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.

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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. <u>Half measures</u> 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 <u>it would, in</u>*

> *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

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