

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

April 25, 2006

An Electronic Letter for the Clients of L.A. Liversidge, LL.B.

1 page

Fair Practice at the WSIB Appeals Branch *Are “fair process” standards eroding at WSIB final level?*

In the past the WSIB Appeals Branch has been a sound model of procedural fairness.

*A duty of procedural fairness lies in every public authority making an administrative decision which affects the rights, privileges and interests of an individual [Supreme Court of Canada in **Cardinal v. Director of Kent Institution**, [1985] 2 S.C.R. 643].*

When the Appeals Branch speaks – the Board speaks

The Workplace Safety & Insurance Board [“WSIB” or the “Board”] Appeals Branch holds a very special role in the Ontario workplace safety and insurance [“WSI”] system. As the final decision level at the WSIB, the Appeals Branch represents the Board’s last institutional “kick at the can”.

When the Appeals Branch speaks – the Board speaks.

The Appeals Branch should represent the Board’s best efforts - it should be the Board at its absolute best

Parties to an appeal should be able to expect that Appeals Branch decisions represent the Board’s best efforts – *best efforts to get the facts; best efforts to apply policy; and most importantly, best efforts at fair process.*

Fairness standards may be slipping

Of late, it is becoming increasingly apparent to this writer that the standards of fairness practiced at the Board’s final decision making level – the Appeals Branch – may be slipping. What could be interpreted as significant legal procedural errors, virtually non-existent in the past, are now appearing. Not in all, or even most, cases of course. But, that they occur *in any case* is troubling.

The Appeals Branch will never be perfect

I am not suggesting that the Appeals Branch has not made incorrect decisions in the past. It has and will. That a number of decisions are reversed at the Workplace Safety & Insurance Appeals Tribunal [“WSIAT” or the “Appeals Tribunal”] is evidence enough of that. That the WSI system *requires* an independent Appeals Tribunal reflects the institutional reality and expectation that the Board is not going to get to the right answer, all of the time, in all of the cases. System design takes this into account – the WSIB is not expected to be 100% correct 100% of the time.

The Board is allowed to be “incorrect” – The Board is not allowed to be unfair

As strange as it may read, legally *the Board is “allowed” to be wrong*. Those cases are “corrected” upon appeal to the WSIAT. *The Board though is not allowed to be unfair.*

In several upcoming issues of **The Liversidge e-Letter**, I will be addressing certain fairness and procedural aspects of the WSIB Appeals Branch. In the next issue of **The Liversidge e-Letter**, I will begin with a basic overview of the standards that are expected of the Board. In later issues of **The Liversidge e-Letter**, I will introduce several real instances of WSIB Appeals Branch determinations and practices as reflected in actual cases that may suggest a deviation from expected fair process standards. I will also attempt to explore potential reasons for this emergence of what I consider to be a relatively recent phenomenon.

I am not suggesting that historically the Board’s Appeals Branch has represented the summit of administrative justice. The Appeals Branch practices and decisions have not been perfect. *But, they have generally resulted from a process that has been fair.* Rarely, if ever, has the Board committed substantive legal errors of the type that would cause it to lose its lawful jurisdiction to even decide a case.

When confronted with allegations of legally inappropriate practice, Board officials have responded that “*as the WSIB is not a court of law*” (the Board’s actions) are “*not a procedural error*” implying that WSIB discretion is unconstrained by common-law principles of natural justice. Of course, this is wrong. Even the strongest privative clause does not extricate the Board from natural justice principles.

However, the Board is generally immune to judicial intervention. That immunity does not fully arise from the exclusive jurisdiction provisions of the WSIA, or because the Board is legally able to set its own practices and procedures. *Rather, that immunity is grounded in the very existence of the WSIAT, and the ability to obtain a fresh hearing (de novo) at the Appeals Tribunal (through a method which I consider to be the archetypical example of fair process in an administrative justice regime).* I will be contrasting the hearing practices at the WSIAT with those of the WSIB Appeals Branch. Legally they should be similar. Examined in-depth, the distinctions are quite remarkable.