WSIB for this report, given their recommendations. If you are looking for value for your money on an audit, you must realize the quality of your report is dependent on the relevance of the auditor's knowledge and expertise to the topic. It is very apparent that the KPMG has no idea of the WSIB's responsibilities for workers who have suffered injuries and illnesses from their workplaces.

I don't see how the WSIB has deemed that these recommendations with merit and brought them forward to the Minister of Labour for approval. Implementation of these recommendations will create a never-ending circle for the injured and ill workers and their families, the representatives, WSIB staff, the ARO and the WSIAT. Very few will be able to meet the deadlines that have been presented and it will be no fault of their own. Representatives will not have time to provide the services that they are so used to providing, with competence, thoroughness and professionalism. What will their recourse be? Have you completed trial runs on a variety of past claims, applying these recommendations to evaluate just how this process might work. I doubt you would find many cases that would fit into all of their recommendations and so I ask what outcomes are you hoping to achieve by implementing these recommendations. I look forward to your response here because living in the real world as an injured worker with 3 injuries, there is no way I would have even been able to meet the guidelines for the first intent to object.

The WSIB has really failed logistically regarding the submissions. I have no doubt you realize summer is typically downtime for many and the limited 6 weeks roughly that we have had for submissions is really unfair to everyone. You have a multitude of submissions to read and you undoubtedly will hear all the reasoning to put a halt to this process now. I am not sure you have really thought out what you are trying to do but recommendations from this audit should not move past you. I realize you have brought them to the Minister of Labour already for consideration but I am hoping that you will realize the serious harm that will come to all parties involved, but mostly the injured and ill workers and their families. Remember the 772 negative decision letters from July 1 to December 31, 2023 that were overturned by the WSIAT? That gives all of us a glimpse of the numbers of claims affected in a 6-month period, but it

also highlights a system that is failing injured and ill workers, resulting in Loss of Earnings and health care benefits, loss of livelihood to the family, mental health issues and many other impacts. Research has already shown the trauma that impacts workers from the treatment of the WSIB; you told me when you first took on the role of the CEO and President of the WSIB that you looking forward to making a difference for injured workers. I hope that you will revisit these recommendations after reading all the submissions with the realization that this will only bring chaos to a system that is not really broken and take a better look at your adjudication processes.

Respectfully submitted,

Janet Paterson

From: Jim Littleford
Sent on: Saturday, July 22, 2023 3:35:35 PM
To: appealsfeedback
Subject: Kpmg

The wsib was started to prevent lawsuits against employers and care for workers injured or sickened by their work

This audit is for the express purpose of saving employers money,(second or third time in last couple years they've had premiums reduced and injured workers monies owed to them reduced for these savings).

Throw this audit out NOW!!!!

The wsib is a criminal organization now, disband it and give us our rights to sue back, and see how quickly employers want it back. Judges will be less likely to put injured workers on public assistance than the "paid bonuses to deny" adjudicators who are nothing more than henchmen for the criminals at the top of the wsib food chain.

Kpmg was paid to screw workers, NO OTHER REASON!!!!!!!

This wont even be read, because I'm an injured worker and advocate for injured workers, and also representing a cluster of poisoned workers who are ALL being screwed by these criminals!!!!!! I look forward to, but do not expect a reply to this, as we injured workers are nothing but a number to people like you(people making these decisions) . This criminal organization disgusts me, and the 400 other people I represent.

Jim Littleford
Board member Thunder Bay Injured Workers Support Group
Chair, Dryden RB4 Committee
For the Justice of RB4 survivors and widows
DO THE RIGHT THING!!!!!!!

From: Jules Tupker
Sent on: Saturday, July 22, 2023 12:23:13 AM
To: appealsfeedback
Subject: KPMG Value For Money Audit Consultation

Dear Sir/Madam,

The KPMG Value for Money Audit that the WSIB has accepted is the beginning of the end of the workers compensation system that William Meredith created over 100 years ago. Successive governments over the past twenty five or thirty years have been working to destroy a compensation system that was meant to help workers injured or made ill at their workplace return to work or be provided with a pension and benefits to allow them to live a decent life. Workers gave up their right to sue employers in exchange for a compensation system and by accepting this VFMA you are now removing the chance for many injured and ill workers, who have proof of their injury or illness from their doctor or medical professional, to appeal a decision by a WSIB adjudicator who has no medical expertise.

As far as you (WSIB and Ministry of Labour, Training and Skills Development) are concerned, injured and ill workers are an expense to employers that need to be reduced and indeed removed from the cost of doing business by employers.

If you have any sense of integrity and decency you will reject the VFMA provided by KPMG and if an audit is required have an independent impartial firm carry out the audit and have injured workers and injured workers advocates participate in the process.

Yours Truly,

Jules Tupker

From: Justin Kong
Sent on: Saturday, July 22, 2023 1:27:20 PM
To: appealsfeedback
Subject: KPMG proposed changes to WSIB

Hello WSIB,

As a resident of Ontario I strongly oppose the proposed WSIB changes. Not only will it make things harder for injured worker there is no reason to think the proposed changes will improve the WSIB system. Please deny and reject the proposed changes.

Thank you

From: Kelli Hansson
Sent on: Monday, July 24, 2023 4:06:41 PM
To: appealsfeedback
Subject: Re: Proposed changes to the appeal process

Dear members of the WSIB Board,

I have only become aware of proposed changes to the Appeal process after the consultation period has ended. I find it very disheartening that we were not notified of the consultation by WSIB, as we are awaiting our opportunity to appeal your decision on my severely ill spouse's denied claim for occupational illness. It does not seem fair that we cannot proceed with our appeal at this time because we are still waiting for the OHCOW physician to complete his review of my spouses file and occupational hygienists summary of his exposures.

Please consider extending the consultation period, as we were not notified or made aware that changes were proposed and may be enacted without allowing affected workers to weigh in on what we see are the issues of the KPMG proposed changes to something that would greatly affect our chances of being successful in our open appeal.

Does WSIB truly cares about workers who are injured or suffer occupational illnesses? If so, please allow us to have an opportunity to review the proposed changes and provide input into how these changes will affect injured and ill workers.

Sincerely,
Kelli Hansson

From: Linda Demers
Sent on: Friday, July 21, 2023 11:54:41 PM
To: appealsfeedback
Subject: Please keep the appeals timeline at six months

Dear WSIB,

I understand that KPMG has recommended to shorten the claim appeals timeframe from six months to 30 days. This email is my plea to ignore that recommendation and to keep the appeal period at six months. People have lives that they have to live (families, commitments) and they don't have all day, every day to work on an appeal. Besides, living in northern Ontario, the 30 day period would probably only be a few weeks by the time I received a letter that my claim had been denied. I worked in a business office for my 30+ years career, but still might need help with my appeal and 30 days is not nearly long enough, especially if I were battling an occupational disease, to launch an appeal. Please keep the appeals timeframe at six months! If I were out of town when the letter arrived, or didn't have Internet access to receive the notification, I might miss the appeals timeframe completely if it were 30 days. Keeping the timeframe at six months provides much more equity to all Ontarians.

Thank you for your consideration of my request.

Linda Demers

Workplace Safety and Insurance Board
Dispute Resolution and Appeals Process Value-For-Money Audit Consultation
appealsfeedback@wsib.on.ca

July 16, 2023

As a member of the public who values a fair workers' compensation system for Ontario workers suffering injury or illness because of work-related hazards, I wish to join the many voicing alarm at recommendations of KPMG's *Value for Money Audit of the Workplace Safety and Insurance Board's Dispute Resolution and Appeal Process* and at the WSIB's response. The unnecessary haste with which the Board is conducting its consultation intensifies concerns over proposed major changes which, if adopted, will severely limit or deny claimants' rights to appeal and access to a just process.

As many advocates have stated, the proposed time limits are unreasonable, leaving injured workers without adequate notice to gather the required medical evidence or find the legal support to file an appeal. With the odds stacked against them, many injured workers will simply abandon all thought of appealing claims denials or unfair compensation. The most vulnerable among them may bypass filing an appeal and accept, to their detriment, reduced benefits for a speedier payout under the proposed new cost-saving alternative dispute resolution process. Of those who do file an appeal, WSIB data from recent years (2017-2021) shows that 65-58% were denied by the Board's Appeals Resolution Officer. In creating additional barriers to moving beyond this first level of appeal, the recommendations erroneously presume all is well with the quality of Board adjudication. In fact, as documented in Freedom of Information data received from the WSIB, when appeals proceeded to the Workplace Safety and Appeals Tribunal, WSIAT rulings have overturned the majority of the Board's decisions.

I urge the Board to provide the opportunity for meaningful participation in a full public consultation process by extending the submission deadline for six months and ensuring all injured workers receive proper notice of the consultation and how they may provide feedback.

Sincerely,

Mary Hanson
115 Lambertlodge Ave
Toronto M6G 3X4

cc: Corporate_SecretarysOffice@wsib.on.ca
Minister.MLTSD@ontario.ca

Mohammad Naqvi
Group Affiliation: IWA4J
Toronto
mnaqvi@mail.com

Date July 21, 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

Re: WSIB Dispute resolution and appeals process value-for-money audit consultation

Dear Mr. Lang:

I am writing to provide feedback on the dispute resolution and appeals process value-for-money audit consultation.

This consultation should be scraped and independent consultations on these issues be held.

The value for money audit on the dispute resolution and appeals process done by KPMG is flawed. Some key issues include:

- It does not document any actual value to injured and disabled workers, the main purpose of the WSIB.
- It fails to research or understand the present experiences of injured workers with lived experience.
- It misrepresents the national and international experience in this area.

- It ignores the facts that the vast majority of WSIB decisions reviewed by the WSIAT are overturned.

My case is a striking example of the unfairness in the KPMG Value for Money Audit. As a worker, I experienced an on-the-job injury, specifically carpal tunnel syndrome in my wrist. Unfortunately, I was unaware of the proper process for reporting the injury, and both my employer and the medical practitioner were hesitant to report it to the WSIB (Workplace Safety and Insurance Board).

In such circumstances, it is crucial for workers to have provisions that safeguard their rights. These measures may include taking legal action against the employer or filing a complaint against the medical practitioner with the College of Physicians. Additionally, it is important to address issues like back pain and hearing loss, which are occupational illnesses that can develop over time. The reporting timeframe for these conditions often begins when the worker becomes aware or should reasonably have been aware that the illness is related to their work and is causing issues like numbness and swelling in the legs.

When I sought another medical practitioner's opinion about my back pain, they attributed my leg's numbness to neuropathy. This explanation seems dubious, as they might have hesitated to disclose the truth to protect the WSIB and employer. Injured worker when learns that his injury is work-related it may not be too late to file a claim.

In conclusion, it is essential for workers to be informed about their rights, reporting procedures, and potential work-related health issues. Employers and medical practitioners must also act responsibly and transparently in handling workplace injuries and illnesses to ensure fair treatment for workers.

I/we support the submission by the Ontario Legal Clinics' Workers Compensation Network of June 5th (attached).

Thank you.

Mohammad Abbas Naqvi

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

From: Nadia Staniszewski
Sent on: Thursday, July 20, 2023 3:09:23 PM
To: appealsfeedback
CC: Corporate Secretary's Office
Subject: Re: WSIB Changes in the Appeal Process

Dear Sir/Madam,

I am writing to you to address my concern about the WSIB consultation process and the eventual loss of appeal rights for injured workers.

The WSIB is providing barely any time to complete and submit responses to the consultation questions on the dispute resolution and appeals process. More concerning, is that this is taking place during the summertime – when many people are off work and on vacation. This is unacceptable.

I would like to request the following:

1. That the deadline to make submissions be extended for 6 months;

2. The consultation should occur in a public setting and should be led by experienced workers' compensation advocates;

3. All injured workers should be notified of the consultation – the radical changes proposed will impact tens of thousands of injured workers, most of whom have no idea about this consultation. Plain and simple, that is wrong.

I have had personal experience dealing with the WSIB system and I know that when the injured worker focused on recovering, experience long waiting times to see a medical specialist, has no knowledge about the appeal process, and need time to find and get help from a legal representative, drastic reductions in the time limits to appeal would further reduce the fairness of the system.

I look forward to hearing back from you as soon as possible.

Sincerely,

Nadia Staniszeski

From: Richard Kubu
Sent on: Saturday, June 10, 2023 5:31:42 PM
To: appealsfeedback
Subject: Feed back

First let me remind the Board that decisions made by WSIB internal appeal branch have an 80% overturn rate at the WSIAT. Obviously the problem is the Boards internal operations but you hired an employer, hardly an unbiased source, to screw over injured workers even more.

Recommendation A: Reduce the appeals rate by 80% by ensuring that case managers and ARO are doing their job properly. This rate indicates that your own employees aren't following the law.

Time limits: There are no time limits in the Historic Trade Off, Meredith realized that the Board was dealing with an injured worker and not lawyers. Something the current board has forgotten. And given my experience with WSIB sending out decisions after the current 6 month appeal time limit has passed. The 30 day time limit for return to work should be abolished.

Establish time lines for decisions: 5 calendar days for initial decision this is ample time for you to determine a workplace accident occurred (if I had my druthers it would be 2 days). 30 days from the appeals form to hearing date, 10 days after for decision, being generous, no need for an delay unless requested by the injured worker.

Recommendation B: Courier the decision to the injured worker, signature required, the time limits to commence upon receipt.

Alternative dispute resolution/Reconsiderations: See Recommendation A. There is no rational behind reconsiderations it is nothing more than a delaying tactic. Alternative dispute resolution is a further diversion of funds intended to go into the pockets of injured workers.

Hearings: All hearings should be oral and only in exceptional cases be in writing only. Given that your employees are working from home the technology is in place, geographical considerations are nullified. WSIB will be able to schedule hearings in a more effective and timely manner.

Return to work time line: See Historic Trade Off.

Priority: Return to work is not a priority, however money matters are.

Recommendation C: Priorities

1. Health care matters shall be hear on an emergency basis.
2. Compensation matters shall be heard on an expedited basis.
3. All other matters, including return to work, to be heard when possible.

Implementation: First you have to stop the treadmill where claims are won at the WSIAT only to be overturned by WSIB and forcing the injured worker to begin the process again. A denial of justice. I went through the process twice so speak from experience.

Recommendation D: restore justice and make decisions of the WSIAT binding on the WSIB. A 30 day time frame is excessive when dealing with compensation, all money matters should have a 5 day implementation process, injured workers should start receiving their monies within 7 days of the decision, with a 90 day lock in date giving time for the injured worker to collect and submit any and all required documentation.

Bypassing the internal appeals process: Since WSIB internal appeals branch has a failure rate of 80%, indicating that by scrapping the appeals branch would save WSIB a lot of money and time on all issues. Scrapping the internal appeals branch has benefits for injured workers as they then could get a fair hearing.

Standardized calculations: First you would have to publish those standardized calculations so that injured workers can hold the Board to account as per the WSIA and to know they are receiving benefit of law.

Recommendation E: Reduce the failure rate of the WSIB internal review process to the acceptable industry standard of less than 3%, educate your employees on how to do their job properly.

From: Russell Roy
Sent on: Sunday, July 23, 2023 4:30:28 PM
To: appealsfeedback
Subject: I have a brain injury from work accident - this policy change is inhumane

---

Many workers, particularly the most vulnerable without representatives, will be dissuaded from appealing altogether. Faced with the stress of constant deadlines and the daunting task of collecting a massive amount of complicated evidence, many workers who would have had their case succeed at appeal will simply accept the injustice that they experienced at the operations level. Putting workers in the position where the most attractive option is to give up and abandon their case demonstrates that these recommendations are completely contrary to the WSIB's duties to injured workers

I have suffered a brain injury – these changes are inhumane. Shame on all connected to this agenda. I took me 18 months wait time to get an independent neurologists appointment for an opinion and some treatment. SYSTEM = FAIL. Designed to fail and be unjust to the injured. EVIL intent.

Russell Roy

Steve Mantis
RR#1
Kaministiquia, ON P0T1X0
smantis@tbaytel.net

July 13, 2023

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

Monte McNaughton
Ministry of Labour, Immigration, Training and Skills Development
14th Floor
400 University Ave
Toronto, ON M7A 1T7
Tel. 416-326-7600
By email to: Minister.MLTSD@ontario.ca

Re: WSIB Dispute resolution and appeals process value-for-money audit consultation

Dear Mr. Lang & Mr. McNaughton:

I am writing to seek your help on the dispute resolution and appeals process value-for-money audit consultation at the WSIB..

This consultation should be scrapped and independent consultations on these issues be held.

The value for money audit on the dispute resolution and appeals process done by KPMG is flawed. Some key issues include:

- It is in contravention to the United Nations Convention on the Rights of Persons with a Disability (CRPD) as it restricts access to justice under section 14 of the CRPD. Canada is a signatory to this convention.
- It does not document any actual value to injured and disabled workers, the main purpose of the WSIB.
- It fails to research or understand the present experiences of injured workers with lived experience.
- It misrepresents the national and international experience in this area.
- It ignores the facts that the vast majority of WSIB decisions reviewed by the WSIAT are overturned.

I support the submission by the Ontario Legal Clinics' Workers Compensation Network of June 5th (attached).

Thank you.

Steve Mantis

copy: WSIB Board of Directors By email to: Corporate_SecretarysOffice@wsib.on.ca

Ontario Legal Clinics'

WORKERS' COMPENSATION NETWORK

Réseau d'échange des cliniques juridiques de l'Ontario sur la loi des accidentés du travail

An organization of community legal clinics funded by Legal Aid Ontario

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

4

- • 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).

5

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,
Co-chair, john.mckinnon@iwc.clcj.ca

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

From: Tara Asselstine
Sent on: Friday, July 14, 2023 3:02:14 PM
To: appealsfeedback
Subject: Feedback on appeals

I am a worker in Ontario and I am outraged about the WSIB consultation process and the eventual **loss** of appeal rights for injured workers.

The WSIB is not providing enough time to complete and submit responses to the consultation questions on the dispute resolution and appeals process. Also, this process is taking time during a summer month when many people will not be working. **This is unacceptable.**

I am demanding the following:

1. That the deadline to make submissions be extended for 6 months;

2. The consultation should occur in a public setting and should be led by experienced workers' compensation advocates;

3. All injured workers should be notified of the consultation. The radical changes proposed will impact tens of thousands of injured workers, most of whom have no idea about this consultation. That is unjust.

I look forward to hearing back from you as soon as possible.

Tara Asselstine

From: Taylor Jones
Sent on: Wednesday, July 19, 2023 7:49:50 PM
To: appealsfeedback
Subject: Appeals and Dispute Resolution Consultation

Good afternoon,

I am extremely concerned about the WSIB's response to the recent Value for Money Audit ("VFMA") completed by Klynveld Peat Marwick Goerdeler ("KPMG"). If the WSIB moves forward in implementing the recommendations, the changes to the WSIA system would be the most drastic since the current Workplace Safety and Insurance Act, 1997 ("WSIA") came into force. Despite the significance of these changes and the impact on injured workers, the consultation period has been brief and performative. There have been no announcements to injured workers, no public hearings, and a very brief window to provide written submissions.

In order to ensure a fair consultation, I am requesting:

1. The consultation period be extended by six months;
2. The consultation be open and public, with involvement from injured workers and experienced advocates;
3. Provide notice to injured workers promptly and clearly, so they are aware of the proposed changes which could drastically affect them and have the opportunity to participate.

Previous consultations also included very short time frames but were not followed by any urgent action from the WSIB, such as the Serious Injury Program Consultation and Temporary Employment Agency Consultation. It is not clear why the consultations must be so hurried. A primary difference in this case is that the WSIB has already come up with a plan for implementing recommendations, which are far more significant. The provincial government has similarly been slow to implement changes to the legislation, such as the increase to workers' compensation rates which was a campaign promise in 2022.

The appeals system is not in crisis and there is no reason for a rushed consultation. The Appeals Services Division ("ASD") is consistently nearing or exceeding their targets. Failing to extend the consultation to allow for proper participation will limit workers' access to benefits and services they are entitled to and undermine the workers' compensation system in Ontario.

In consideration of the imminent deadline for the current 'consultation', my thoughts on the proposed changes are below.

General

It is clear from the recommendations in the VFMA audit that KPMG is not familiar with the WSIB system or mandate in Ontario or elsewhere, or administrative law in general. The recommendations certainly fail to serve the injured workers whom the legislation is in place to protect. The purpose of the WSIA is to promote healthy and safe workplaces, facilitate return to work and recovery of injured and ill workers, and provide compensation and benefits to injured and ill workers. The report from KPMG does not detail how their recommendations would serve this purpose or include any insight about the impact of these recommendations on workers.

The purpose for annual audits is to ensure programs are running efficiently. The report does not illustrate how the recommendations will achieve this purpose, and step outside of this scope by suggesting sweeping, unnecessary changes. The WSIB's response and failure to include workers in this process or provide meaningful consultation further undermines the purpose of the WSIA.

KPMG further fails to provide information on internal factors at the WSIB. There is minimal focus on staffing levels, decision quality or consistency, training provided to decision makers, or delays within the WSIB. For example, reconsiderations are supposed to be completed within two weeks, however, often take several weeks or even months. Reconsiderations are often essentially re-dated copies of the original decisions. Appeals decisions are supposed to be implemented within a month, however, often take several months or longer, and often involve new entitlement decisions and therefore result in new appeals being filed. These are two recurrent issues which decrease the efficiency and quality of the appeals process as well as access to justice. There is no consideration on how many ARO decisions are overturned at the WSIAT. There is no input from front line staff or CUPE, the union representing decision makers.

KPMG recommends the WSIB take a number of steps concerning representatives, including keeping a roster of qualified representatives, review competency and training requirements, and tie compensation to level of effort. This recommendation is one of the clearest examples of KPMG's ignorance of the workers' compensation system or administrative law and legal processes in general, and the roles of the WSIB and the Law Society of Ontario.

Finally, the KPMG asserts that a number of recommendations are supported by a jurisdictional scan. Of note, the KPMG only included information from workers' compensation systems with more restrictive time limits or appeal rights, and omitted the systems from provinces with longer appeal periods or greater appeal rights.

Time Limits

The proposed time limit changes for objections, evidence, and filing appeals will amount to claim suppression. The six month time limit for most decisions is found in section 120 of the WSIA. The Board does not have the jurisdiction to ignore this, and the government would be remiss to change it. Decisions are often not even received by workers for two weeks, which leaves only a couple of weeks to file their objection with their position fully outlined. It is unrealistic to expect workers would be able fairly and fully detail their position, as it can take four weeks for their claim files to be sent to them. Additionally, the correctness of a decision is not always obvious within thirty days: for example, recovery time may exceed estimates, work transition plans may prove to be unsuitable, benefit duration may prove to be inadequate.

After filing the objection, workers would then be required to provide all evidence within another thirty days, when it is probable they would not be able to even obtain all of their evidence in that period. It is extremely difficult to be able to get in to see a specialist, get any diagnostic imaging completed and interpreted, and have the reports submitted by the doctor within a month. An unrepresented worker would face great difficulty in understanding and satisfying these requirements as they are not aware what information is required or able to facilitate these referrals on their own. If they are able to find a representative after receiving the decision, the representative would then face the same time challenges and thus face great difficulty in meeting their professional obligations. In summary, these changes limit workers' abilities to have their claims fairly adjudicated, participate in the appeals process, and obtain quality representation.

KPMG further recommends a requirement for Appeals Readiness Forms ("ARF") to be filed within one year of the initial decision. Again, the WSIB does not have the authority to create a time limit. The recommendation also contradicts the recommendation the Board to consolidate all matters and hear cases holistically. There are numerous factors beyond the workers' control which could make an appeal of all issues within a year unrealistic: recovery delays or complications, health care interventions, and retraining or participation in a return to work plan all often take upwards of a year. It can take months for case managers to obtain or review evidence or make entitlement decisions, particularly where specialized decisions (i.e. psychotraumatic or chronic pain entitlement) are required.

Appealable decisions

The limits on which decisions can be appealed are equally concerning. Again, this extends beyond changing WSIB policy and would require changing the legislation (section 119(3) of the WSIA). The recommendation is also not supported by the WSIB's own data. For example, Non-Economic Loss ("NEL") benefits are not simply standardized calculations and include a number of variables. Nearly a quarter (24%) of Operations level NEL decisions were allowed or allowed in part by Appeals Resolution Officers in 2021. This does not factor in the number of NEL appeals that were allowed or allowed in part by the Workplace Safety and Insurance Appeals Tribunal (WSIAT).

Alternative Dispute Resolution (ADR)

The proposals regarding ADR are problematic and yet another prime example of KPMG's ignorance regarding administrative law and natural justice. KPMG recommends that front line decision makers and ASD staff be trained in mediation and ADR. A cornerstone of mediation is that the mediator is a neutral third party, which certainly would not be possible for WSIB staff. The idea of incentives is very concerning. As it stands under the current process, workers are 'informed' of their appeal rights by a brief appeals paragraph hidden in decisions. It is a rarity to have a decision maker explain objections or appeals to a worker. I am concerned that there would be a similar lack of transparency if these recommendations are provided, and particularly if there are incentives to settle early and multiple time limits to meet early on. There is additional concern for unrepresented workers who may agree to far less than they are entitled to because they don't understand their rights or can't afford to wait any longer for benefits.

Conclusion

There are numerous issues with the Audit, KPMG's recommendations, and the WSIB's response.

The only correct approach at this point is to scrap the current consultation in favour of a longer, public consultation so that all of these concerns can be discussed in an open forum with true input from those most affected: injured workers.

Sincerely,

Taylor Jones
Licensed Paralegal
(she/her)

The Legal Clinic

From: Russ Archibald
Sent on: Wednesday, July 19, 2023 1:23:48 PM
To: appealsfeedback
Subject: Proposed implementation of KPMG VFMA in the WSIB ASD program

---

Hello

As a Teamsters Canada Rail Conference worker representative/advocate who is concerned and deeply committed to promoting worker safety and welfare, I am writing to express my unwavering support for the United Steelworkers (USW) consultation submission that firmly rejects KPMG proposed changes to the Workplace Safety and Insurance Board (WSIB) Appeals Service Division. The USW consultation drafted by Andy LaDouceur and Sylvia Boyce is very accurate in its approximation of the catastrophic effect these changes would have on injured worker's rights.

The proposed changes to the WSIB Appeals Service Division, if implemented, would undermine the rights and protections of injured workers, leaving the most vulnerable with no choice but ignore and not report their injuries. In the event that a worker is so severely injured that they can not possibly return to or stay at work, then they are left with not alternative but to access other tax payer funded federal and provincial supports such as CPPD, DOSP and OW. The loss of earnings and health care costs are properly the obligation of the injury employer. The changes would also put additional stress on the already stretched provincial health care system by making OHIP fund the treatment for a work related injury.

The severely reduced time limits that are proposed in the changes to the ASD will make it improbable or impossible for injured workers to appeal a negative decision. It will also restrict their time and ability to find someone to represent them in that appeal and impossible for that worker representatives to properly prepare an appeal.

The proposed changes to the Appeals Service Division practices and procedures will have a chilling and claim suppressing affect on all reportable injuries in all industries. It will also have a negative impact on our already overburdened social safety net systems. As a concerned citizen and worker representative, I stand in solidarity with the USW District 6 in opposing these changes to the WSIB Appeals Service Division that would compromise workers' safety and welfare. I urge the WSIB to consider the invaluable insights presented in the USW's presentation and recognize the importance of protecting the rights of injured workers.

In conclusion, I implore the relevant decision-makers to carefully review the consultation submission from United Steelworkers District 6 and take decisive action to preserve and strengthen injured workers' rights, including the right to fair representation.

Thank you
Sincerely,

Russ Archibald
Chairperson
Provincial Legislative Board of Ontario
Teamsters Canada Rail Conference

From: Tracy Currie
Sent on: Wednesday, July 12, 2023 5:12:48 PM
To: appealsfeedback
Subject: Extend Response Consultation Time for KPMG Recommendations

---

Good Morning,

I'm concerned about the WSIB consultation process and the eventual loss of appeal rights for injured workers.

The WSIB is not providing enough time to complete and submit responses to the consultation questions on the dispute resolution and appeals process. More concerning, is that this is taking place during the summertime – when many people are off work and on vacation. This is unacceptable.

I would like to request the following:

1. That the deadline to make submissions be extended for 6 months;

2. The consultation should occur in a public setting and should be led by experienced workers' compensation advocates;

3. All injured workers should be notified of the consultation – the radical changes proposed will impact tens of thousands of injured workers, most of whom have no idea about this consultation. Plain and simple, that is wrong.

The KPMG Recommendations to Shorten Appeals Times essentially muzzles injured workers and their support network such as doctors, and legal representatives. It doesn't appear that KPMG understands the system from the injured workers perspective but only cares about the employers perspective and the WSIB already is biased toward the employer as demonstrated by how many workers need to go to the tribunal to get a fair assessment.

The Appeals System needs to remain the same because:

- KPMG does not understand the injured workers needs and are biased towards employers
  It can easily take many months to access a family doctor and obtain needed documents, and furthermore it takes months to access a medical specialist
- Injured workers need time to collect themselves following an injury and typically do not know the WSIB process and it takes time to find out who they need to contact and for what
- Occupational Injuries take many months and sometimes years to access appropriate medical specialist
- Legal representation can take much more time to access than the proposed appeal time limits allow
- Legal Aid Clinics are already understaffed and wait times have gotten longer

The KPMG recommendations are not in the best interests of injured workers and creates a greater imbalance of power. This is why there needs to be more time given to complete and submit responses to the consultation questions on the dispute resolution and appeals process.

Please acknowledge that you have seen this email. I look forward to hearing back from you as soon as possible.

Kind Regards,
Tracy Currie

From: Wendy-Ann Moulton
Sent on: Monday, July 17, 2023 4:19:20 PM
To: appealsfeedback
Subject: Appeals feedback

I am a worker in Ontario and I am outraged about the WSIB consultation process and the eventual loss of appeal rights for injured workers.

The WSIB is not providing enough time to complete and submit responses to the consultation questions on the dispute resolution and appeals process. Also, this process is taking time during a summer month when many people will not be working. This is unacceptable.

I am requesting/demanding the following:

1. That the deadline to make submissions be extended for 6 months;

2. The consultation should occur in a public setting and should be led by experienced workers' compensation advocates;

3. All injured workers should be notified of the consultation. The radical changes proposed will impact tens of thousands of injured workers, most of whom have no idea about this consultation. That is unjust.

I look forward to hearing back from you as soon as possible.

From: William John Young
Sent on: Thursday, July 6, 2023 8:59:32 PM
To: appealsfeedback
Subject: Dispute resolution and appeals process value-for-money audit consultation

This email provides my comments (shown in red) with respect to the recommendations under consideration for dispute resolution and appeals process coming out of the value-for-money audit.

Recommendation 1.1: We should establish expertise in alternative dispute resolution within front-line decision-makers and the Appeals Services Division to provide early resolution and reduce the volume of cases going to appeals.

Recommendation 1.1: Our alternative dispute resolution and appeals processes should only start once the workplace party has clearly documented the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy.

Recommendation 1.1: We should adopt set timeframes for the reconsideration process.
The audit recommends we adopt a 30-calendar-day time limit through legislative change. We will review the proposal for legislative changes with the Ministry of Labour, Immigration and Training and Skills Development. Ultimately, the Government of Ontario has jurisdiction over changes to the WSIA. However, we can implement timeframes that apply after we receive an intent to object form. For example, we could change the process so that once an intent to object form is submitted, a response on the reconsideration must be made within 30 calendar days and we could grant an additional 30 calendar days if any supplemental information is required and then allow 30 calendar days to complete the alternative dispute resolution and reconsideration processes and communicate the decision back to the person with the injury or business.

The 30-day appeal time limit for any issue should be a non-starter for a variety of reasons as follows.

In my 30 years of consulting and paralegal experience, WSIB decisions:

1. Frequently are incomplete, i.e., address one or some issues in dispute, but not all issues.
2. Frequently are not sent (or even copied) to the employer's legal representative, i.e., the WSIB does not send the decision to the employer representative who wrote to the WSIB in the first place (so, reaction or appeal by the employer representative within 30 days will be difficult)
3. Sometimes are never received – period.
4. With the current Canada Post mail service, it can take two weeks or longer for mail to arrive (so again, reaction or appeal by the employer or the employer's representative within 30 days will be difficult).

i. What appealable issues do you think are appropriate for this mediation-arbitration model?
- **Any issue.**

i. What principles should guide the mediation-arbitration approach? What else should we consider?
- **WSIB personnel should be flexible in decision-making and not have their hands tied, i.e., not be fettered by considering WSIB policy to be "the law."**
- **Merits and justice should be the driving principle.**
- **Avoiding severe adverse financial impacts for employers should be a guiding principle.**

i. If mediation does not resolve the issue, what factors should be considered to determine whether an oral hearing or a hearing in writing should be used for the arbitration component by the Appeals Resolution Officer?

- If an appellant goes through the mediation process in a transparent and open-minded manner (criteria could be set), then the appellant should be eligible for an oral hearing without the expense, time delay, and difficulty of proving to a subjective Appeals Resolution Officer that a hearing is warranted.

i. To ensure expediency, what would be a reasonable timeframe for the mediation component? Is 30 calendar days reasonable?

- I have serious concerns about adherence to a 30-day time limit for any part of a mediation or appeal process (see my earlier comments).

i. How might alternative dispute resolution be used by front-line decision-makers? If there is a dedicated team of front-line operational experts delivering alternative dispute resolution, how much should other front-line decision-makers be trained in the approach?

- We have not been informed of appeal volumes, so we cannot comment on whether a dedicated team of ADR "front-line operational experts" would be able to handle the appeal volumes.

- ADR expertise takes a lot of training and experience, so it is a little grandiose to talk about the WSIB having ADR "front-line operational experts."

- On the employer revenue side of WSIB business there are circumstances where ADR is either impractical, or not needed, nor would it resolve an "objection" on issues such as:

- A straightforward business activity classification where WSIB coverage is mandatory when workers are employed. The employer may not agree that coverage should be mandatory, but it is and there is nothing to mediate as the employer is required to have WSIB insurance. An example would be a restaurant where when workers are employed, coverage is mandatory. This may seem like a trite matter, but there are thousands of restaurant businesses registered with the WSIB every year.

i. What factors should we consider in making the above information mandatory to initiate the dispute resolution and appeals process?

- Making the ADR process mandatory is in my view heavy-handed.

- Appellants should be given the choice of whether to utilize the ADR process.

- There could be rules whereby is an appellant does not utilize the ADR process, then they either forfeit their right to an oral hearing with an ARO or must demonstrate to the ARO that an oral hearing would be necessary, or helpful.

- There is nothing wrong with having a requirement to stipulate on the notice of appeal/objection the rationale for the appeal/objection.

- There currently is a formal "Notice of Objection" form for claim matters, but there is not a similar form for employer revenue appeals, so that disparity should be rectified.

- Again, I have serious concerns with an objection time limit of 30 days.

i. What factors should we consider when implementing 30—calendar-day timeframes for each step in the above reconsideration process?

The Ontario Ministry of Finance stipulates the following time limits for filing objections.
Notice of Objection - Time limits
180 days

- **Liquor Tax Act, 1996 (Beer, Wine and Spirits Taxes)**
- **Corporations Tax Act (Premium Taxes and specified refunds only)**
- **Electricity Act, 1998**
- **Employer Health Tax Act**
- **Estate Administration Tax Act, 1998**
- **Fuel Tax Act**
- **Gasoline Tax Act**
- **Land Transfer Tax Act**
- **Mining Tax Act**
- **Race Tracks Tax Act**
- **Retail Sales Tax Act**
- **Taxation Act, 2007 (specified refunds only)**
- **Tobacco Tax Act**

90 days

- **Ontario Guaranteed Annual Income Act**

60 days

- **Community Small Business Investment Funds Act, 1992**

30 days

- **International Fuel Tax Agreement (IFTA)**
- **Highway Traffic Act (International Registration Plan)**

Again, I do not believe it would benefit either the employer or injured worker communities to go to a 30-day objection time limit on appeals.

Recommendation 1.2: We should implement a one-year time limit after the initial decision date for appeal readiness forms to be submitted. Both parties should be required to include their proposed resolution on the appeal readiness form, which will help define the resolution method, the scope of the dispute and the necessary expertise and documentation required.
Currently, once the time limit to object to a decision has been met, people with injuries and businesses have no time limit as to when they can submit the appeal readiness form. This means that an appeal readiness form can be submitted years after the original decision was made, and as mentioned above, without enough information about their desired outcome (i.e., the proposed remedy). As a result, it takes us more time and effort to address the reconsideration which makes it difficult for us to offer consistent service for all claims
For comparison purposes, WSIAT requires an appellant to file:

1. **The Notice of Appeal within six months of a WSIB final decision.**

2. **A Readiness Form stipulating the appellant is ready to proceed.**

3. **A Confirmation of Appeal Form within 24 months of filing the Notice of Appeal.**

i. If we were to implement a new one-year time limit from the decision date to submit an appeals readiness form on January 1, 2024, how should we manage appeals from before this date where an appeal readiness form has not yet been submitted?

Whether the WSIB uses an "appeals readiness form" or some kind of "confirmation of appeal" form, my suggestion would be consistency with WSIAT practice. My preference would be to retain the six-month appeal time limit and a 24-month time limit to proceed with the appeal once a notice of objection is filed would be reasonable. For

employer revenue issue appeals though, there needs to be introduction of a WSIB notice of objection form.

a. Should appeals from before this date be exempt from the requirement to send an appeal readiness form within one-year?
Yes – why would policy be changed retroactively?

a. If we were to make appeals from before this date exempt from the requirement to send an appeal readiness form within one year, what would a reasonable time limit be? Would one year from the new effective date be reasonable?
- **Again, my view is that there should be something like a 24-month time limit. Any limitation to the appeal rights of an appellant should be subject to repeated notice by the WSIB of appeal rights time limits.**

i. Under what extenuating circumstances should we consider extending the one-year time limit for submitting the appeals readiness form?
Currently the WSIB objection form stipulates that the appellant has met the time limit requirement for notifying the WSIB that an issue is in dispute. It also stipulates there is no time limit for filing the objection form. While I really like the current "arrangement," it would not be unreasonable to have a 24-month requirement to have filed the formal appeal. Again, a process such as that utilized by WSIAT would be preferrable.

i. Is January 1, 2024, a reasonable start date for the new one-year appeal readiness form time limit? How much time would you need to make sure you have enough notice for a start date?
Again, my preference would be a 24-month window between filing a notice of intent to appeal and when the formal appeal must be filed. Whether there is a "readiness form" or an additional "confirmation of appeal" form to file, there are circumstances where 12 months can be problematic.
There could be a process where an extended time limit can be requested. I do not like multiplying rules and regulations but see my comments below with respect to a time limit extension.

The current criteria we consider for a time limit extension is in the **Appeals practices and procedures** document and below:

1. Whether the person received actual notice of the time limit. **Agreed, but there also needs to be stated decisions on all issues under appeal.**
2. The person was experiencing serious health problems. **Agreed. This stipulation should also extend to the person's legal representative.**
3. Someone in the person's immediate family has experienced serious health problems. **Agreed. This stipulation should also extend to the immediate family of the person's legal representative.**
4. The person had to leave the province or country due to an illness or death in their family. **Agreed. This stipulation should also extend to the person's legal representative.**
5. The person has a condition that prevents them from understanding or meeting the time limit. **Agreed.**
6. The person objected to other closely related issues within the time limit, and it would be impossible to address all of the issues separately. **Agreed.**
   - **Consideration should also be given to whether the appellant has been able to obtain suitable legal counsel. Some issues in dispute can require specific expertise to address and an appellant may have difficulty finding the right legal representative.**

Recommendation 2.3: We should establish criteria for determining in-person or online hearings by considering factors like geographical location, suitability and appropriateness of technology, and accessibility.

Since the start of the pandemic in 2020, we have been very flexible in determining the method of resolution for appeals. We have worked directly with the parties to best accommodate their needs either online, in person, or in a hybrid manner for oral hearings. We conducted a survey in 2022 on online oral hearings and it showed that they were positively received and that we should continue to

offer them. Our current oral hearings are online. We make exceptions for in-person oral hearings in unique cases impacted by things like accessibility needs or technological challenges.

i. What other factors should we consider in determining whether the oral hearing should be offered in person or online?

For employer revenue issues in my view whether oral hearings are held in person or online is not an issue. I actually prefer online hearings in view of the terrible Toronto traffic.

My bigger concern is that it is impossible for employers with financial constraints to obtain an oral hearing on WSIB revenue matters in view of the WSIB's restrictive two-stage process of obtaining an oral hearing. Having an oral hearing should be the employer's option in WSIB employer revenue appeals, not a matter of the ARO's discretion. For example, determination of an employer's WSIB classification for rating purposes without hearing testimony from the employer is in my view patently absurd.

Recommendation 3.1: We should make sure that return-to-work decisions with a 30-calendar-day time limit are prioritized and expedited through the appeals process.

i. What factors should we consider in expediting return-to-work issues when there are multiple issues in an appeal?

This not my area of expertise or experience and I would not presume to comment beyond

Recommendation 3.2: We should reinforce the 30-calendar-day time limit for appeal implementation and ensure this is measured across the organization.

Case Managers have 30 calendar days to implement appeals decisions from the Appeals Services Division or WSIAT. Decision implementation timeframes depend on how much of the required information is available on the claim file. If the Case Manager needs more information from the workplace parties, implementation may take longer than 30 calendar days.

Currently, the Appeals Resolution Officers' decisions sometimes lack instructions and the information required to implement their decision. We will review the way Appeals Resolution Officers' decisions are written to make sure they include directions for their decision to be implemented including any supplementary information needed. The decisions will also address the issue and entitlements requested by the parties as identified on the Appeal Readiness Form or the benefits that flow from the decision as part of the parties' proposed resolution to the appeal.

i. What factors should we consider in reinforcing the 30-calendar-day timeline for appeal implementation?

- **One consideration is whether the operations area in employer revenue appeals is going to agree with an ARO's decision if it favours the employer's appeal.**
- **Most appellants would be reasonable in giving the WSIB longer than 30 days to implement a favourable decision, provided the WSIB gets it right.**
- **If it is going to take longer than 30 days to implement an ARO's decision, the operations area should keep the appellant informed.**

Recommendation 4.2: We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

We are assessing examples of decisions we make that rely on standardized calculations to determine if we should exclude them from our internal appeals process. This might include certain permanent impairment rating (quantum) decisions, and their non-economic loss monetary award calculations; certain loss-of-earnings benefits calculations and decisions; and certain personal care allowance decisions.

i. If we were to exclude decisions that rely on standardized calculations from our internal appeals process, what are some factors we should consider?

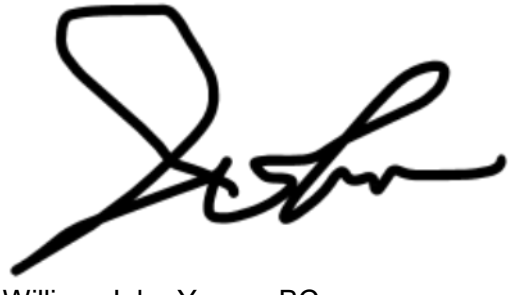
- **I do not handle matters involving the above-mentioned types of calculations but would not want calculations involving an employer's insurable earnings or premiums to be excluded from the WSIB's internal appeal process.**

i. Are there other decision types that we should exclude from our internal appeals process? **My preference would be to allow the appellant, specifically in employer revenue issue appeals to request escalation of an objection to WSIAT, at the employer's own discretion. In other words if the operations area (Employer Service Centre or Employer Audit Services [Stakeholder Compliance Services]) has made their final decision and escalated the matter to the Appeals Services Division, the employer should have the right or option of requesting the operations area's decision be considered the final decision of the Board and be able to escalate the objection or appeal to WSIB without having to fight with the Appeals Services Division for that right.**

i. Sometimes in different claims for the same person, an issue in dispute may be active with WSIAT while another issue is active with us. Should there be options to request for us to exclude some decisions from our internal appeals process to pursue the holistic resolution of the issues for the person or business at the WSIAT? **Agreed.** Under what circumstances would this be best? **Where the issues overlap or intersect. For example, an employer classification appeal and the effective date of the classification under appeal. The same would be true of contractor coverage status appeals, i.e., whether workers or independent operators and the effective date of the ruling. Generally, those issues are handled as one appeal, but they should be kept together.** What else should we consider? **Any issues affecting premiums for an employer appeal should be dealt with in one appeal process to avoid the requirement for multiple premium adjustments affecting the same periods once WSIAT makes a final decision.**

Thank you for the opportunity to provide feedback.

Sincerely,



William John Young, BCom
Licensed Paralegal
Notary Public for the Province of Ontario
Commissioner for Taking Affidavits
WILLIAM JOHN YOUNG PROFESSIONAL CORPORATION
19 Green Meadow Crescent
Richmond Hill, ON L4E 3W7
Phone: (416) 726-6174
Fax: 1-416-352-1810
Email: jyoung984@rogers.com
www.williamjohnyoung.com

From: Various
Sent on: Sunday, September 3, 2023
To: appealsfeedback
Subject: WSIB Consultation on dispute resolution and appeal process audit recommendations

---

I am writing to provide feedback on the dispute resolution and appeals process value-for-money audit consultation.

The recommendations from the KPMG 'Value for Money Audit' are misinformed, misguided, and will lead only to further harm to injured workers. The WSIB was designed to *help* injured workers, and is instead mentally damaging workers, eliminating options for compensation or access to much needed healthcare, and leaving workers in poverty without redress. If the WSIB seeks to eliminate delays or inefficiencies, the answer is not creating new barriers on workers with impossible timelines and limiting their right to appeal. The WSIB should review its adjudication practices at first instance, and give appropriate weight to medical evidence from treating healthcare practitioners.

The WSIB should be guided by the voices of the workers it was designed to serve, and not by false determinations of 'value for money' by their misinformed auditors. Injured workers have reached out to the WSIB consistently with our allies and community delegations, but there has been no proper communication or consultation. All we heard from the WSIB was that no one was able to talk to us, and the WSIB locked us out at the door of the WSIB head office building in Toronto during our community delegations on Injured Workers Day in 2022 and Day of Mourning in 2023. All injured workers, with their injuries and pains, had to stand outside of the WSIB building to deliver injured workers' group letters to demand justice. This shows that the WSIB has no accountability for injured workers and the community.

A recent Freedom of Information request from the Ontario Network of Injured Workers Groups revealed that in 2022, the WSIAT overturned almost 80% of WSIB decisions that came before them. Similarly, the first quarter of 2023 has seen almost 75% overturned. This highlights the poor decision making at the operations level, the real problem in the WSIB. If fixed, better decision making at the operations level would have the best effect on reducing the number of appeals while simultaneously providing justice for injured workers.

I support Injured Workers Action for Justice (IWA4J)'s submission and demand the WSIB get rid of the KPMG recommendations and best carry out its mandate to serve the community for a more fair and full compensation system for workers.

Regards,

Celine McDonald
Tom Orlando
Jogesh Birtharia
Mohamed Housesin Baker
Novlette Evans
Yvonne Hinds
Aaron Gervais
Sudarshan Tonk
Darshika Selvasivam
Cathy Suklje
Kelly Vegan