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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

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

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.

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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).

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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

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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.

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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.

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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)

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- 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.

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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,

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encl.

cc. ONIWG
A. Farquhar