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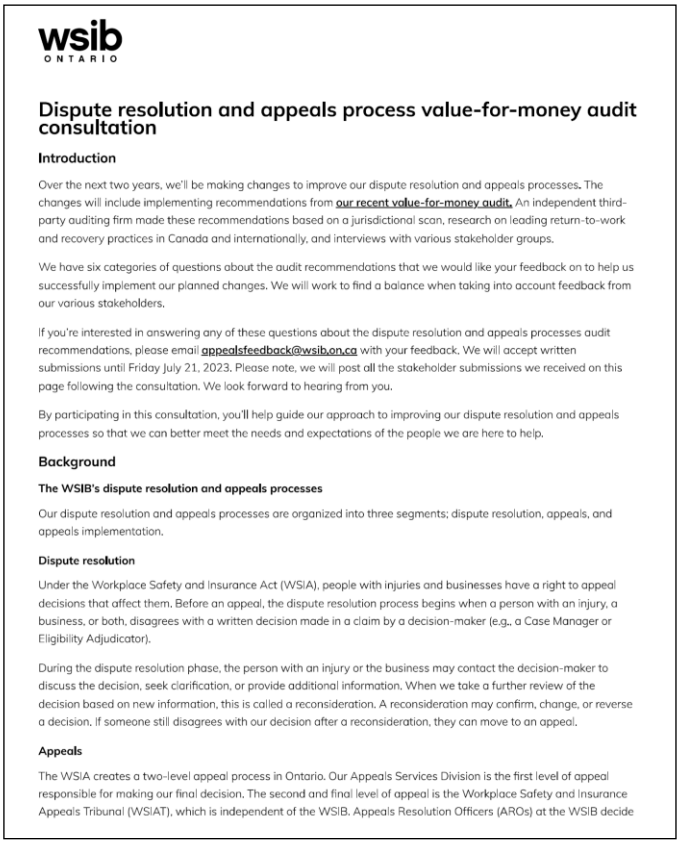
Comment with respect to the WSIB Dispute resolution and appeals value-for-money audit consultation



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Dispute resolution and appeals process value-for-money audit consultation

Introduction

Over the next two years, we'll be making changes to improve our dispute resolution and appeals processes. The changes will include implementing recommendations from **our recent value-for-money audit.** An independent third-party auditing firm made these recommendations based on a jurisdictional scan, research on leading return-to-work and recovery practices in Canada and internationally, and interviews with various stakeholder groups.

We have six categories of questions about the audit recommendations that we would like your feedback on to help us successfully implement our planned changes. We will work to find a balance when taking into account feedback from our various stakeholders.

If you're interested in answering any of these questions about the dispute resolution and appeals processes audit recommendations, please email **appealsfeedback@wsib.on.ca** with your feedback. We will accept written submissions until Friday July 21, 2023. Please note, we will post **all** the stakeholder submissions we received on this page following the consultation. We look forward to hearing from you.

By participating in this consultation, you'll help guide our approach to improving our dispute resolution and appeals processes so that we can better meet the needs and expectations of the people we are here to help.

Background

The WSIB's dispute resolution and appeals processes

Our dispute resolution and appeals processes are organized into three segments; dispute resolution, appeals, and appeals implementation.

Dispute resolution

Under the Workplace Safety and Insurance Act (WSIA), people with injuries and businesses have a right to appeal decisions that affect them. Before an appeal, the dispute resolution process begins when a person with an injury, a business, or both, disagrees with a written decision made in a claim by a decision-maker (e.g., a Case Manager or Eligibility Adjudicator).

During the dispute resolution phase, the person with an injury or the business may contact the decision-maker to discuss the decision, seek clarification, or provide additional information. When we take a further review of the decision based on new information, this is called a reconsideration. A reconsideration may confirm, change, or reverse a decision. If someone still disagrees with our decision after a reconsideration, they can move to an appeal.

Appeals

The WSIA creates a two-level appeal process in Ontario. Our Appeals Services Division is the first level of appeal responsible for making our final decision. The second and final level of appeal is the Workplace Safety and Insurance Appeals Tribunal (WSIAT), which is independent of the WSIB. Appeals Resolution Officers (AROs) at the WSIB decide

Comment developed
by L.A. Liversidge, LL.B.
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Comment with respect to the WSIB Dispute resolution and appeals value-for-money audit consultation

PART I: A comment on the process and a suggestion for a better way forward

A. WSIB must improve consultation outreach

1. As I understand it, the WSIB dispute resolution and appeals value-for-money audit consultation ("Appeals Consultation") was posted on the WSIB website June 6, 2023.

2. I did not become aware of this consultation until attending an unrelated meeting at the WSIB June 19, 2023, with the discovery of the consultation being incidental to that meeting.

3. It seems that I was not alone. No non-WSIB participant at that meeting was aware of the consultation.

4. Significantly, this lack of awareness seems endemic. In a letter of June 19, 2023 from Mr. John Bartolomeo, a well-known and respected legal counsel and co-director of "Workers' Health and Safety Legal Clinic," Mr. Bartolomeo wrote:

> Despite being involved in the Value for Money Audit consultation and a regular attendee to Appeals Services Division Stakeholder meetings, I was not advised of the consultation. I would also point out that injured workers who will be directly impacted remain unaware that future appeals will be severely restrained by a new process effectively eliminating the worker's ability to bookmark appeals for later action.

5. My experience mirrors that of Mr. Bartolomeo.

6. If at least two legal representatives who have similar engagements with the WSIB and who directly participated in the KPMG value for money audit ("VFMA") (I was interviewed by KPMG on August 24, 2022) were not aware of this consultation until quite late in the process, one can reasonably conclude that few were.

7. More importantly, many more interested stakeholders unable to hear "through the grapevine" were likely not aware or perhaps, even to this day, have not been made aware.

8. This should concern the Board.

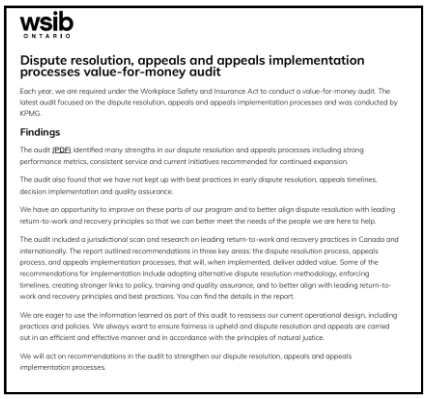
9. Respectfully, the absence of wide-spread early notice diminishes the integrity of the consultation exercise. I present a broad remedy later in this section with respect to the process overall and echo recommendations for a very different process along with a recommendation to commence a revitalized process afresh.

10. However, the Board is well advised to step back and assess how it reaches out for comment and seek to improve its processes. Thirty years ago, the Board did a better job of notice and outreach with far fewer tools available. Reaching a broader audience today should be much easier and far more effective, by many orders of magnitude.

11. Outside the scope of this consultation, I encourage the Board to pose this question to stakeholders: *How can we improve our consultation outreach?* The Board must then be prepared to listen to the advice.

B. Is the WSIB already proceeding with changes notwithstanding the consultation? Is the consultation a bona-fide exercise or an after-thought?

1. In February 2023 the WSIB made an announcement on its webpage advising that:



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Dispute resolution, appeals and appeals implementation processes value-for-money audit

Each year, we are required under the Workplace Safety and Insurance Act to conduct a value-for-money audit. The latest audit focused on the dispute resolution, appeals and appeals implementation processes and was conducted by KPMG.

Findings

The audit (PDF) identified many strengths in our dispute resolution and appeals processes including strong performance metrics, consistent service and current initiatives recommended for continued expansion.

The audit also found that we have not kept up with best practices in early dispute resolution, appeals timelines, decision implementation and quality assurance.

We have an opportunity to improve on these parts of our program and to better align dispute resolution with leading return-to-work and recovery principles so that we can better meet the needs of the people we are here to help.

The audit included a jurisdictional scan and research on leading return-to-work and recovery practices in Canada and internationally. The report outlined recommendations in three key areas: the dispute resolution process, appeals process, and appeals implementation processes, that will, when implemented, deliver added value. Some of the recommendations for implementation include adopting alternative dispute resolution methodology, enforcing timelines, creating stronger links to policy, training and quality assurance, and to better align with leading return-to-work and recovery principles and best practices. You can find the details in the report.

We are eager to use the information learned as part of this audit to reassess our current operational design, including practices and policies. We always want to ensure fairness is upheld and dispute resolution and appeals are carried out in an efficient and effective manner and in accordance with the principles of natural justice.

We will act on recommendations in the audit to strengthen our dispute resolution, appeals and appeals implementation processes.

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>
> We are eager to use the information learned as part of this audit to reassess our current operational design, including practices and policies. We always want to ensure fairness is upheld and dispute resolution and appeals are carried out in an efficient and effective manner and in accordance with the principles of natural justice.
>
> **We will act on recommendations in the audit to strengthen our dispute resolution, appeals and appeals implementation processes**. (emphasis added)

2. The announcement prompted me to email the Board on February 21, 2023 to query if the Board was planning a consultation process:

> **Consultation Secretariat:**
>
> I have read the WSIB notice re the "Dispute resolution, appeals and appeals implementation processes value-for-money audit" (link here and replicated below). It is unclear if the Board is planning on a public consultation process, similar to the process engaged in 2012, and which resulted in the "new" process (i.e., the current process), as described in the six page May 2014 WSIB document (no longer on the WSIB website) "Modernizing the Workplace Safety and Insurance Board's Appeals Program."
>
> It would be greatly appreciated if you would advise if a consultation is being planned. A related question. While the Board's web announcement declares, "We will act on recommendations in the audit to strengthen our dispute resolution, appeals and appeals implementation processes," no specifics are set out. This leads to a series of questions, such as but not necessarily limited to: a) What specific recommendations will the Board be implementing?; b) Are there recommendations in the KPMG report that the Board will not be considering or implementing; c) Is the Board still developing specific changes it will be implementing? There are more. All in all, the Board's web announcement is somewhat unclear as to what the next specific steps are, when they will be articulated and whether or not stakeholders will be engaged in a future consultation process. Any clarification that can be provided would be greatly appreciated.
>
> Thank you. Regards, LAL

3. A week later, I received this response:

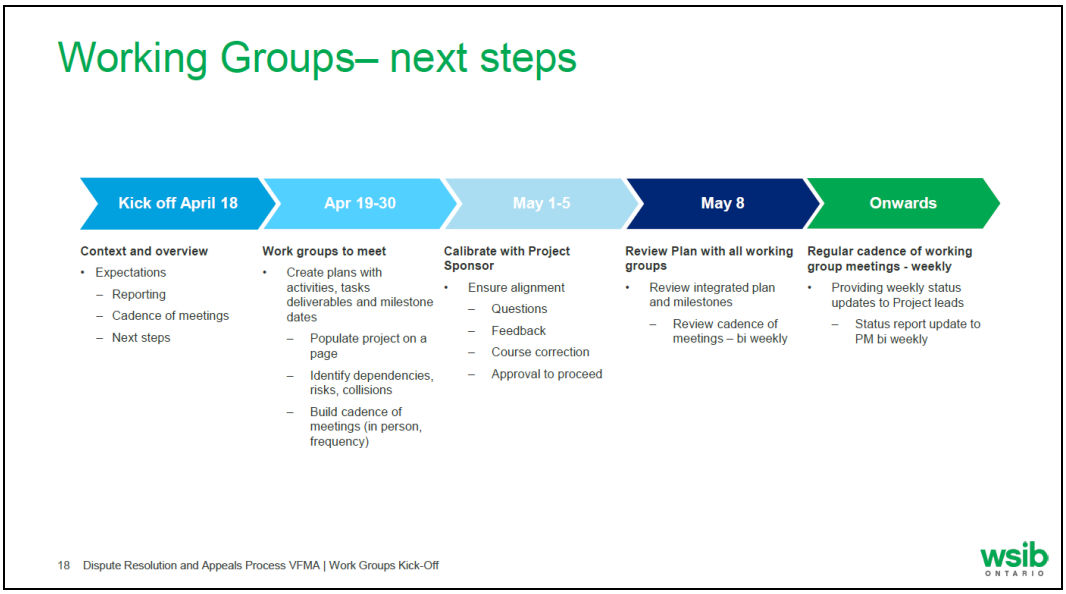
> We are planning out next steps which include **whether or not** there will be a consultation and what that framework might look like . . . (emphasis added)

4. It is clear that as late as early March 2023, no decision was taken with respect to whether there would be a consultation process or if there was, what it would entail. As mentioned, I did not learn of the specifics of the consultation process until June 19, 2023, although I was unofficially informed on May 17, 2023 that there would be some form of consultation.

5. I was therefore very surprised to recently discover that on April 18, 2023 the WSIB held an internal meeting with a PowerPoint presentation entitled, "VFMA Dispute Resolution and Appeals Process Working Groups Kick off." I would like to thank "Injured Workers Online" for obtaining this document via a freedom of information request and for making this document publicly available.

6. I strongly suggest to the WSIB that this document should be prominently posted on the WSIB consultation webpage, along with any subsequent similar documents. In reading this 31-page plan, I was unable to find any suggestion of a consultation process. From this, I can only reasonably conclude that the current Appeals Consultation was not a "go" at least as at April 18, 2023 and that the focus was towards implementation not stakeholder engagement. It is interesting that the "WSIB Policy Agenda 2023" published in January 2023 (after the November 30, 2022 KPMG VFMA had been received by the WSIB) makes no mention of an appeals consultation.

7. What is clear is that by mid-April 2023 the Board had crafted an elaborate implementation plan, (reflected in page 18 of the presentation, replicated below), that has likely been refined since:



Working Groups– next steps

Kick off April 18	Apr 19-30	May 1-5	May 8	Onwards
Context and overview • Expectations – Reporting – Cadence of meetings – Next steps	**Work groups to meet** • Create plans with activities, tasks deliverables and milestone dates – Populate project on a page – Identify dependencies, risks, collisions – Build cadence of meetings (in person, frequency)	**Calibrate with Project Sponsor** • Ensure alignment – Questions – Feedback – Course correction – Approval to proceed	**Review Plan with all working groups** • Review integrated plan and milestones – Review cadence of meetings – bi weekly	**Regular cadence of working group meetings - weekly** • Providing weekly status updates to Project leads – Status report update to PM bi weekly

18 Dispute Resolution and Appeals Process VFMA | Work Groups Kick-Off

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8. In a June 28, 2023 webpage release, **Injured Workers Online** said:

> An implementation plan by the WSIB with staff teams already in progress and detailed time lines to put the KPMG proposals into effect (provided through freedom of information request) **casts doubt on whether the consultation will have any impact on the changes**. (emphasis added)

9. This, I submit, is a very reasonable position to voice.

10. Past WSIB Annual Reports have articulated the Board's commitment to stakeholder engagement and consultation. For example, in the **2012 WSIB Annual Report** (at p. 14) this was written:

> **Increased transparency.** We continue to change the way we do business with a focus on increasing transparency. In 2012, we published our strategic plan, as well as quarterly financial and operational results, on our website. We continue to implement our policy renewal process with a strong focus on stakeholder consultation. The WSIB is committed to maintaining consistent stakeholder engagement and consultations, and providing regular communications to stakeholders and the public.

11. In the Chair's Message in the **2013 WSIB Annual Report** (at p. 5):

> **Commitment to Stakeholder Engagement**
>
> The dialogue and consultation with stakeholders has been critical this year as we review issues of concern and policies of the Board. In particular, the Benefit Policy Review and Rate Framework Review have been influenced by stakeholder feedback and advice and we look forward to future consultation.
>
> I would like to thank the four Chair's Advisory Committees, (Labour & Injured Workers Advisory Committee, Industrial & Manufacturing Advisory Committee, General Business Advisory Committee and the Construction Industry Advisory Committee) for regularly meeting with me to present the collective perspective of their sectors as we engage in a meaningful and constructive dialogue on system issues and concerns. I value their insight and advice.

12. The approach and rhetoric of the Board a decade ago remains instructive today and I encourage the Board to critically assess its current protocols against the promises of the recent past. A simple question warrants reflection: *Why are so many stakeholders, and in particular labour and injured worker stakeholders, upset or concerned about this process?*

13. I respectfully suggest that the WSIB must re-establish the integrity of the Appeals Consultation through three actions:

    a. *One*, immediate and full public disclosure through its website of the Board's implementation plans beyond those articulated in the April 18, 2023 presentation;

    b. *Two*, by holding a post-consultation stakeholder meeting to publicly acknowledge and address stakeholder comments and suggestions;

    c. *And three*, by suspending continuing Appeals VFMA implementation action until the conclusion of the consultation, which includes the serious consideration of ideas and suggestions of various stakeholders, including the consideration of the adoption of a more preferred process.

C. Why stakeholder and especially labour and injured worker support for the consultation process is essential

1. In a January 2020 document, "Framework for operational policy development and renewal" the Board explained how effective consultation assists in legitimizing its polices (at p. 8):

> **4.3. Consultation**
>
> When necessary, consultation will form part of the policy development process at the WSIB, contributing to transparent, evidence-based decision-making. Obtaining and considering a range of views enables the development of policies that are effective, responsive **and viewed as legitimate by those they impact**. This in turn contributes to better understanding and acceptance of and compliance with policies. (emphasis added)

2. The consultation process is currently underway so of course there is limited public feedback available at the moment. What is clear however, is that the feedback that is publicly accessible is not supportive of the current consultation exercise. This should concern the Board. I will canvass a small sampling of that discontent for illustrative purposes. Later, I will comment more directly on some of the critiques that have been placed on the public record.

3. Without commenting on the persuasiveness of the complaints canvassed, several media reports are noteworthy:

> **June 2, 2023 Hamilton Spectator, "Injured workers under threat again":**
>
> "If the current recommendations are legislated by the Ford government, injured workers will face an array of new barriers when seeking WSIB compensation. The recommendations would force advocates to spend all our time trying to meet time limit requirements. We won't have time left to seek actual justice for injured workers."
>
> **May 31, 2023 news release, Ontario Network of Injured Workers Groups:**
>
> "It can take several months to a year just to get medical reports or assessments for injured and ill workers, and if these recommendations get implemented, then representatives will become time limit machines," says Maryth Yachnin, Staff Lawyer at the Industrial Accident Victims' Group of Ontario (IAVGO). "It's shameful the WSIB is even considering these suggestions from KPMG. Many of the workers we help will be forced into poverty because they can't appeal unfair decisions in time."
>
> **May 31, 2023, Canadian Occupational Health and Safety, "Outrage over recommended timeline for WSIB appeals":**
>
> "This is a slap in the face to those workers and their families," says Jamie West, Ontario NDP MPP and current labour critic.
>
> **Ontario Federation of Labour:**
>
> "Tell McNaughton to reject the KPMG recommendations."
>
> "Send an email to Ford's Minister of Labour, Monte McNaughton, to tell him that if he wants to improve the compensation system, to consult with the injured and ill worker community – not the out of touch and harmful KPMG recommendations. It is hard enough as it is for workers to seek justice after being harmed at work."
>
> **June 28, 2023 Injured Workers Online:**
>
> "All participants expressed concern that the WSIB has shown no interest in the opinions of injured workers, legal experts or any other stakeholders and therefore public and political pressure will be

necessary if injured workers are going to be heard. In addition to sending comments to the WSIB consultation email, they will be sending copies to the Minister of Labour, their own MPP and the Chair of the WSIB. Those addresses are set out below. If you are concerned about losing the right to appeal, please join the others in stating your concerns to the WSIB and politicians."

4. All of the very few currently available comments or responses from the labour and injured worker communities express similar comments:

June 5, 2023 letter from the Ontario Legal Clinics' Workers' Compensation Network:

"This report is a direct attack on injured workers right to appeal decisions of the WSIB. The auditors' recommendations should not be used as a starting point for discussions about changes to the workers compensation system. We urge the Board of Directors not to undertake an overhaul of the appeals system on the basis of these flawed assumptions, poor research, and ineffective comparators." (p. 1)

"The Auditor's recommendations will result in appeals suppression. The time limit recommendations provide "value for money" - fewer worker appeals, fewer claims allowed - to the WSIB, but at the expense of justice for injured workers." (p. 6)

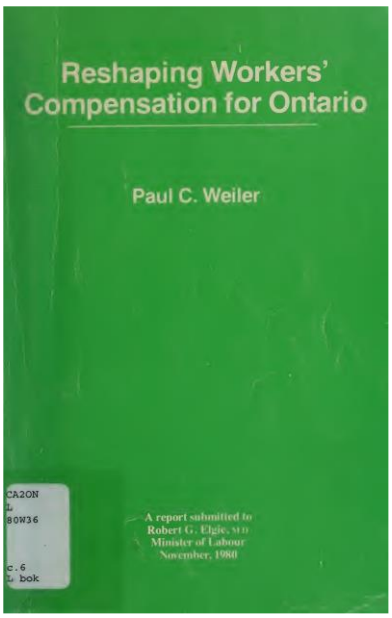
June 19, 2023 letter from Workers' Health and Safety Legal Clinic:

"Further, given the intention to impose new time limits on injured workers – who should all have been notified – this consultation should be done by an independent third party to verify if the recommendations are even correct. If the WSIB can retain Jim Thomas for a policy consultation with independent hearings, a similar approach should be taken for this consultation." (p. 2)

April 25, 2023 letter from the Thunder bay & District Injured Workers Support Group to the Ontario Ombudsman:

"We wish to complain about the KPMG value for money audit of the appeal system and the WSIB's response to it. We are concerned that this will disentitle most injured workers and ignores the disability needs of the injured worker population, especially those with significant permanent disabilities and who have developed mental health challenges as well as dealing with poverty and unemployment. Your office is no doubt aware of these challenges, as many injured workers deal with you." (p. 1)

5. It is instructive to turn to Prof. Paul C. Weiler's seminal November 1980 report "**Reshaping Workers' Compensation for Ontario,**" in which, among many other things, Professor Weiler addressed the structure of decision-making (Chapter 4). With respect to worker perceptions of the process, as it then existed, Prof. Weiler commented:



"Underlying these difficulties is a growing feeling that the Workers' Compensation Board has become a faceless, impersonal, even dehumanizing organization, one which puts injured workers through a mail-order assembly line." (p. 92)

"Worker groups insist on the fundamental principle that claimants for compensation must be treated fairly, and that they must be given full opportunity to make the best case they can to the Board. The manner in which the Board proceeds must engender a sense of confidence in its decisions, must give a legitimacy to its rulings, which renders them tolerably acceptable even when they are adverse." (p. 93)

6. From the few public comments that are presently available, these historic themes which until recently had been generally absent from WSIB discourse appear to be re-emerging.

7. What is striking, it seems to me, is that those opposing the current consultation and the KPMG VFMA recommendations specifically, are not suggesting that the Board ought not to facilitate a review of the WSIB decision review and appeals processes. In fact, now that door has been opened, it seems some groups are agreeable to participate in a more agreeable and broader process.

8. On June 28, 2023 Injured Workers Online said:

> The lack of legal expertise in the process is also an issue. The right to a fair hearing is the cornerstone of our administrative justice system. In past policy reviews the WSIB appointed outside legal experts to direct the consultation. Jim Thomas, former Vice Chair of the WSIAT and Harry Arthurs, former Dean of Osgood Hall Law School were appointed by previous WSIB administrations to design policy consultations, hold public hearings and prepare a report. Some participants are writing to request the involvement of someone like a judge or administrative law expert.

9. On June 5, 2013, the Ontario Legal Clinics' Workers' Compensation Network said:

> Stakeholders would welcome the opportunity to have an honest conversation about the shortcomings of the WSIB's appeals process. Labour and injured worker organizations have already expressed alarm at these proposals and the WSIB has proposed another consultation. However, the vast majority of people that would be adversely affected by the proposed changes are injured workers. Written consultations and internet based meetings would exclude many of them. An honest conversation with the people affected requires proper notice to injured workers of the proposed changes and public, in person meetings where injured workers can speak to the WSIB. The VFMA recommendations, as this letter demonstrates, won't solve the problems that exist and instead will delay long needed improvements to the workers' compensation system. We as that you share our concerns with the Board of Directors and we would be pleased to meet to discuss these concerns.

10. I would encourage the Board to peruse the 2008 article, "**Their only power was moral, The Injured Workers' Movement in Toronto**, 1970 – 1985," Robert Storey, Social History, Vol. 41, No. 81, May 2008. The magnificent title is also the concluding quote of the article, attributed to Orlando Buonastella, then and still, very active and very influential in the Ontario workers' compensation system.[1] I have always posited that it was the morality behind the movement that ensured the remarkable structural reform success. It wasn't might. It was right.

11. More than two decades ago, I wrote this (see the June 26, 2002 issue of **The Liversidge *e*-Letter**):

> **Worker inequities drove fundamental reform**
> From a 1973 Government Task Force on WCB administration, which radically expanded the Board's administration resources, to the first Weiler Report (1980) which would dovetail into two massive legislative reforms in 1985 and 1990, changing in absolute terms the legal and administrative framework, labour issues influenced, and then directly manoeuvred, every facet of

[1] Mr. Buonastella was co-author of the aforementioned April 25, 2023 letter to the Ontario Ombudsman.

> reform. This commanding influence was sparked and then fed by a potent and formidable ingredient – being on the side of fairness.
>
> **Before 1990 the system was structurally unfair to workers**
> Before 1990, the WSI legal and administrative framework was, by any measurement, systemically unfair to workers. It may require some effort to recall the depth of worker despair from today's vista. But it was meat chart pensions, a refusal to address disease, an autocratic and paternalistic Board, a strictly in-house appeal and review mechanism, that created true discontent, discontent allowed to ferment for years, until it erupted in a screaming demand for change, change which was delivered with an as yet unmatched political enthusiasm

12. This period represents the core narrative of contemporary workers' compensation. A populous but disenfranchised group, very slowly, but deliberately, incrementally and methodically, founded a movement that not only advanced a powerful case for change, but participated in its design and implementation. Many of those actors are active still, several of whom are currently voicing opposition to the present appeals consultation.

13. Ron Ellis, the inaugural Chair of the Appeals Tribunal, said this at the "**Workers' Compensation Board of Ontario 75th Anniversary Symposium**, September 20-21, 1989" (from the publication of the same name at p. 16):

> "It was the appearance for the first time of people who were experienced professional advocates knowledgeable about the system that put the adjudication processes of the Board under severe pressure to which in the end they were unable to respond effectively."
>
> "The impact of those advocacy resources on the adjudication processes evolving across the country are one of the major influencing factors at work today in my submission."

14. Some features of that period are beginning to resurface. In real time, we are witnessing a re-mobilization of grievances against the WSIB. The collective request for a different process does not appear to be unreasonable.

D. Managing consultation and reform: In the past, the Board has done well and not so well

1. The Board's history is replete with examples of the Board doing exemplary outreach work with the stakeholder community. In the mid to late 1980s, with the system alive with the spirit of engagement and reform in the wake of the commencement of the independent Appeals Tribunal, the Board's policy and consultation department was on overdrive.

2. That period was likely the zenith of the Board's openness to external viewpoints in every facet of its engagement with the public, from legalistic policy reviews flowing from WCAT policy decisions (such as **Decision 72R, 1986,** under the then s. 86(n) of the *Workers' Compensation Act*), and massive consultation undertakings on disablement arising out of the employment, occupational disease, and chronic mental stress, to identify just a few.

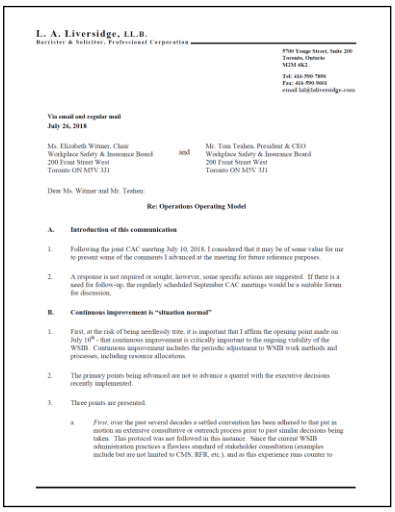
3. The commitment to consultation ebbed and flowed a bit in the decades since, but when it mattered, the Board always seemed to rise to the occasion often surpassing past consultation efforts. The September 30, 2010 WSIB Funding Review process, culminating in the highly influential Funding Fairness document, the 2012/13 Jim Thomas Benefits Review and the Board's 2015/16 Rate Framework consultation, are the highlights.

4. When the Board did misstep, it was noticeable.

5. In recent years, perhaps the most glaring mistake is when the Board proceeded unilaterally to adjust the case management process within the Board with no external consultative effort. The exercise was short-lived.

6. This prompted an urgently called post-implementation meeting on July 10, 2018 with stakeholders expressing outrage at the absence of any outreach or consultation effort on the part of the Board.

7. Some elements of my letter of July 26, 2018 jointly addressed to the Chair and President of the Board are germane to the current issue.



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Via email and regular mail
July 26, 2018

Ms. Elizabeth Witmer, Chair
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

and

Mr. Tom Teshim, President & CEO
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Witmer and Mr. Teshim:

Re: Operations Operating Model

A. Introduction of this communication

1. Following the joint CAC meeting July 10, 2018, I considered that it may be of some value for me to present some of the comments I advanced at the meeting for future reference purposes.

2. A response is not required or sought, however, some specific actions are suggested. If there is a need for follow-up, the regularly scheduled September CAC meetings would be a suitable forum for discussion.

B. Continuous improvement is "situation normal"

1. First, at the risk of being needlessly trite, it is important that I affirm the opening point made on July 10th - that continuous improvement is critically important to the ongoing viability of the WSIB. Continuous improvement includes the periodic adjustment to WSIB work methods and processes, including resource allocations.

2. The primary points being advanced are not to advance a quarrel with the executive decisions recently implemented.

3. Three points are presented.

a. *First*, over the past several decades a settled convention has been adhered to that put in motion an extensive consultative or outreach process prior to past similar decisions being taken. This protocol was not followed in this instance. Since the current WSIB administration practices a flawless standard of stakeholder consultation (examples include but are not limited to CMS, RFR, etc.), and as this experience runs counter to

8. The bottom-line conclusion I reach is this: When the Board engages in a serious and comprehensive consultation for serious issues, the eventual reforms are usually successfully received by the public and successfully implemented. When it does not, they are not.

E. LAL's suggestion for going forward

1. The WSIB has convened a written response consultation with a short response window. This has attracted criticism. That criticism should be seriously considered.

2. Alternative suggestions have included: an extension of the deadline; more effective notice; in-person consultation meetings; and, an independent third-party facilitator, similar to the Harry Arthurs Funding Review or the Jim Thomas Benefits Review.

3. These are ideas that warrant consideration. This is my suggestion: Once the deadline has expired (July 21, 2023), the WSIB should secure the services of an independent and acceptable (to stakeholders) third-party reviewer on par with a Jim Thomas or Harry Arthurs, to review the submissions and offer process recommendations to the Board, which could include:

   a. continuing the current process as planned;

   b. recommending an entirely different review focus along the lines set out in the June 5, 2023 Ontario Legal Clinics' letter, i.e., public meetings to allow "an honest conversation about the shortcomings of the WSIB appeals process";

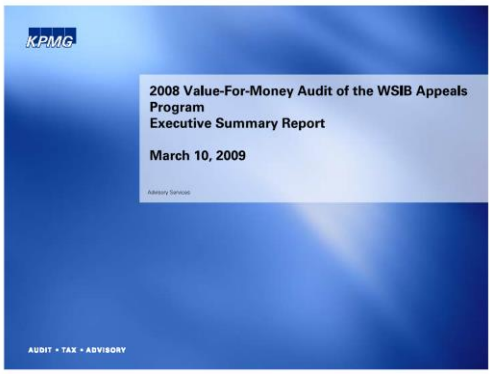
   c. arranging discussions/meetings at the call of the reviewer, in a manner not at all dissimilar to the process engaged by Prof. Paul Weiler in 1980;

   d. or, recommending a different consultation process, in scope and process.

4. I envision a process that should be completed no later than the end of November 2023, thereby avoiding a counter worry of "delay." However, it must be accepted that any urgency is of the Board's making. In fact, addressing WSIB decision-making and appeal efficacy was not on the radar of the injured worker or employer communities prior to the November 2022 release of the KPMG VFMA. More to the point, as canvassed in the next section, it wasn't on the Board's radar either until 2022.

PART II: What exactly was so wrong the WSIB decision-making and appeals processes before the November 2022 KPMG report?

A. A 2009 KPMG WSIB Appeals Program VFMA report concluded "The Appeals program is delivering value-for-money." *What changed?*



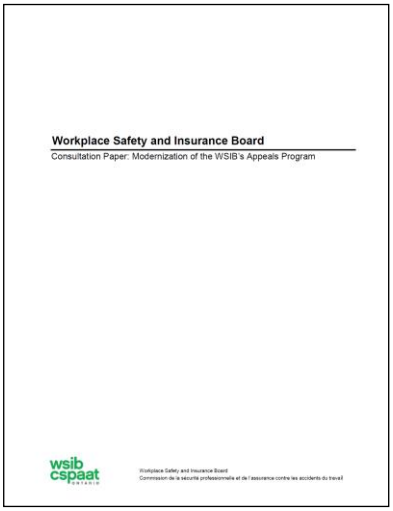
1. In 2008, KPMG conducted a similar VFMA on the WSIB Appeals Program. An Executive Summary Report was released March 10, 2009.

2. The March 10, 2009 report concluded "*The Appeals program is delivering value-for-money.*" (Slide 7)

3. The findings of the 2008 KPMG VFMA will be explored in a moment.

4. Even though KPMG provided a "thumbs-up" in 2009, the Board did not rest on its laurels and still proceeded to improve the appeals system.

B. WSIB 2012 Consultation Paper: Modernization of the WSIB's Appeals Program



1. In 2012 the Board released a very comprehensive consultation document setting out proposals to "modernize" the Board's appeals system. "Modernize" was the corporate buzz of the day akin to today's "efficiencies."

2. (Note: This document is no longer available on the WSIB website it would seem. However, I have an archived copy and it is available here.)

3. The 2012 consultation document set out the case for change (at p. 3). Some of these observations seem similar to the 2022 KPMG findings.

The Case for Change

Workplace parties and their representatives deserve a timely and responsive appeals program that produces quality decisions. In recent years, the WSIB's Appeals Services Division's ability to meet that standard has been eroding. Workplace parties/representatives have understandably been asking why the WSIB's appeals process is so lengthy.

In recent years our inventory of unassigned cases has grown to approximately 4,500 cases and resulted in a six-month wait time for assignment of a case to an Appeals Resolution Officer.

Several systemic inefficiencies have been identified as contributing to delays in the current process. These include:

- Incomplete Objection Forms that provide minimal information to support the objection.
- Initial decisions that sometimes do not outline the reasons for a decision clearly enough.
- Absence of a central depository for recording Objection Forms to ensure they are properly addressed and they are referred to the appropriate front-line decision maker or to the Appeals Services Division.

- The front-line decision maker is required to reconsider a decision based on new information and/or a defect in the decision-making process, but the reconsideration process is not as robust as it could be.
- Cases where there are significant information gaps and/or outstanding issues identified by the objecting party at the time of discussion with the Appeals Resolution Officer, or which are recognized by the Appeals Resolution Officer upon their review of the file. This may result in the case going back to front-line decision maker, and may contribute to further delays in the workplace parties receiving a final decision from the WSIB.
- Withdrawal of approximately 20% of appeals after numerous Appeals Services Division staff have spent time dealing with them. In addition, the lack of appeal preparedness leads to late submissions, the postponement of hearings, or post-hearing submissions.
- Significant time investment by Appeals Resolution Officers performing administrative tasks to get cases ready (e.g., calling or writing to the workplace parties/representatives to clarify the issues that are being objected to; requesting outstanding information that should have been obtained prior to referral to the Appeals Services Division; and clarifying why an oral hearing is being requested when the nature of the case suggests it is not warranted).

4. The consultation document set out the (then) "new" appeals program (at p. 4):

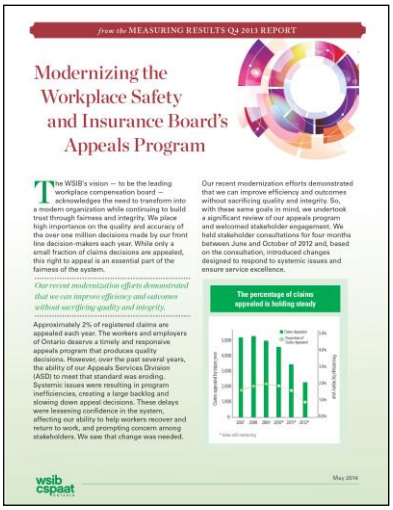
The New Appeals Program Model
Highlights

The benefits of the modernized appeals program include:

- ✓ A simple and easy-to-complete Intent to Object Form that benchmarks the right to object within six months; invites objecting parties to provide new information that will allow fast-tracking of reconsiderations; and allows for greater coordination and tracking.
- ✓ A more robust reconsideration process by front-line decision makers.
- ✓ Immediate access to file information for objecting parties where reconsideration of decisions is not warranted.
- ✓ Advancement of cases to the Appeals Services Division only when the workplace parties submit a "declaration of appeal readiness" through completion of an enhanced Objection Form.
- ✓ No time limit for workplace parties to come forward with their "declaration of appeal readiness" on the enhanced Objection Form.
- ✓ Oral hearings retained for complex entitlement objections.
- ✓ Improvement of the resolution timelines of appeal-ready cases.

C. So, were the changes a success? What the Board itself said

1. In a May 2014 document "**Modernizing the Workplace Safety and Insurance Board's Appeals Program**," one could only believe, YES! (NOTE: This document is also no longer on the Board's website but I have an archived copy available here).


from the MEASURING RESULTS Q4 2013 REPORT

Modernizing the Workplace Safety and Insurance Board's Appeals Program

The WSIB's vision — to be the leading workplace compensation board — acknowledges the need to transform into a modern organization while continuing to build trust through fairness and integrity. We place high importance on the quality and accuracy of the over one million decisions made by our front line decision-makers each year. While only a small fraction of claims decisions are appealed, this right to appeal is an essential part of the fairness of the system.

Our recent modernization efforts demonstrated that we can improve efficiency and outcomes without sacrificing quality and integrity. So, with these same goals in mind, we undertook a significant review of our appeals program and welcomed stakeholder engagement. We held stakeholder consultations for four months between June and October of 2012 and, based on the consultation, introduced changes designed to respond to systemic issues and ensure service excellence.

Our recent modernization efforts demonstrated that we can improve efficiency and outcomes without sacrificing quality and integrity.

Approximately 2% of registered claims are appealed each year. The workers and employers of Ontario deserve a timely and responsive appeals program that produces quality decisions. However, over the past several years, the ability of our Appeals Services Division (ASD) to meet that standard was eroding. Systemic issues were resulting in program inefficiencies, creating a large backlog and slowing down appeal decisions. These delays were lessening confidence in the system, affecting our ability to help workers recover and return to work, and prompting concern among stakeholders. We saw that change was needed.

The percentage of claims appealed is holding steady

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May 2014

2. This document (at p. 4) advises:

> **Performance improvements**
>
> While the modernized appeals program has only been in effect since February, 2013, a number of benefits are already being realized:
>
> - new appeals are being resolved faster, and
> - the backlog of appeal cases has now been completely eliminated.

3. And at p. 5:

> Stakeholder engagement remains one of our key priorities and we continue to dialogue with representatives to discuss and more fully understand any remaining concerns. In addition, we will continue to monitor the effectiveness of the modernized program as it matures and as additional outcome data becomes available.
>
> Looking ahead, we are confident that our dedication to a fair, transparent and timely adjudication process, both by front line decision makers and by the AROs, will continue to play a key role in our becoming the leading workplace compensation board.

4. Ongoing reports through the Board's Annual Reports outline a similar narrative of success:

> **2013 WSIB Annual Report, p. 14:**
>
> **Appeals modernization improves efficiency.** Following significant engagement with stakeholders, we introduced reforms to our Appeals system to respond to the growing backlog of appeals and ensure timelier resolution of appeals in the future. While these reforms have only been in effect since February 1, 2013, early indications are that the new system has greatly improved timeliness and maintained the quality of decision making, thus increasing fairness to workers and employers. All outstanding appeals registered prior to 2012 have been resolved and the active inventory of appeals has decreased by 68%, from approximately 8,000 at December 31, 2012 to just over 2,500 by December 31, 2013. We fully expect the efficiency of the system to further improve as the appeals backlog has now been eliminated.

2014 WSIB Annual Report, p. 20:

The timeliness of eligibility decisions continued to improve – over 93% of decisions were made within two weeks, compared to 91% in 2013. The modernized appeals process also showed decision making efficiencies. On average, appeals were resolved in 97 days, a vast improvement from 223 days in 2012.

2015 WSIB Annual Report, p. 24:

Reduced appeals inventory. The number of appeals received by the WSIB decreased by nearly one-fifth or 19% in 2015; 8,063 new appeals were received compared to 9,995 in 2014. The decrease in incoming appeals, together with ongoing timeliness of appeal resolutions, resulted in a 21% decrease in the inventory of active appeal cases, from 2,646 cases at the end of 2014 to 2,088 at the end of 2015.

In 2015, 87% of appeals were resolved within six months which was a decline from the 2014 level of 92% resolved within six months. The decline was anticipated as longer timelines were introduced as of mid-2014, allowing more time for appeal responses, thereby improving the effectiveness of the appeal process.

2016 WSIB Annual Report, p. 20:

Fewer incoming appeals. The WSIB has been working to enhance front-line decision making, the results of which are now being reflected in the declining volume of incoming appeals. After decreasing by 19% in 2015, the number of appeals coming into the WSIB's Appeals Services Division has once again declined in 2016, by 13%. The volume of incoming appeals has decreased from 8,063 in 2015 to 6,979 in 2016. This ongoing reduction in appeals is also attributed to the long-term decline in registered claims and the work effort from the Operations team at the WSIB to ensure that cases are "appeal ready" before they are forwarded to the Appeals Services Division.

In 2016, 90% of appeals were resolved within six months, an improvement of 3% from the 2015 level. The strong 2016 result for timeliness of resolution has helped to keep the inventory of active appeals at a reasonable level. There were 1,867 active appeals at the end of 2016, a decrease from 2,088 appeals in 2015.

2017 WSIB Annual Report, p. 18:

Appeals volume and inventory remain low. For the third consecutive year, the number of appeals coming into the WSIB's Appeals Services Division has decreased. There were approximately 6,000 incoming appeals in 2017, down from 6,979 appeals in 2016. With fewer new appeals, the inventory of active appeals has also declined for the third year in a row, from 1,867 at the end of 2016 to 1,072 at the close of 2017.

2018 WSIB Annual Report, p. 5:

Decision timeliness maintained

Even though more claims were registered in 2018, the time required to make eligibility decisions beat our target for the year. In 2018, we made 93% of eligibility decisions within two weeks, exceeding our target of 90%.

Also, 89% of appeals were resolved within six months, up 1% from 2017 and above the 87% target. We achieved this despite a 5% increase in the number of appeals registered with our Appeals Services Division.

2019 WSIB Annual Report, p. 4:

Stable appeal outcomes

Of the issues resolved by our Appeals Services Division in 2019, 29% were allowed or allowed in part. This decision reversal rate is within our expected range of 26% to 33% and consistent with our 2018 result of 27%.

Our appeal decisions continued to be timely, with 87% of appeals being resolved within six months, well above our target of 80%.

2021 WSIB Annual Report, p. 4:

Appeal decisions also continued to be timely, with 86% of appeals decided within six months in 2021 compared to the target of 80%.

5. Up to the end of 2022, the Board seems to be continuing to perform quite well. This is from the Board's Q4 Quarterly Metrics report (p. 3):

Q4 2022 Executive summary

Key metrics for the Appeals Services Division (ASD) in Q4 2022 and the full year 2022 are summarized in the table below.

Key metrics at a glance

Legend: ● Expectations met or surpassed ▲ Metric needs close monitoring ◆ Expectations not met

Appeals Measure	Target	Q4		Full year Jan-Dec	
		Q4 2022	Compared to historical average Q4, 2019-2021	Jan-Dec 2022	Compared to historical average Jan-Dec, 2019-2021
Incoming new appeals registered	n/a	1,290 ▲	1,350 (4% ↓)	5,688	5,593 (2% ↑)
Appeals resolved	match/exceed incoming	1,635 ●	1,282 (28% ↑)	6,511	5,225 (25% ↑)
% of decisions resolved by oral hearing *(oral hearing includes teleconferences, video conferences, and in-person hearings)*	n/a	10% ▲	13% (3% ↓)	10%	12% (2% ↓)
% resolved within 6 months of appeal registration	80%	92% ●	79% (13% ↑)	91%	85% (6% ↑)
% resolved within 30 days of assignment to the ARO (or from oral hearing date)	90%	89% ◆	91% (2% ↓)	89%	92% (3% ↓)
Average overturn rate at issue level	n/a	30% ▲	29% (1% ↑)	30%	30% (0 -)
Inventory of appeals in progress (at end of period)	Less than 2,500	1,580 ●	2,141 (26% ↓)	1,580	2,141 (26% ↓)

Through the continued efforts on stabilization of the Appeals program through 2022, open inventory continued to decline and has reached historical averages. Even though the 2022 volume of incoming appeals was marginally above the historical average, continued efficiency and effectiveness efforts as well as the recruitment of additional AROs to maintain budgeted complements in 2022 allowed resolution of appeals to overwhelm incoming issues. Additionally, the proportion of appeals relating to initial entitlement issues and those relating to SIEF issues had climbed in 2020-2021. These temporary increases - likely associated with the rate framework modernization - have now returned to traditional levels (see Appendix 3).

The above focus and commitment allowed ASD to exceed our service level resolving over 91% of appeals within 6 months versus the 80% target.

The percentage of decisions released within 30 days of assignment to the ARO (or from oral hearing date) was slightly below target due to 2022 ARO recruitment cohorts but performance in this category should return to target level or above once the ARO trainees have gained further experience. The average decision overturn rate in 2022 was 30%.

In January 2022, we worked with our partners in Eligibility to introduce an appeals intake and triage process where a dedicated group of AROs review and triage incoming appeal referrals to ensure they are appeals ready. In October 2022 we expanded this process to include six additional business areas and we anticipate including all remaining business areas by early 2023. We are also continuing the new initiatives of bundling appealable issues on same or related claims and returning new information received during the appeals process to front-line decision-makers for an opportunity to reconsider their decisions without delaying the appeals process if it's still required afterwards.

The 2021 value-for-money-audit (conducted through 2022) focused on the dispute resolution and appeals process. The ASD welcomes it's recommendations and has received approval at the BoD and the Ministry on the audit findings and recommendations. We look forward to immediately starting on implementation initiatives.

3 ASD Quarterly Metrics Report - Q4 2022

* For simplicity, the historical average of previous quarters is unweighted

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6. 92% of appeals are resolved within six (6) months of appeal registration, which is an achievement twelve (12) percentage points above the 80% target.

7. Moreover, the inventory as at December 31, 2022 was 1,580. This is an impressive 920 below the 2,500 target, or 37% better than planned.

D. Contrasting the March 2010 KPMG VFMA with the November 2022 KPMG VFMA

2.1 Summary Audit Opinion

The Appeals Program is delivering value-for-money for the WSIB. In particular:

- The Program creates value-for-money for the WSIB by providing workers and employers with a cost effective and flexible process to present their objections to WSIB adjudicative decisions by:
  - Providing an effective, quasi-independent and quasi-judicial dispute resolution mechanism that addresses worker and employer objections in a flexible, timely and fair manner;
  - Managing and resolving the most complex and difficult WSIB adjudication cases; and
  - Providing a range of dispute resolution processes, including expedited review (60-Day Option), review, enquiry and oral hearing.
- The Program processes deliver Program objectives economically.
  - In particular, the Program has sound planning, budgeting, monitoring and continuous improvement processes.
- The Program processes provide for the efficient resolution of appeals in a manner consistent with Program objectives.
  - The Program has clearly defined accountabilities, appeals procedural guidance, sufficient resources and continuous improvement to enhance Program management and stakeholder responsiveness; and
  - *Program efficiency could be enhanced by strengthening criteria around some Program procedures, timelines and exceptions.*
- The Program processes effectively support Program objectives according to the principles of fairness and transparency.
  - Program processes provide transparency, accessibility and procedural fairness consistent with the mission of rendering final resolutions to objections that are timely, fair and comprehensive; and
  - *Program effectiveness could be enhanced by continuing to work with Operations to improve the management of files that are withdrawn from the Branch or returned to Operations.*
- The Program has mature performance management including a wide variety of performance objectives and related indicators.
  - These indicators are closely tied to Program objectives and provide a balanced variety of performance related information; and
  - *Performance measurement indicators could be enhanced in conjunction with the implementation of recommendations noted in the Report.*

 7

Workplace Safety and Insurance Board – Value for Money Audit of the Dispute Resolution and Appeals Process

Executive Summary: Background and Overview

Value for Money Conclusions

Through our review of the WSIB's Dispute Resolution and Appeals Process, we have concluded that the process currently demonstrates "low" value for money[1]. Currently, decision making timelines are too long and impede effective rehabilitation and return to work leading practices. Our rating is a reflection of research and leading rehabilitation and return to work practices we noted during our jurisdictional scan which were notably more timely. There is an opportunity for the WSIB to reassess its current appeals operational design including practices and policies to ensure the doctrine of fairness is upheld and dispute resolution and appeals are carried out in an efficient and effective manner with due consideration of defined timelines.

Our rating is also based on the fact that there are weaknesses which may have a significant impact preventing achievement of strategic objectives. While performance metrics have shown improvement over the past years, there remain a number of significant challenges that continue to impede the efficiency and effectiveness of the process. These include:

- Fragmentation of appeals so that workplace party issues are not dealt with holistically, which leads to multiple appeals with slow resolution and added cost and decision making delays for the workplace party.
- Unnecessary administrative delays in terms of assigning the appeal to the Appeals Resolution Officer which prolongs the appeals process.
- Lack of timelines in place to register an appeal and lack of enforcement of appeal implementation timelines, which do not support effective rehabilitation and return to work practices. This is further evidenced by the fact that the average appeal timeline for 2021 was in excess of 200 days.
- Lack of an effective and accountable quality assurance processes across dispute resolution and appeals decision making. Current quality assurance processes do not set rigorous standards for determining whether cases should move into the formal appeals process, proceed straight to the WSIAT, or return to the front line for further reconsideration.
- The litigious nature and the decision-making delays associated with the process are contrary to the WSIB's strategic objective of "Meeting Our Customers Needs and Expectations", and do not support leading practice rehabilitation and return-to-work principles. Processes can be improved to support WSIB objectives focused on accessible and personalized customer service, and timely, quality and fair decision making.

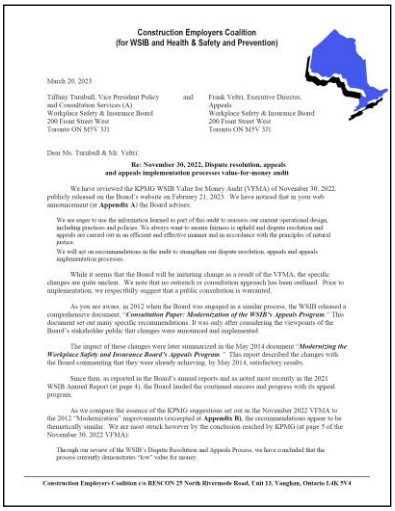
[1]The significant impact on injured workers lives as a result of decision delays was chronicled in "Red Flags, Green Lights, A Guide to Identifying and Solving Return-to-Work Problems" by Ellen MacEachen, PhD, Lori Chambers, MSW, Agnieszka Kosny, PhD and Kiera Keown, MSc. The guide was published by the Institute for Work & Health, 2009.

(continued overleaf)

 5

1. What is puzzling is this: In 2009 value-for-money existed and in 2022 it did not. This is in spite of enhancements *after* the 2009 VFMA, all of which, by the Board's own account, improved the appeals process.

2. This very point was raised by the **Construction Employers Coalition (for WSIB and Health & Safety and Prevention)** ("CEC"), a coalition with which I am involved, in a letter to the Board of March 20, 2023:



Construction Employers Coalition
(for WSIB and Health & Safety and Prevention)

March 20, 2023

Tiffany Turnbull, Vice President Policy and Consultation Services (A)
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

and Frank Veltri, Executive Director, Appeals
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Turnbull & Mr. Veltri:

Re: November 30, 2022, Dispute resolution, appeals and appeals implementation processes value-for-money audit

We have reviewed the KPMG WSIB Value for Money Audit (VFMA) of November 30, 2022, publicly released on the Board's website on February 21, 2023. We have noticed that in your web announcement (at **Appendix A**) the Board advises:

> We are eager to see the information learned as part of this audit to measure our current operational design, including practices and policies. We always want to ensure fairness is upheld and dispute resolution and appeals are carried out in an efficient and effective manner and in accordance with the principles of natural justice.
> We will act on recommendations in the audit to strengthen our dispute resolution, appeals and appeals implementation processes.

While it seems that the Board will be initiating change as a result of the VFMA, the specific changes are quite unclear. We note that no outreach or consultation approach has been outlined. Prior to implementation, we respectfully suggest that a public consultation is warranted.

As you are aware, in 2012 when the Board was engaged in a similar process, the WSIB released a comprehensive document, "***Consultation Paper: Modernization of the WSIB's Appeals Program***." This document set out many specific recommendations. It was only after considering the viewpoints of the Board's stakeholder public that changes were announced and implemented.

The impact of these changes were later summarized in the May 2014 document "***Modernizing the Workplace Safety and Insurance Board's Appeals Program***." This report described the changes with the Board commenting that they were already achieving, by May 2014, satisfactory results.

Since then, as reported in the Board's annual reports and as noted most recently in the 2021 WSIB Annual Report (at page 4), the Board lauded the continued success and progress with its appeal program.

As we compare the essence of the KPMG suggestions set out in the November 2022 VFMA to the 2012 "Modernization" improvements (excerpted at **Appendix B**), the recommendations appear to be thematically similar. We are most struck however by the conclusion reached by KPMG (at page 5 of the November 30, 2022 VFMA):

> Through our review of the WSIB's Dispute Resolution and Appeals Process, we have concluded that the process currently demonstrates "low" value for money.

Construction Employers Coalition c/o RESCON 25 North Rivermede Road, Unit 13, Vaughan, Ontario L4K 5V4

> As we compare the essence of the KPMG suggestions set out in the November 2022 VFMA to the 2012 "Modernization" improvements (excerpted at Appendix B), the recommendations appear to be thematically similar. We are most struck however by the conclusion reached by KPMG (at page 5 of the November 30, 2022 VFMA):
>
> > Through our review of the WSIB's Dispute Resolution and Appeals Process, we have concluded that the process currently demonstrates "low" value for money.
>
> The conclusion of "low value for money" is perplexing. We observe that in the 2008 Appeals VFMA, released March 10, 2009 and also facilitated by KPMG, that it was found at that time (page 7) that the WSIB Appeals program is "is delivering value for money for WSIB."
>
> In 2010 the appeals program was delivering value for money. Enhancements were developed and implemented in 2012. These enhancements were lauded by the Board right up to the most recent report of 2022. Now, the same auditing firm has concluded there is now only "low" value for money. In our respectful view, what has not been made clear is the primary contributing reasons for this change in opinion.
>
> Respectfully, before change is initiated, we suggest that is necessary the Board clearly outline the reasons for a change in opinion of KPMG, particularity in light of the enhancements introduced after the 2008 VFMA.

3. A useful if not required exercise would be to assess the efficacy of the 2012 appeals system enhancements and ascertain why contemporary performance is not considered satisfactory. It is submitted that this may be difficult since all performance metrics seem to paint a contrary picture, and the Board itself lauded the impacts of the 2012 appeal enhancements over the years.

4. This is particularly important to clarify in the wake of very serious contentions raised by injured worker organizations that the planned appeal changes may well result in appeals suppression (as previously canvassed – see the June 28, 2028 webpage for Injured Workers Online and the June 5, 2023 letter from Ontario Legal Clinics' Workers' Compensation Network).

E. Conclusions

1. While a review and public consultation focused on improving the Board's appeal performance is never to be discouraged, using the KPMG recommendations as the primary driver for a review let alone the primary source of core recommendations, will unlikely instill confidence in the stakeholder community.

2. I repeat my suggestions that a respected independent third-party reviewer should assess the submissions received and advise the Board how to best proceed.

PART III: The June 5, 2023 Ontario Legal Clinic's letter - a direct comment

A. Introduction

1. On June 5, 2023, just prior to the commencement of the Board's consultation, Mr. John McKinnon, Co-chair of the Ontario Legal Clinics' Workers' Compensation Network, wrote to the WSIB CEO setting out a comprehensive and valuable commentary on the KMPG VFMA.

2. I have made several references to this letter previously in this document. Mr. McKinnon's letter represents the most comprehensive critique currently available. I am certain it will be joined by many others by the deadline. As WSIB policy consultation respondents are rarely able to reply to depositions from other respondents, and as it is likely the June 5, 2023 communication advances themes that will be repeated in other submissions, it may be of value to the WSIB to receive a commentary on the June 5th letter.

3. Mr. McKinnon is an experienced and well-respected advocate for injured worker interests. I do not personally know Mr. McKinnon and have no professional affiliation with him or his organization, and have met him only professionally and tangentially on occasion, dating back it would seem, to the **W.C.A.T. Decision 915 Leading Case**, in which we were both engaged as intervenor counsel for different parties.

4. The commentary which follows is not presented as a critique of Mr. McKinnon's analysis, but to reinforce support for certain elements of the analysis with which I am in agreement, as such concordance may be of some assistance to the Board. No inferences should arise by any specific absence of comment.

5. In the following sections, I will excerpt selected paragraphs of the June 5th letter followed by my personal commentary. Any highlight or emphasis has been added by myself.

B. Comment on the letter's introductory paragraphs, pages 1 and 2

> The introduction of the WSIA in 1997 included the requirement that the WSIB conduct an annual VFMA of at least one of its programs. **The purpose of the VFMA was to ensure that the Board's programs are efficiently and effectively run.** Stakeholders have been allowed to participate to varying degrees in these audits. As representatives, we participate by answering auditor's questions and advising on potential improvements in the compensation system. **Unfortunately, on more than one occasion, we have observed auditors with little genuine understanding of the workers compensation system produce a report that is antithetical to the basic principles of workers compensation, the administration of justice and the principles of fairness.**
>
> The 2022 VFMA of the dispute resolution and appeals process engaged stakeholders and yet produced recommendations far from anything discussed. The acceptance by the Board of Directors does not indicate due appreciation of their impact on injured workers and the overreach of the auditors' report. **When you have read our concerns listed below, you will see that we feel the KPMG report bears no resemblance to a value for money assessment.** This report is a direct attack on injured workers right to appeal decisions of the WSIB. The auditors' recommendations should not be used as a starting point for discussions about changes to the workers compensation system. We urge the Board of Directors not to undertake an overhaul of the appeals system on the basis of these flawed assumptions, poor research, and ineffective comparators.
>
> **The VMFA recommendations will negatively impact injured workers' access to justice.** If the WSIB adopts its recommendations, many of the most vulnerable injured workers won't be able to

appeal their decisions and will not receive full compensation under the Workplace Safety and Insurance Act. Facing draconian 30-day time limits to appeal decisions they don't understand, they won't appeal. Or, if they manage to appeal, they will be pressured into settling for something less than their full entitlement under the WSIA.

LAL Comments:

- The statutory authority, indeed annual requirement, for a VFMA is WSIA s. 168 (1):

  Value for money audit
  168 (1) The board of directors shall ensure that a review is performed each year of the cost, efficiency and effectiveness of at least one program that is provided under this Act. 1997, c. 16, Sched. A, s. 168 (1).

- VFMAs were introduced into the Ontario workers' compensation system as a result of **Bill 15, Workers' Compensation and Occupational Health and Safety Amendment Act, 1995**, which received Royal Assent December 14, 1995. Bill 15 was the first stage of a two-stage reform thrust, with the second and more comprehensive phase introduced through **Bill 99, Workers' Compensation Reform Act, 1996**. Bill 99 is essentially the current WSIA (although it has received numerous amendments over the past quarter century).

- The main opening points of the June 5, 2023 letter, if I may be so bold as to summarize, is that the appeals VFMA strayed from the usual expectations of a VFMA, with that foray delving into administrative architectural design all of which is rendered problematic by a lack of understanding of the "*basic principles of workers compensation, the administration of justice and the principles of fairness*."

- These are criticisms I share. I will add one more plank to that eloquent phrase. The VFMA does not reflect an informed sense of the contemporary history of the evolution of decision-making and decision-review processes of the WSIB which have been developed collaboratively, actively sought by the Board or otherwise, through an engaged pursuit of processes chasing the "rule of law." That pursuit is not just that of the Board's. In fact, as history knows, the Board arrived rather late to this party. It did though, arrive.

- The VFMA under active consideration, in my respectful opinion, strays beyond the reasonable parameters one would expect from an exercise of this type, with this said with full awareness that I am dreadfully lacking the requisite background and skills to assess the efficacy of VFMAs generally. However, I believe I am ably equipped to assess design missteps that are inconsistent with the best process design requirements of the workers' compensation system. This exercise, I respectfully propose, fits that concern.

- The Ontario Auditor General office succinctly describes its mandate (on the AG website) for VFMAs thusly:

  Value-for-money audits — The Auditor General examines government programs, agencies, certain public-sector organizations receiving government grants and Crown-controlled corporations to see if their administrators have spent money with due regard for economy and efficiency and have satisfactory procedures for measuring and reporting on effectiveness. In other words, he **ascertains if taxpayers have received value for the tax dollars spent** by the entities we audit. As part of these audits, the Auditor also checks that the management of the auditees being examined collected and spent money in the ways that the Legislature intended it to. (emphasis added)

- That approach seems consistent with the general expectation as inferred in the June 5, 2023 letter.

- To assess the founding intent of the inclusion of this power (and requirement) in the WSIA, it is instructive to turn to the legislative debate when Bill 15 was introduced in 1995.

- The Minister of Labour's statement to the House November 14, 1995 when Bill 15 was introduced for second reading is quite consistent with the Auditor General's explanation of the purpose of VFMAs:

> **Hon Mrs Witmer:** The legislation also establishes value-for-money audits that will ensure the board's programs and operations are efficient, effective and financially sound. Value-for-money audits are a business practice used by well-run organizations to ensure that efficiency, economy and effectiveness are achieved in the delivery of all programs.

- The opposition response, including a pointed warning, is also instructive:

> **Mr Duncan:** Finally, we'll amend section 16 of Bill 15 to provide that the Legislature will determine where value-for-money audits will be conducted. **Wouldn't it be interesting -- and I can't imagine that this government would, but some government some day may decide not to study part of the act or not to study part of the board, or do a value-for-money audit, for political purposes**. So it ought to be left to the Legislature to determine where those value-for-money audits should be conducted.
>
> If you are truly interested, if you truly believe that better financial management and accountability will result from those value-for-money audits, then I am quite certain that my friends and colleagues opposite will support our amendment, which will allow the Legislature to determine where value-for-money audits will be conducted on an annual basis. (emphasis added)

- It perhaps is unfortunate that when provided with the reins of government, Mr. Duncan did not follow through on that amendment. Perhaps as a result of this exercise, the dormant suggestion of Mr. Duncan's will acquire a new life, and be placed on a pending workers' compensation reform list. The need is arguably more acute in 2023 than in 1995.

- I present this general proposition. The potential mischief envisioned by Mr. Duncan almost 28 years ago, is cured by a strict adherence by VFMAs to the design expectations of the Auditor General and the Minister of Labour of 1995. In short, the efficacy of current programs should be assessed. Public policy design alternatives must be left to the "experts" and in the case of the Ontario workers' compensation program, it is the Board that is the expert. In short, the VFMA should "stay in its lane."

- Should a VFMA stray outside its lane, a risk arises that recommendations may be particularly unworkable such that the integrity of the entire VFMA may become suspect. I wish to highlight one such example. The June 5, 2023 letter commented on this recommendation (at p. 2):

> KPMG suggests that the WSIB "establish a roster of qualified representatives" and examine the system of compensation to the representative community. Further, it suggests that the WSIB should tie compensation to representatives "level of effort throughout the decision process". An informed reviewer would know that the WSIB doesn't fund representation, it cannot control representation and it cannot be held responsible for the cost of representation of appellants. The WSIB cannot determine compensation for representatives. It would be entirely inappropriate for

either the WSIB or the Law Society of Ontario to interfere with workers' or employers' solicitor-client relationships with respect to compensation.

- This is the relevant excerpt from the VFMA (p. 37):

> The WSIB should work with the Law Society of Ontario and other relevant parties **to establish a list of qualified representatives from which workplace parties can draw upon**. This would include exploring the potential for specific competency and training requirements for the representative community in terms of workers' compensation and work place injury with the Law Society.
>
> **Based on the above, the WSIB should establish a roster of qualified representatives from which the WPP's can draw upon. The system of compensation for the representative community should be examined and tied to their level of effort throughout the decision process.** The fee structure should incent the timely and early resolution of decisions throughout the appeals process.
>
> We acknowledge that through implementation of the recommendations included in this report, the use of worker representatives may decrease in the future; in particular recommendations to resolve decisions through ADR and implementation of a Quality Assurance Function. **The WSIB should monitor the use of worker representatives in the future and work with the relevant parties to establish a roster of qualified representatives from which workplace parties can draw upon**. (emphasis added)

- This recommendation is "far off the mark" and cries out for a respectful retort.

- Perhaps the best place to start is the *Law Society Act*, R.S.O. 1990, CHAPTER L.8, which sets out the functions of the **Law Society of Ontario** ("LSO") at s. 4.1:

> **Function of the Society**
> 4.1 It is a function of the Society to ensure that,
> (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
> (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario. 2006, c. 21, Sched. C, s. 7.

- Section 4.2 sets out the principles to be applied by the LSO:

> **Principles to be applied by the Society**
> 4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
> 3. The Society has a duty to protect the public interest.
> 4. The Society has a duty to act in a timely, open and efficient manner.
> 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized. 2006, c. 21, Sched. C, s. 7.

- The LSO has established long standing Rules of Professional Conduct. **Rule 5.1-1** along with the LSO accompanying commentary is particularly helpful:

> **Rules of Professional Conduct**
>
> **5.1-1** When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.
>
> **Commentary**
>
> [1] **Role in Adversarial Proceedings -** In adversarial proceedings, **the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law**. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.
>
> 2] This rule applies to the lawyer as advocate, and therefore **extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals**, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures. (emphasis added)

- Should the WSIB somehow attempt to secure control, including fee control, over the workplace parties' ("WPP") legal representation, the core of the lawyer's independence is struck down, absolutely and completely, to the point that even should a WPP secure representation under those conditions, the WPP could and likely would, question the independence of counsel.

- The independence of legal counsel is so vital to fair judicial and quasi-judicial process that nothing less than the rule of law would be fatally compromised by such an approach envisioned by the VFMA.

- I respectfully and strongly suggest that the Board and the authors of the VFMA read the legal article, "**The Independence of the Bar: An Unwritten Constitutional Principle**," by Roy Millen, widely available and found on the Canadian Bar Association website. Some short excerpts make the point:

> The independence of the bar is "one of the hallmarks of a free society." An independent bar provides citizens with access to justice. It is also critical to the independence of the judiciary, the proper functioning of the administration of justice and the maintenance of the rule of law. It is one of the unwritten constitutional principles that create the conditions for the protection of our rights and freedoms. (at p. 107)
>
> . . . . . .
>
> Put simply, the maintenance of our constitutional values and freedoms requires a bar that is independent from the state (at p. 130)

- Should the Board or the government proceed to codify the VFMA suggestion, I suspect a hurricane of constitutional litigation would be unleashed.

- Notwithstanding that the Board has politely rejected this suggestion of the VFMA (at page 37), the concern of any reasonable reader is this: *Is the rest of the report reliable?*

- This need not be a death knell to the idea of reviewing the WSIB appeals process. Far from it. In fact, the June 5, 2023 letter seems to welcome a differently structured review. In the concluding paragraph the letter says, "*Stakeholders would welcome the opportunity to have an honest conversation about the shortcomings of the WSIB's appeals process*." I would urge the Board to set aside the VFMA and consider a different more far-reaching consultation that embraces the idea of "*an honest conversation.*" I would support such an exercise.

- Perhaps the simplest and best way to start is to simply ask of the critics of the Board's proposals, "*how do you recommend proceeding?*" If the response is reasonable, why would not the Board accept?

C. Comment on the interpretation of the auditor's qualifications to assess matters of administrative law, pages 2 and 3

The purpose of the VFMA is to ensure that Board programs are run efficiently and effectively. The auditors make recommendations that go beyond this function and the authority of the WSIB.

KPMG suggests that the WSIB can choose to enforce a one-year time limit to submit the Appeal Readiness Form (ARF). The Board can't because the law doesn't allow it. As the WSIB appears to recognize in its response, it has no statutory power to create a new time limit. Once a worker has met their time limit under WSIA s. 120, the Board can't impose an additional time limit.

. . . . . .

KPMG suggests that the WSIB can bypass the statute and refuse to hear some appeals based on subject matter. It suggests that some decisions like NEL decisions are based on "standardized calculations" and so appeals are "effectively redundant". **An informed reviewer would know that NEL decisions are complicated, often incorrect, <u>and often changed on appeal</u>: 24% of NEL decisions were allowed or allowed in part by Appeals Resolution Officers in 2021**. Many NEL appeals are premised on the interpretation of medical evidence that should be included/excluded in the NEL assessment, the potential impact of a pre-existing condition, whether the AMA Guide was properly interpreted based on the medical condition(s), a review of a workers' activities of daily living, etc. Clearly, these appeals are not as straightforward as KPMG suggests in their gross simplification.

It should be noted that the WSIB has no ability under the statute to refuse to hear certain appeals, making KPMG's recommendation moot. Section 119(3) of the WSIA provides that "**The Board shall give an opportunity for a hearing**."

KPMG suggests that the WSIB can choose to enforce a 30-day time limit on decisions that are "combined" with a RTW decision. <u>This is incorrect</u>. Under s. 120(3) of the WSIA only decisions concerning return to work or a labour market re-entry plan have a 30-day time limit. Injured workers have 6 months to object to all other WSIB decisions.

<u>LAL Comments</u>:

- I addressed my views of the role of a VFMA as directed by WSIA s. 168 (1). The June 5, 2023 letter advances many other critiques that warrant unpacking.

- With respect to the time limit element, the June 5, 2023 letter asserts that:

> "KPMG suggests that the WSIB can choose to enforce a one-year time limit to submit the Appeal Readiness Form (ARF). The Board can't because the law doesn't allow it."

- In the WSIB consultation document, published one day after the June 5, 2023 letter, the Board addresses the issue in this manner:

> **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.

- Based on commentary publicly available at the time of this writing, the argument against this proposition is fairly clear – one year is generally too short and an insufficient amount of time.

- The Board would rely on its powers pursuant to WSIA, s. 131 to establish its "practice and procedure":

> **Practice and procedure**
>
> **131** (1) The Board shall determine its own practice and procedure in relation to applications, proceedings and mediation With the approval of the Lieutenant Governor in Council, the Board may make rules governing its practice and procedure.
>
> **Same, Appeals Tribunal**
>
> (2) Subsection (1) applies with necessary modifications with respect to the Appeals Tribunal.
>
> **Non-application**
>
> (3) The *Statutory Powers Procedure Act* does not apply with respect to decisions and proceedings of the Board or the Appeals Tribunal.

- The Board should be mindful to ensure its administrative rules or policies do not exceed its statutory authority and thereby risk being held *ultra vires*. Regard should be had for the principles set out in the Nova Scotia Court of Appeal decision, ***Surette v. Nova Scotia (Workers' Compensation Board)*, 2017 NSCA A 81**, which held that Board policies are "*in substance subordinate legislation*" (para. 18), that "*an additional limitation period not contemplated by the Act*," is "*inconsistent with the Act*" (para. 33). After the release of *Surette* the Nova Scotia WCB revamped the policy in question to conform with the Court of Appeal decision.

- I do not know what would become of a judicial quarrel over the Board's power to set a secondary limitation period as contemplated by **Recommendation 1.2**. I do know however that a judicial squabble is unnecessary if the Board sets acceptable and reasonable limits in policy, open for broad discretionary application.

- The WSIAT follows similar limitation periods (WSIA, s. 125 (2) and has the same powers as does the Board to "*determine its own practice and procedure*" (WSIA, s. 131 (2)):

> **Appeal**
>
> **125** (1) A worker, employer, survivor, parent or other person acting in the role of a parent under subsection 48 (20) or beneficiary designated by the worker under subsection 45 (9) may appeal a final decision of the Board to the Appeals Tribunal. 1997, c. 16, Sched. A, s. 125 (1); 2021, c. 4, Sched. 11, s. 42 (7).

Notice of appeal

(2) **The person shall file a notice of appeal with the Appeals Tribunal within six months after the decision or within such longer period as the tribunal may permit. The notice of appeal must be in writing and must indicate why the decision is incorrect or why it should be changed.** 1997, c. 16, Sched. A, s. 125 (2).

- To administer the statutory time limitations and to ensure the efficient administrative operation of the WSIAT, the WSIAT has adopted certain time limits. These are set out in the WSIAT's Practice Directions, notably, **Practice Direction "Inactive Appeals"** and **Practice Direction "Closing Appeals by the Tribunal."**

- To assess the application of these Practice Directions, the Board should examine the WSIAT's actual applications through its decisions. While there are a few decisions available (using the search terms "Practice Direction" and "Closing Appeals" with the CanLII search engine, 139 cases are identified), it becomes clear that closing appeals at the WSIAT is clearly a last resort and put in motion only after an extraordinary effort is made to allow an appellant to proceed with the appeal. This is as it should be. I draw the Board's attention to two decisions in particular which reflect that approach, ***Decision No. 902/09*** **(May 7, 2009)** and ***Decision No. 1061/22E*** **(August 19, 2022)**.

- Interestingly, in my experience, and to my knowledge, the approach of the WSIAT with respect to similar considerations has not attracted any significant, if any, push back or opposition from stakeholders and/or advocates. From this I believe two propositions may well emerge. *First,* stakeholders and advocates are likely of the view that the WSIAT's approach is reasonable. *Second,* stakeholders and advocates are likely of the view that the Tribunal's exercise of adjudication discretion in cases such as this is generally trusted.

- It is perhaps the element of trust or more precisely, the absence of trust, that leaps out of the commentary so far publicly available. It is not, I believe overstatement to suggest that groups that have responded so far do not trust the proposed changes or the Board for proposing them. This should be very concerning to the Board. If the VFMA and the proposed policy responses are fomenting distrust, stakeholder acceptance is effectively impossible.

- The Board would be well advised to simply mirror, in words and in practice, the precise approach of the WSIAT as reflected in the aforementioned Practice Directions and as applied in actual cases.

- With respect to the "standardized calculations" appeals, I am in full agreement with the positions advanced in the June 5, 2023 letter. The letter correctly notes the mandatory direction of WSIA, s. 119 (3):

Principle of decisions
119 (1) The Board shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent.
Same
(2) If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits.
Hearing
(3) The Board shall give an opportunity for a hearing.
Hearings
(4) The Board may conduct hearings orally, electronically or in writing.

- Regardless of the level the Board chooses to be the "final decision" (and I contend that it is within the Board's discretionary authority to make that determination as a matter of process), it is a rather moot point overall, since the Board "*shall give an opportunity for a hearing*." The Board's discretion is whether the hearing is in writing, orally or electronically. The Board has no discretion not to hold a hearing.

- The June 5, 2023 letter asserts that "*24% of NEL decisions were allowed or allowed in part by Appeals Resolution Officers in 2021*." If this assertion is true, that is all the evidence needed to powerfully discredit this recommendation once and for all, not that "access to justice" should be determined in any sense by some mathematically established likelihood of success.

- The Board recommends:

  > **Recommendation 4.2:** We should exclude decisions based on standardized calculations from our internal appeals process and these decisions should be appealed directly to the WSIAT.

- Such a recommendation only serves one clear purpose – to reduce the appeal caseload inventory of the WSIB. It does nothing to further justice. Moreover, it does nothing to reduce the administrative responsibilities required of the Ontario workers' compensation system. It simply uploads what would be WSIB appeals directly to the WSIAT, with the WSIAT effectively becoming the first and final appeal arbiter.

- This recommendation is a *de facto* declaration that the Board seeks to offload certain appeal and review responsibilities with the only rationale being efficiency gains, with efficiency very narrowly construed. The Board would be well-advised to assess its role and mandate in the context of justice. This is a Pandora's box, which, once opened, may well allow for a fast and steep slide right back to the structural inequities of the pre-1970s, and may I remind of the implications of that.

D. Comment on the assertion that the "auditor's proposals will reduce WSIB benefit expenditures and not protect injured workers' legal rights," pages 3 and 4.

The report implies that there are too many worker appeals and that they are not resolved in an appropriate amount of time, causing undue delays in the return-to-work process, which is at odds with the WSIB's "Better at Work" ideology. The remedy for these perceived ills is to radically transform the Dispute Resolution and Appeals Process.

KPMG's narrative does not fit the facts. There is no crisis in appeals. Since 2000, there has been a substantial reduction in the number of worker appeals. From 6,800 worker appeals in 2000, the WSIB appeals caseload has dropped to 4,305 appeals in 2021 – this represents a 37% decline. Excluding 2020 by virtue of the COVID-19 Pandemic, the WSIB has exceeded its targets for the percentage of appeals resolved within six months since 2017. In fact, KPMG outlines that the number of appeals resolved within 6 months for the first quarter of 2022 was 92% - 12% greater than the 80% target established by the Board. **The auditors have manufactured a crisis that doesn't exist to legitimize their radical proposals which will negatively impact compensation for injured and ill workers. The recommendations in the report are unnecessary and an overreaction.**

. . . . . .

An informed reviewer would consider the significant number of denied reconsideration decisions and worker appeals at the WSIB compared to the WSIAT. Freedom of Information (FOI) data provided by the WSIB reveals that the number of denied worker appeals has steadily increased since 2000. Between 2017 and 2021, 65%-68% of worker appeals were denied by the ARO. However, when these worker appeals proceeded to the WSIAT, the majority of decisions were overturned. Only 27%-35% of worker appeals were denied at WSIAT – a marked difference revealing flaws in adjudication at the Board.

A report published by the Industrial Accident Victims Group of Ontario reviewed one year's decision by the WSIAT and found:

> In 110 appeals, the Tribunal found that the WSIB failed to respect the medical advice of the worker's treating physicians about return to work.
>
> In 175 appeals, the Tribunal found that the Board's decision was contrary to all, or all discussed, medical evidence.
>
> In 81 appeals, the Tribunal found that the Board's decision was made without any supporting evidence
>
> In 75 appeals, the Tribunal found that the Board denied benefits based on "pre-existing" issues without adequate evidence.

LAL Comments:

- I agree entirely that the objective record establishes that the WSIB appeals program has exceeded all important targets. Objectively, there is no basis for change, based on performance. Performance is improving not degrading. As canvassed earlier, the Board itself was, until 2022, rather proud of its program on appeals administration.

- I support the June 5, 2023 letter's assertion that "*the recommendations in the report are unnecessary*."

- Respectfully, what ought to attract the attention of the Board is the assertion, if correct, that 65-68% of worker appeals were denied by the ARO whereas only 27-35% of worker appeals were denied by the WSIAT. The citing of this statistic cannot be read to conclude that the 27-35% WSIAT performance relates to the same bundle of cases. It likely does not. We do not know how many of the 65-68% of worker cases denied at the Board proceeded to the WSIAT. If all did, then arguably the comparison is quite powerful.

- Nonetheless, the broad point being made seems to be this – the WSIAT and the WSIB while operating with the same statute and the same policies, reach very different results, with the implication being that the standard of justice of the WSIAT exceeds that of the WSIB. If this is in fact the overall point, the Board should openly turn its attention to that criticism.

E. Comment on the assertion that the KPMG recommendations "making it harder for Workers," pages 4 – 8.

KPMG's report recommends the introduction of 3 new time limits and the reduction of 1 existing time limit. **This would require legislative change, a political decision which should be based on the fundamental principles of workers compensation and administrative law and which is outside the scope of a value for money audit**. We are concerned that the WSIB responded favourably to these recommendations when they will make navigating an already cumbersome bureaucracy even more difficult.

In short, 4 time limits would have to be met in 1 year, compared to 1 time limit under the current legislation. Underlying these recommendations is a lack of understanding of how the WSIB process functions and what the law states. **These are impractical recommendations that work neither in theory, nor in practice.**

For example, here are just some of the outcomes to be expected under a system based on KPMG's recommendations: **(10 specific outcomes are listed and discussed)**

The Auditor's recommendations will result in appeals suppression. The time limit recommendations provide "value for money" - fewer worker appeals, fewer claims allowed - to the WSIB, but at the expense of justice for injured workers.

KPMG's report recommends increased ADR mechanisms at the Board to resolve disputes early. **Mediation requires a neutral mediator**. The WSIB is both the opposing party and the judge that has denied the injured worker benefits, it cannot be the mediator.

The WSIB has increasingly adopted insurance-based practices in its decision-making. It has adopted quotas for appeals and it is reasonable to expect that the WSIB will adopt quotas for early resolution, thereby creating pressure on decision-makers and injured workers to settle early. **Injured workers in the appeal system because their compensation has been cut off or reduced are desperate and vulnerable**. That pressure from above will create pressure on injured workers to accept less than they believe they are entitled to avoid a lengthy appeal process. **Most injured and ill workers are not represented and are not fully aware of their rights**.

It is especially alarming that the auditors recommended the WSIB "consider exploring incentive/disincentive schemes to resolve disputes early through ADR and reduce the number of cases going through the costly and time consuming appeals process." The WSIB should not hold injured and ill workers hostage by offering speedy payment of reduced benefits. The use of increased ADR is particularly troublesome for injured workers who have low capacity or those who do not speak English. The likelihood injured workers' legal rights will be violated is a genuine concern. This recommendation will cut claim and administration costs but will not provide justice to injured workers.

The auditors recommend several additional measures that will make appeals harder for vulnerable injured workers. In addition to the time limit changes, they suggest that workers be burdened with **new procedural barriers** including an obligation to clearly outline the reasons related to the decision they are objecting to, why it should be changed, and the proposed remedy before their appeal will even meet their time limits under WSIA s. 120. This obligation is contrary to the Act, which requires at s. 120(2): only that an objection must be in writing and must indicate why the decision is incorrect or why it should be changed. It requires legal advice which, as noted above, will not be accessible within the time limits. As well, there is a recommendation to require an electronic ARF "which only allows forms with complete data fields to be submitted" (p. 20). Workers who have low literacy, limited English, or don't understand workers' compensation won't even be able to complete their appeal forms.

LAL Comments:

- The June 5, 2023 letter very ably advances the points and little comment is necessary. I agree entirely, as previously outlined, that the VFMA should "stay in its lane" and not become engaged in the legislative process, in any manner of speaking.

- The Board's relationship with the government is governed by the WSIB and Minister Memorandum of Understanding, which sets out clear protocols for the Board's role in regulatory reform.

- The ten (10) paragraphs on pages 5 and 6 should be carefully considered by the Board, and particularly the allegation that the proposals "*will result in appeals suppression*." The Board's appeals process should be perfectly fair and suitable for the unrepresented appellant.

- I agree with the concerns of the proposed enhanced reliance on mediation and address this in more depth later in this response.

- I agree entirely with the problem of "incentives" (June 5, 2023 letter, page 7; VFMA page 18). Workers' compensation benefits are provided as a matter of right. Period. I am surprised that the WSIB administration agreed with this proposition (VFMA p. 18). The Board should clearly and categorically "go on the record" and dismiss that the idea of incentives to resolve disputes will be considered in any form or fashion.

F. Comment on "Time to Reflect on the Role of the VFMA," page 8

If a VFMA was done to make sure that the WSIB met generally accepted accounting principles, stakeholders would welcome seeing the Board undergo regular audits. However, auditors such as KPMG should not review the scope of legislation and the administrative justice system - **subject matter experts would be more appropriate**.

As the 2022 example demonstrates, the VFMA process has become an overreach of responsibility. **Auditor recommendations that reflect a lack of understanding of the workers compensation system, that run afoul of the law, that fail to examine the problems raised from all angles, and that are selective with the facts relied upon do not help the WSIB to improve the compensation system.**

LAL Comments:

- As canvassed earlier, I agree that the WSIB must use VFMAs as originally intended, not as a vehicle for broad policy or administrative review.

PART IV: A response to some of the specific proposals set out in the Appeals Consultation Document

A. Introduction

1. I will not be presenting additional comment on all of the questions posed by the Appeals Consultation. Comment has been presented respecting time limits and the so-called "standardized calculations" appeals. Strong arguments against both proposals have been advanced.

2. This section will focus on the alternative dispute resolution ("ADR") proposals and in-person versus on-line hearings.

B. Overall, what is the objective being sought?

1. One of the objectives of the VFMA appears be to reduce the number of appeals progressing to the final decision-making level, the Appeals Resolution Officer ("ARO").

2. The VFMA at page 18 when introducing the suggestion of "incentives," notes the objective "*to resolve disputes early through ADR and reduce the number of cases going through the costly and time consuming appeals process*."

3. I have commented earlier on the problem with "incentives" and will not repeat those comments.

4. However, the point to be made here is that there may be an overlooked risk to the proposals overall. The goal to reduce the number of cases going through the appeals process may (and likely would) influence resource allocations. A shift in resource allocations may result in no improvement, or perhaps may even diminish, the Board's delivery of substantive justice. "*Substantive justice is the first aspect of justice that procedure should deliver*."[2]

5. Efficiency gains realized through an emphasis on ADR and re-routing cases back to first level decision-makers could inadvertently result in a diminishing level of substantive justice. It must be remembered that the Ontario workers' compensation system is itself an ADR mechanism from top to bottom. While perhaps imperfect in some respects, overall, between the WSIB and (especially) the WSIAT, a high standard of substantive justice is delivered rather effectively and rather efficiently.

6. The capacity for incremental improvement is always available <u>providing the primary goal being sought is *increasing* substantive justice</u>. If the primary goal is to make the system quicker and easier to use, while there may be "more access" there likely would be "less justice."[3]

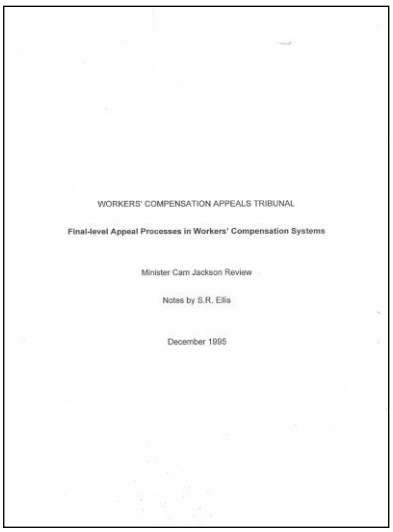
7. To better explain this point, I turn to a December 20, 1995 paper authored by S. R. Ellis, then W.C.A.T. Chair and which was presented to the Hon. Cam Jackson, Minister Responsible for Workers' Compensation Reform as Minister Jackson was about to embark on his review of the

[2] Noel Semple, "Better Access to Better Justice: The Potential of Procedural Reform" (2022) Vol 100 The Canadian Bar Review 124, at 139 (available on the CBR website here).
[3] *Ibid*., at p. 157

Ontario WCB.[4] The paper is entitled, "**Workers' Compensation Appeals Tribunal, Final-level Appeal Processes in Workers' Compensation Systems**," **Notes by S.R. Ellis**.[5]

8. I add that Dr. Ellis, other than being the inaugural Chair of the Appeals Tribunal, continues his extraordinary career pursuing administrative justice in Canada and is the author of "**Unjust by Design, Canada's Administrative Justice System**,"[6] a book which I suggest is essential reading for anyone engaged in the design of an administrative justice process.[7]

9. From the December 20, 1995 paper (pp. 19 and 20) (emphasis added):


WORKERS' COMPENSATION APPEALS TRIBUNAL

Final-level Appeal Processes in Workers' Compensation Systems

Minister Cam Jackson Review

Notes by S.R. Ellis

December 1995

> 79. It may be important to ask why an appeal structure is necessary to achieve justice or to be seen to achieve justice in individual cases. Why, for instance, can this not be effectively accomplished with only on level of decision making? **In the worker's compensation system, why should the claims adjudicators' decisions- making process not be itself a sufficient process from a justice perspective?**
>
> 80. In any event, why, in the workers' compensation system, has justice been apparently thought to require three levels of "appeal" beyond the initial adjudication? In the judicial justice system, for example, there is commonly only one level of appeal as of right and even in that appeal, factual findings of the first-level decision maker are rarely reviewed.
>
> 81. It is very important to appreciate, however, that **in the workers' compensation system, the first two levels of decision-making - the claims adjudication level, and the paper review in the decision review branch - were not primarily dictated by considerations of fairness and justice. They were required for reasons of efficient management of a system that must be understood as most importantly a system of mass adjudication.** (LAL Note: The Decision Review Branch no longer exists.)
>
> 82. Every year the Ontario WCB opens in round figures about 400,000 new claim files. Of this, approximately, 200,000 arise out of lost time accidents. Approximately 85% of these claims are not contentious in any way.
>
> 83. To provide at the first level - the claims adjudicative level - the trappings and quality of an adjudication process that from a justice perspective would be necessary and appropriate for adjudicating contentious issues of fact, medicine and law would be uneconomic and inefficient. What is required at the first level of adjudication in workers' compensation system is a highly efficient screening process that will very quickly recognize and pay the 85% of claims in which there is no significant dispute.
>
> 84. So, at that level, one must locate a large number of adjudicators with high caseloads who must in their decision-making operate within narrow limits of discretion and judgment. The Board has

[4] Minister Jackson released "New Directions For Workers' Compensation Reform: A Discussion Paper," in January 1996 and his final report, "New Directions For Workers' Compensation," in June 1996.
[5] This paper is not likely widely available. I received a copy in 1995 as a member of the W.C.A.T. Advisory Committee. I will be placing a copy on my website shortly following the release of this paper.
[6] S. R. Ellis, Unjust by Design, Canada's Administrative Justice System, (Vancouver: UBC Press, 2013).
[7] On a personal note, I consider Dr. Ellis as one of very few true heroes of the modern workers' compensation program. With that potential personal bias noted, his words quoted ring true due to their thoughtfulness and endurance almost 28 years later.

developed extensive policy guidelines to assist these front-line decision makers in handling cases quickly and as consistently as possible.

85. The paper review at the Decision Review Branch level was simply a refinement of that initial screening process. It allowed more experienced adjudicators to pick up and deal with obvious mistakes in the initial screening.

86. **Thus, in effect, for cases involving issues that were disputed, the hearings officer level was the system's first level of adjudication that approximated what is appropriate for dealing with disputed issues from a justice perspective. The Hearings Officer process is analogous, therefore, to the trial court in the civil justice system.**

87. Accordingly, while the initial levels of Board decision-making were called levels of "adjudication", in effect, there were two levels of a screening process and only one level of adjudication.

88. **In my view, those who have from time to time suggested reducing the levels of adjudication in the system by improving the quality of the initial adjudication have not taken into account the indispensable role of a rough and ready initial screening process in the efficient management of a system of mass adjudication.**

89. That justice requires one level of appeal above the trial court level is a principle which has always been accepted in Canadian judicial systems and usually in its administrative justice systems as well. The number of levels varies from subject matter to subject matter but the need for at least one level of appeal has been by and large accepted. Prior to 1985, that role was played in the workers' compensation system by the WCB's own "Appeal Board". Subsequently, it has been played by the Tribunal.

10. The structural efficiencies of a mass adjudication system are permissible if overlaid with a procedurally fair appeal process that delivers a high standard of substantive justice. If the WSIB is attempting to replicate, at the operating level, the standard of justice received at the ARO or even the WSIAT, respectfully, that pursuit may be a quixotic dream.

11. Of course, improvement should be sought. Always. The VFMA recommendations pertaining to the establishment of enhanced "**Quality Assurance**" is an excellent recommendation that, once implemented, should begin to deliver better results throughout the Board's decision-review apparatus and ultimately deliver a higher standard of substantive justice. That improvement would be primarily achieved through better training, enhanced resource development and superior skill development.

C. The ADR Recommendation 1.1

1. As set out by the **Government of Canada Dispute Resolution Reference Guide**, mediation is:

> Simply put, mediation is negotiation between disputing parties, **assisted by a neutral**. While the **mediator is not empowered to impose a settlement**, the mediator's presence alters the dynamics of the negotiation and often helps shape the final settlement. The Canadian Bar Association defines mediation as "the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no decision making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."
>
> Successful mediations result in a signed agreement or contract which prescribes the future behaviour of the parties; this is often called a memorandum of understanding. Such an agreement has the force of a contract and, when signed, becomes binding. (emphasis added)

2. According to the same source, mediation is "*non-coercive: the mediator does not decide for the parties, but helps them make their own decision.*"

3. The **Human Rights Tribunal of Ontario** "Guide to Mediation" advances two essential principles: i) the agreement of both parties is required; and, ii) the mediator is not the decision-maker.

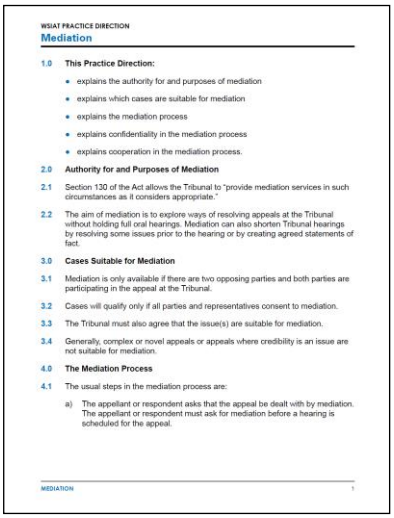
4. The WSIB is proposing an entirely different approach in the Appeals Consultation. The Board is proposing, "*a mediator helps the parties reach an agreement for settlement, and if the parties are unable to reach an agreement, the mediator then acts as an arbitrator and makes a binding decision, similar to what an Appeals Resolution Officer does today*."

5. Respectfully, this model is unsuitable. The Board should accept the immutable principles set out earlier – both parties must agree to the mediation and the mediator under no circumstances assumes the role of decision-maker.

6. It is perplexing why the Board is attempting to develop a new model of mediation in the workers' compensation scheme, when a perfectly viable and tried and true process already exists as designed and practiced by the WSIAT.

7. The WSIAT Mediation Practice Direction is established and well-known to the stakeholder and advocacy communities. It is perfectly and easily adaptable to the WSIB and complies with the basic understandings of mediation as practiced by most administrative tribunals.

8. While there may be some administrative distinctions between the WSIB and the WSIAT as a matter of structural necessity, where there is room for commonality, there is no reason not to pursue administrative similarities.



WSIAT PRACTICE DIRECTION

Mediation

1.0 **This Practice Direction:**

- explains the authority for and purposes of mediation
- explains which cases are suitable for mediation
- explains the mediation process
- explains confidentiality in the mediation process
- explains cooperation in the mediation process.

2.0 **Authority for and Purposes of Mediation**

2.1 Section 130 of the Act allows the Tribunal to "provide mediation services in such circumstances as it considers appropriate."

2.2 The aim of mediation is to explore ways of resolving appeals at the Tribunal without holding full oral hearings. Mediation can also shorten Tribunal hearings by resolving some issues prior to the hearing or by creating agreed statements of fact.

3.0 **Cases Suitable for Mediation**

3.1 Mediation is only available if there are two opposing parties and both parties are participating in the appeal at the Tribunal.

3.2 Cases will qualify only if all parties and representatives consent to mediation.

3.3 The Tribunal must also agree that the issue(s) are suitable for mediation.

3.4 Generally, complex or novel appeals or appeals where credibility is an issue are not suitable for mediation.

4.0 **The Mediation Process**

4.1 The usual steps in the mediation process are:

a) The appellant or respondent asks that the appeal be dealt with by mediation. The appellant or respondent must ask for mediation before a hearing is scheduled for the appeal.

MEDIATION 1

9. Similar mediation protocol is perhaps the best example where this is possible.

D. In-person versus on-line hearings, Recommendation 2.3

1. The swift and massive switch to virtual hearings as a result of the pandemic was a remarkable development. While many judicial schemes world-wide made this transformation with many maintaining at least some elements of this approach, the implications with respect to the delivery of substantive justice are not as yet fully understood.

2. The **Office of the Commissioner for Federal Judicial Affairs Canada, Action Committee on Court Operations in Response to COVID-19** published an interesting document, "**Virtual Hearings: Operational Considerations – Benefits and Challenges**," which likely mirrors the assessment and experiences of many judicial and quasi-judicial institutions including the WSIB.

3. In an accompanying document, "**Virtual Hearings: Areas for Further Study**," the Action Committee sets out the need for further study and lists several areas that warrant attention, excerpts of which appear below:

Areas For Further Study

Over the past two years, courts across Canada, and around the world, have held virtual hearings in a wide range of circumstances. As the Action Committee has highlighted in its publications outlining Orienting Principles and Operational Considerations for virtual hearings, consensus is beginning to emerge about many of the questions that a court must ask itself when determining the mode of proceeding. To that end, various features of virtual or in-person hearings are now recognized as either a benefit or a challenge for access to justice. However, there are still areas that remain relatively unexplored, or for which no consensus has yet emerged. To that end, the Action Committee has identified the following subjects on which further study may be warranted, as Canadian courts continue to determine the role that virtual hearings will play in their future operations.

1. Evidentiary issues in virtual proceedings

Further study may be warranted into the challenges and benefits associated with managing evidence of all kinds in virtual hearings, including:

- → Physical evidence, such as documents, photographs, and exhibits
- → Testimonial evidence, including the ability of the court to assess reliability and credibility; the ability or willingness of individuals to testify; and the differential impacts of the mode of hearing on different types of testimony (e.g. lay witnesses versus expert witnesses, narrative versus material testimony)

2. Oral advocacy in the virtual context

There are diverging views on whether counsel can effectively advocate for their clients in the virtual context. It would be useful to collect further data to develop an evidence-based picture of how, and the extent to which, effective oral advocacy can be conducted on a virtual platform, particularly in the context of hybrid hearings, in which one party may be appearing in person while the other is remote.

3. The outcome of virtual versus in-person proceedings

While some studies are beginning to emerge in countries that have used virtual hearings for longer than Canada, such as the United Kingdom, further study could be conducted on the comparative outcomes and impacts of virtual, hybrid and in-person hearings for various types of matters and proceedings. This could include, for example:

- → Monitoring comparative settlement rates and associated timelines for virtual or in-person judicial dispute resolution (JDR) in different types of matters – anecdotally, some jurisdictions have reported similar or increased settlement rates in virtual settings while others noted decreased rates compared with in-person JDR
- → Monitoring comparative case progression timelines and disposition rates overall and at various stages of judicial proceedings
- → Monitoring comparative outcomes of trials and other substantive hearings

4. Effects of virtual hearings on specific groups of hearing participants

Anecdotal information to date reveals that the relative attractiveness and efficacy of in-person versus virtual hearings for groups such as self-represented litigants, victims of crime, accused persons, and families and children, can vary greatly. In addition, Indigenous persons, newcomers from different cultural backgrounds, or those from a range of different lived experiences may experience virtually courts differently. Further monitoring of the effects of virtual hearings on these different groups, as well as on the effectiveness of mitigation measures put in place to address some of the challenges that may arise in the virtual context, is warranted.

5. Effects on rural and remote communities

Further research on the effects of centralization of court hearings and services would help to reveal whether the increased use of remote technologies to deliver justice has had a net positive or negative effect on rural and remote communities.

. . . . . .

8. Effects of virtual hearings on participants with interpretation needs

Further monitoring of the comparative outcomes of cases in which interpretation is used either in person or remotely would assist in understanding a number of factors, including:

- → The impact of available technology on the quality of interpretation
- → Whether available technology enables simultaneous and/or consecutive interpretation, and the impact of the mode of interpretation on the participants and the process
- → The relative impact on interpretation of seeing the speaker in person versus onscreen

4. Of course, even though the technology for virtual hearings existed before the pandemic, virtual hearings were rather rare. Circumstances intervened and available technology was adapted to "keep the wheels of justice turning" if not the wheels of the world. It is perhaps telling that this technology was implemented as a matter of necessity and that administrative policy choice pre-pandemic did not result in wide-spread application.

5. One could presume that at least intuitively there may have been some pre-pandemic misgivings, alleviated somewhat perhaps as comfort with this technology became wide-spread.

6. I urge the WSIB in the immediate wake of the pandemic not to engineer permanent change until the "jury is in." Certainly, explore the benefits of this technology but be wary of the potential downsides as well. The Board would be wise to initiate its own parallel studies as those proposed by **Federal Judicial Affairs Canada, Action Committee on Court Operations**.

7. It may be valuable for the WSIAT and the WSIB to share experiences and collaboratively analyse matching experiences. Such an exercise can be enabled in my view without compromising the independence of either institution.

E. Problem: Vocabulary and terms

1. With respect to vocabulary, I have observed the introduction of imprecise terms in the Appeals Consultation and the **Appeals Services Division Practices and Procedures document DRAFT 1** ("Appeals Draft P&P") which was sent out for limited comment last month. I responded to that limited consultation on June 21, 2023. My response can be found on our website. The vocabulary requires revision to ensure consistency with the WSIA and to ensure common terms have common meaning.

2. I will set out essentially the same commentary I presented to the Appeals Draft P&P.

3. The Appeals Draft P&P and the Appeals Consultation utilize similar but not identical language to refer to the same "person." The Appeals P&P uses the term "**injured/ill person**" throughout whereas Appeals Consultation uses the term "**person with an injury**." Both documents are referring to the same "person."

4. I will explain why neither term should be deployed in either document or any similar WSIB document. I will set out what the proper terminology should be and strongly urge the Board to **purge those terms in both documents and replace them with more suitable descriptors**, a list of which I will present.

5. In a legal context and in legal writings, the term "injured person" has specific meanings. This is especially the case when dealing with matters under the WSIA as "injury" sustained in employment is a predicate condition for entitlement.

6. In the context of a document which is setting out the practices and procedures for an appeal under the auspices of the WSIA, quite often the very matter under consideration is whether or not the individual is in fact an "injured/ill person" or a "person with an injury." The entire proceeding will not be about whether or not the individual is a "person" of course, but may very well be, **and quite often is**, about whether or not there is an illness or an injury (WSIA, ss. 13 and 15).

7. One need not be an established "injured/ill person" or a "person with an injury" to submit a claim to the WSIB, or pursue an appeal within the WSIB, as that is a finding of fact to be determined by the Board itself.

8. As mentioned, the very nature of the proceeding may well be whether or not the individual is in fact an "injured or ill person" or a "person with an injury." As is common, often the determination of the Board may well be that the person is not, in fact, an "injured/ill person" or a "person with an injury." The Appeals Consultation and Draft P&P use of these terms actually permits the construction of this absurd sentence, "*The injured/ill person (or person with an injury) who submitted the appeal was found after due consideration of all of the evidence not to be an injured/ill person (or person with an injury).*" This playfully constructed sentence illustrates the absurdity.

9. Neither term "injured/ill person" or "person with an injury" appears within the WSIA. However, the WSIA does set out and define relevant and legally important terms that actually describe the same "person" attempted by the Draft P&P and the Appeals Consultation.

10. The WSIA defines the terms worker, dependant, employer, guardian, learner, spouse, student, all of whom may possess claim and appeal rights, with some ironically excluded by the term "injured/ill person" or "person with an injury."

11. For the intended purposes of the Draft P&P and Appeals Consultation, the Board should limit itself to the terms "appellant" and "respondent" or "party" or collectively "parties."

12. I encourage the Board to seek guidance from the WSIAT webpage "Terms We Use" which defines the terms as follows:

> **Appellant:** An appellant is the person who makes the appeal to the WSIAT.
>
> **Party:** A party is worker or employer who has decided to become involved in an appeal. Usually, only people who may be affected by how the appeal is decided can become involved. No one has to take part in an appeal if they do not want to, but the WSIAT can still decide the appeal.
>
> **Respondent:** A person who starts an appeal at the WSIAT is called the appellant. The other person or people involved in the appeal are called respondents. For example, when a worker starts an appeal, the employer is usually the respondent. When an employer starts an appeal, the worker is usually the respondent.

13. While not a part of this immediate exercise, if it is the case that these terms have permeated beyond the two documents referenced and appear in other WSIB policy and procedure documents, my recommendation applies equally to those documents.

All of Which is Respectfully Submitted,

L.A. Liversidge
July 20, 2023

Endnote: In this submission I have referenced several letters publicly available, some of which were addressed to the WSIB. It is my understanding that the Board has likely responded to some or all of these communications. I have not been made aware of or read any specific WSIB response. Should these responses appear on the public record, I will offer future comment as and if warranted. LAL