Workplace Safety and Insurance Board

Consultation on Modernization of the Appeals Program

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Submitted to: **Workplace Safety and Insurance Board**

Submitted by: **Ontario Bar Association, Workers' Compensation Section**

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Table of Contents

Introduction

The OBA

As the largest voluntary legal organization in the province, the OBA represents approximately 17,500 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 37 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several policy initiatives each year - both in the interest of the profession and in the interest of the public.

The OBA Workers' Compensation Section

The Workers' Compensation Section ("the Section") of the Ontario Bar Association (OBA) has approximately 200 members, including the leading practitioners in the field. The Section is a unique meeting place for employer and worker representatives who practice in the workers' compensation/workplace insurance field. The Section also has neutral members from the Workplace Safety and Insurance Board (WSIB) and Workplace Safety and Insurance Appeals Tribunal (WSIAT). The Section sponsors educational events throughout the year, including an annual day-long continuing legal education session and the Ron Ellis Award dinner, where an annual award of excellence is made to an advocate, neutral or other deserving recipient. Because the Section has members from both workplace communities and from the adjudicative agencies which these advocates deal with regularly, it is able to have balanced and constructive conversations on issues and challenges for this sometimes contentious area of practice.

The issues raised in the WSIB's consultation on modernization of the appeals system are vital to the members of the Section. This submission reflects the views of the worker and employer members only, since the WSIB and WSIAT members must abstain from involvement in a consultation of this nature. We have been able to reach consensus on a number of important issues, and hope that this submission can contribute to the improvement of the WSIB's appeals system.

We must note that our Section members include many of the most experienced and well resourced advocates practicing in this area of law. This means that we would be comfortable with many changes which bring the WSIB appeals process more in line with WSIAT and other tribunals. However, we realize that many workers and employers in the appeals system may be less well represented, or in fact not represented at all. Overall, this reality needs to be taken into account. We mention in this submission at several points where it is particularly important.

The structure of the submission follows closely that of the WSIB consultation paper. At the end, we raise some additional issues and suggestions.

Improvement in dispute resolution is a collective responsibility

Our Section believes strongly that improvement in dispute resolution is not just WSIB's responsibility – it is a collective responsibility for all key participants in the appeals system. This means that employer and worker representatives must play a constructive role and think about all possible ways to encourage effective and early dispute resolution.

In our discussions, we have observed that, generally speaking, there is a lack of a culture of cooperation in dispute resolution among representatives. This is much different from other areas of law, where in spite of representing different clients and/or interest groups, advocates are often able to evaluate the strengths and weaknesses of their cases and come to acceptable negotiated or mediated settlements. Our Section is committed to contributing to the development of an improved culture of cooperation on dispute resolution. When we evaluate various proposals from WSIB, as well as expressing our views on whether they will improve the appeals system, we are also specifically trying to determine whether the new approach will help strengthen dialogue and cooperation between worker and employer representatives.

Specific recommendations

1. Operating Area Decisions

We welcome the WSIB's proposals to provide improved reasons, especially including the policy reference and a revised appeals process paragraph. This change is critical so that parties have a clearer understanding of the legal foundation for the WSIB's decision, as well as how to challenge that decision. Given the WSIB's announced intention to more strictly adhere to time limits, ensuring that parties clearly understand the appeals process and the time limits is also critical. This means that WSIB decisions must provide more prominent notice of the nature and implications of appeal time limits. To facilitate prompt filing, WSIB should consider simply attaching the Intent to Object Form to decision letters.

In improving the operating area decisions, we recognize the challenge of mass adjudication by a large number of Board decision makers with a wide range of experience, analytical and writing skills. However, reducing the number of cases that are taken to appeal and the length of time it takes to get them there starts with decision making at the operational level. Specifically, these decisions must reflect the evidence that has been gathered, and provide a clear analysis of the case. This will require a significant investment in training front line case management staff.

To that end, we are prepared to offer our services- as both employer and worker counsel who appear before the WSIB, to assist in the training efforts that may be necessary to achieve the necessary decision making at the operational level.

2. Time Limit to Object

There are two issues that arise with respect to time limits. In respect of return to work cases, we are firmly of the view that objections to return to work decisions need to be pursued in a timely way. As a result, we are of the view that employers and workers should generally be required to adhere to the time limits on return to work decisions

The WSIB has also provided a list of factors (in Appendix 3) as to when time limit extensions will be granted. In reviewing that list, we would offer the following comments:

The criterion of whether the parties were able to understand the time limit should be explained in more detail. We can see a number of different issues here. First, the worker may have a language barrier that prevents him or her from understanding the decision. Second, the worker may have a cognitive barrier that prevents him or her from understanding the decision. This cognitive barrier could include a mental health problem that limits (or prevents) the worker from understanding the appeals process. Those would appear to all parties be reasonable grounds to extend the time limits. It is our view that the WSIB should make this clearer to ensure that this part of the policy is not misinterpreted. It is not clear to us whether there would be any other circumstances where a worker could not understand the decision.

The criterion on a substantial miscarriage of justice is very unclear and undefined. We are not sure why it was included by the WSIB or what sort of cases would fall underneath this criterion. This needs to be clarified.

In considering any time limit extension, there should be some reference given to the prejudice that the participating party might suffer if the time limit was extended. In defining prejudice, however, it will be important for the Board to ensure that it does not include having a decision reversed. Additional costs (for an employer), or having benefits rescinded (for a worker) does not equate to prejudice in the legal sense. Rather, prejudice means the loss of an ability to defend a party's position or advance a party's case.

Overall, a stricter adherence to time limits is appropriate. However, it has to be done in a way that ensures that the WSIB balances the rights of both employers and workers with the need to ensure finality in the administration of its cases. It also needs to be communicated clearly to the practitioners that appear before the WSIB. We also specifically recognize that account must be taken of the special vulnerability of unrepresented parties, especially those where English is not their first language.

3. Intent to Object Form

The WSIB has proposed procedural changes to the intent to object form. These changes should be embraced for both procedural and substantive reasons. Specifically, we would make the following points:

It is important for the WSIB, and the opposing party, to know the case that they have to meet. Requiring the completion of these forms, including a requirement to provide additional information, will ensure that appeals are processed more promptly and that parties know the case that they have to meet, and can promptly respond to it.

If the WSIB's strategy to reduce the number of appeals, and the waiting time to have the appeals heard, is to be successful, then that strategy needs to start with the parties to an appeal outlining their case at the earliest possible moment. However, it is equally important to ensure that a party's ability to bookmark an appeal does not require them to prepare their entire case.

As part of this initiative, the WSIB should move to a system where objection forms are completed and submitted online.

4. Objecting to a Decision

We are generally supportive of the WSIB's approach on objecting to a decision. We would note three points that the WSIB should implement in managing objections:

The intent to object form should be sent out at the same time as the participant form, so that both sides have an opportunity to outline their position. One of the flaws that we see with the WSIB's new process is (as discussed below) that it can lead to endless trips to the reconsideration team, without a final decision ever being made. It is critical for the WSIB to streamline the consideration of a case, and to do so in a way that considers the views and issues of both sides.

The participating party should, as currently happens, be allowed to participate in the appeal if they submit their participant form beyond the thirty days allotted to complete the form. However, a party submitting a participant form late should not be entitled to have any part of the appeal process either delayed or re-done, unless they can demonstrate that they meet the criteria for an extension of time limits as outlined above.

As is noted throughout our submissions, the WSIB should move to an online system for forms completion as soon as possible.

5. Objection Form

This set of proposals would establish a formal requirement for documentation of the appeal before it would be considered by the Appeals Branch. This includes submission of an Objection Form and more specific documentation where an oral hearing is being requested. The provision of extensive documentation would also provide the basis in some cases for reconsideration through the Objection Intake Team. It is important, from our perspective, to ensure that the completion of the Objection Form is a party's opportunity to present its full case. A party who completes an objection form should be putting their best foot forward- and outlining their case.

WSIB is also stating that once the Intent to Object Form has been submitted, there would be no time limit for bringing forward the appeal by way of filing the Objection Form.

We generally support the proposal. This would make the WSIB approach similar to that adopted a number of years ago by WSIAT. We do caution the WSIB that they need to take into account the situation of unrepresented parties, who will struggle to provide the same level of information as an experienced representative.

We are also concerned about the sometimes very long delays in bringing appeal cases forward once the *Intent to Object* form has been submitted and the appeal time limit met. In some situations, we are seeing appeals brought forward a number of years later. For workers, this means, for example, that an appeal of initial entitlement may come when they are already in a labour-market re-entry program; for an employer, it could mean responding to a complex entitlement matter where witnesses are unavailable or have faded and, in general, the available information is limited. Section members observed that in at least some cases, it appears that some clients may be informed by their representative that their appeal is being brought forward, when in fact no action is being taken by the representative.

There was significant sentiment in the Section that WSIB should adopt an approach similar to that at WSIAT, where notice is generally given at the two year point that the appeal needs to be brought forward; and ultimately the appeal can be dismissed if no action it taken. However, there was also concern that for the unrepresented or poorly represented worker, especially those with mental health problems, the implications of a time limit to bring the appeal forward would be serious. We all agreed that it would be helpful if the WSIB established a process of sending a letter to the representative copied to the worker/employer, at the two year point, noting that no action had been taken and asking the representative to respond as to their plans. This would help expedite appeals in many cases.

6. Objection Intake Team

This is an area where both employer and worker representatives have serious issues with the WSIB's process. The problem starts with the manner in which the objection intake team considers a decision. They get the decision once the objecting party has advanced all (or substantially all) of its new information. They do not have the information from the other party.

Once they have this information, as we understand the process, the objection intake team will then review the material (from one side only) and, if they disagree with the decision, will return the matter to the operating area. This system has the potential to produce endless reviews of decisions that never reach the appeals branch. As an example, a worker objects to a decision, and provides new information. The employer is not involved in the process, and the objection intake team sends the objection back to the operating area to reverse the decision. The employer then objects, and provides new information, which causes the objection intake team to find for the employer, and then reverse the decision again. It then goes back to the Operating area for the worker to object again. This could go on forever. In short, the objection intake team would be functioning as Decision Review Specialists, but without a right for the losing party to appeal the decision to an ARO.

Instead of this process, we would suggest that the objection intake team should obtain input from both sides of a dispute and, if necessary, reverse the operating area's decision. However, regardless of what decision the objection intake team makes, the party who receives the unfavourable decision should be allowed to proceed directly to the Appeals Branch, and should be limited in the presentation of their appeal to the information that they provided to the Objection Intake Team, unless the evidence was unavailable at that time.

It appears to us that the function of the objection intake team is to act as a gatekeeper to reduce the number of appeals in the appeals branch. While that is a reasonable function and goal for this team, it is also important to remember that the ultimate goal of the changes that the WSIB is proposing should be to ensure the prompt and efficient adjudication of claims. Parties cannot appeal to the WSIAT until the WSIB has issued a final decision. Therefore, it is important for any new system to recognize that final adjudication must be prompt as well as thorough.

In addition, one of the tools for reducing the number of appeals that the WSIB is required to deal with is ADR. ADR only functions properly when both sides are aware of the case that the other side is advancing. As a result, the WSIB's proposed processes need to be changed in order to ensure that parties to an appeal exchange information as soon as possible after an appeal is launched.

7. Access – employer as participant

We have no concerns with the WSIB's recommended approach.

8. Appeals Triage Disclosure

We support the basic approach recommended by WSIB; however, we propose that the other party have 30 days rather than 14 days to respond.

In general, we support any measures which would encourage full and early disclosure.

9. Methods of Resolution

Access to an oral hearing before an ARO, under appropriate circumstances, is vital to the credibility of the appeals system. For some workers and employers, that hearing may be the first time they have had their "day in court" and an opportunity to put their case before a WSIB decision maker. We are pleased to see that the WSIB is recognizing this and establishing criteria for oral hearings. In appendix 5 of the WSIB's proposal, criteria are set out in order to determine which types of matters will be dealt with through an oral hearing, and which types of matters will be dealt with in writing. We are of the view that these criteria are generally reasonable. However, there are a couple of concerns that should be noted:

When the objection form is filed, the WSIB should obtain submissions from both parties as to the method for resolving the dispute. The participating party may have legitimate interests in the method of resolution, and their views should be heard. These submissions should be required in a short time frame, reflective of the time frames contained in the appeals process.

The methods of resolution should include, where appropriate, an opportunity for the parties to participate in an ADR process and have their voices heard. Specifically, parties should be allowed to participate in an ADR process, managed by an ARO, if they both agree to that process.

10. Appeals Manager – Determination on Method of Resolution

As noted above, access to an oral hearing under appropriate circumstances is strongly supported by both the employer and worker members of our Section. Currently, the ARO has the authority to determine how the appeal should proceed. WSIB is proposing a major change to this – basically, an appeals manager would make this decision in future.

We had unanimous support from the Section to leave this vital decision with the ARO rather than a manager. In our view, it is crucial that the ARO, who knows the case and has often had the opportunity to speak with one or both parties, have the discretion to determine how s/he wishes to hear the case. This can include a combination of oral and written process where appropriate. To take that authority away from the AROs will diminish their standing, affect the credibility of

the WSIB's adjudicative process, and most importantly, severely impact the ability of the AROs to do their job. The AROs are the decision makers. They have reviewed the file. If they are going to make the decision, then they have to decide what information they need (and how they need to get it) in order to make the best decision. This is not a task that can or should be assigned to someone else.

11. Hearing Scheduling

The WSIB has proposed relatively tight timelines for hearing scheduling. These deadlines are acceptable if the WSIB is prepared to provide more than one or two dates for a hearing. Scheduling a hearing within three months is something that most representatives can live with if there is a reasonable selection of dates. However, giving a party one or two dates to choose from in a three month period is probably not reasonable. It is our view that the implementation of this practice will determine whether it is reasonable.

It is important to remember that a party has a right to choose its representative. Forcing a representative to agree to one or two dates in a ninety day period has the effect of negating a party's right to choose its representative. The WSIB needs to ensure that scheduling is done in a balanced way that recognizes the rights of the parties.

12. Hearing Postponements

We are in agreement with the WSIB proposal to continue the current approach to postponements.

13. Withdrawals

We are also in agreement with the proposed approach around withdrawals.

14. Returns

The WSIB's approach outlines that "returns" (that is, returning a case to the operating area for further information gathering or adjudication) should be rare. We agree that this is the correct approach. However, the current experience of both employer and worker representatives is that there is no time limit on the handling of returns by the operating area. In fact, there are cases in our experience where it has taken in excess of six months for the operating area to deal with a return. Again, as noted above, it is important to establish firm timelines for any returns that are made to the operating area (or the Objection Intake Team). Unless there is a need to collect new information, no return should take more than thirty days for the operating area to address.

15. Oral Hearings and 16. Resolutions

We have no concerns about these proposals.

17. Downside Risk

The WSIB proposals around downside risk are contentious with both employer and worker representatives. The WSIB's proposed approach is dramatically different from that established for over two decades now by WSIAT. We prefer the WSIAT approach, which recognizes the importance of finality in decision making and views reconsideration as appropriate only following a stringent process and under compelling circumstances.

We have an adjudicative and appeals system with statutorily established appeal deadlines, which provides the opportunity for either party to object to a WSIB decision. If important new information or evidence, unavailable at the time of the initial decision, emerges, of course there is a role for reconsideration. For example, if either the employer or worker has materially misrepresented some aspect of a case, we would agree that reconsideration is appropriate. We also recognize the longstanding approach to downside risk for the specific issue under appeal – for example, a party appealing quantum knows that they risk receiving less than they had previously been granted. This type of downside risk is common to many areas of law and any qualified representative will be advising their clients of it.

It is tremendously destabilizing for an employer or worker to be informed that if they appeal a specific issue, sometimes years after earlier issues have been resolved by WSIB, they open up the whole case for review. In many cases, this could mean that a party with a serious issue or concern, holds back for fear of losing something granted by WSIB previously. So a potential injustice will go unchallenged because of fear of negative consequences for earlier decisions. Therefore we recommend that WSIB adopt the WSIAT approach, which is basically a high bar for reconsideration.

We have more specific concerns about the proposal that a party registering an Intent to Object must acknowledge downside risk in writing. This adds to the very serious concerns we have with the WSIB's proposal, as discussed above and we believe that even more parties will hesitate to appeal based on this initial barrier.

So we fundamentally disagree with the proposed approach.

If WSIB does process with this approach, we prefer Option 2 to Option 1.

Additional Proposals

We have several additional proposals for WSIB's consideration.

Hearing Ready Letter- we believe that the WSIB should adopt a process similar to that of the WSIAT, and prepare a readiness letter. This letter will outline the issues in dispute and (if an oral hearing is being held) the witnesses that will be testifying. This is something that is

currently required in the Policy and Procedure manual, but is not done on a consistent basis. These letters are highly useful in organizing the hearing, focusing the issues and ensuring that there is no confusion at a hearing or in the completion of written submissions.

Scope of Review- while the WSIB's proposal for change notes that employer account objections are currently out of scope, Appendix 5 includes several of these items. The process that has been proposed by the WSIB should be extended to include employer account objections. It is vital that the WSIB's approach to these matters be transparent, and include employer account objections. In the alternative, if the WSIB is not prepared to include revenue appeals in this process, then the WSIB needs to clearly define the rules for employer account objections.

Distinction Between Revenue and Claims Issues- in our review of these issues, some concerns were noted respecting the manner in which notice is handled, particularly in transfer of cost cases. These concerns are at all levels of the adjudication process, and revolve around notice to the other side. From our perspective, it is important to ensure that notice is provided in these cases in the same manner as in claims cases.

Improving the process for referral of cases to the operating area – Currently, cases referred back to the operating area often go to more than one branch. This reflects structural issues in the WSIB case management model. It is important that WSIB ensure that the referral process is well organized and that where more than one part of the operating area must review a case, that be done promptly and effectively.

Conclusion

The OBA appreciates the opportunity to comment on the proposed appeals process changes and we look forward to continuing to work with the WSIB as the matter moves forward.