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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