**L. A. Liversidge, LL.B.**
**Barrister & Solicitor, Professional Corporation**

# LAL Notes 20231107 Redaction Meeting with Gavin Pokan, Chief Operating Officer and Frank Veltri, Senior Director, Appeals

# 10:00 am – 11:00 am (Lakeview Room)

**L.A. Liversidge**

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|---|---|
| **Subject:** | Meeting - Gavin/Frank/Les - Redaction issue |
| **Location:** | Toronto - Lakeview Room |
| **Start:** | Tue 2023-11-07 10:00 AM |
| **End:** | Tue 2023-11-07 11:00 AM |
| **Recurrence:** | (none) |
| **Meeting Status:** | Accepted |
| **Organizer:** | Ashley Velonis-Selinis |

WSIB Office
200 Front Street West
Lakeview Room – 19th floor

Please let me know if you require accommodation to fully participate in this meeting.

If you require additional information please contact us at accessibility@wsib.on.ca.

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# LAL Notes for November 07, 2023 Redaction Meeting

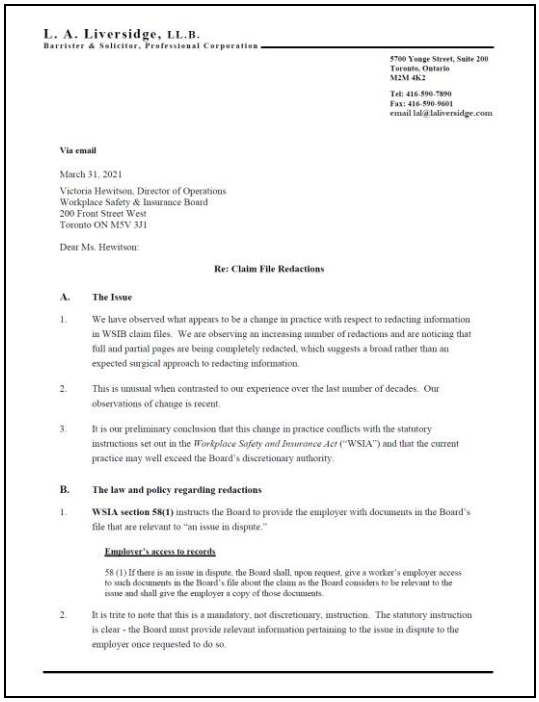
## A. The statement of the problem

1. It has been generally observed that the WSIB has: a) increased the frequency of redactions on access documents; and, b) increased the magnitude and extent of the redactions.

2. This issue was raised by Ian Cunningham, COCA at the September 27, 2023 CAC meeting. Ian advised that the issue was raised following information presented to him by the Office of the Employer Adviser (OEA).

3. LAL assumed the lead in discussing the issue on September 27, even though the issue had not been placed on the agenda. There was limited discussion at the CAC meeting and the November 07 meeting was arranged to continue the discussion. It is unknown who will be attended other than LAL, FV and GP.

4. LAL has direct experience on this issue, having raised it with senior WSIB officials in 2021 and having successfully appealed a case on point to the WSIAT. See letter of March 31, 2021 from LAL to Victoria Hewitson, Director of Operations, WSIB **(Tab A)** and the May 3, 2021 response from Denise Caron-Adam **(Tab B)**.



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**Via email**

March 31, 2021

Victoria Hewitson, Director of Operations
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Hewitson:

**Re: Claim File Redactions**

**A. The Issue**

1. We have observed what appears to be a change in practice with respect to redacting information in WSIB claim files. We are observing an increasing number of redactions and are noticing that full and partial pages are being completely redacted, which suggests a broad rather than an expected surgical approach to redacting information.

2. This is unusual when contrasted to our experience over the last number of decades. Our observations of change is recent.

3. It is our preliminary conclusion that this change in practice conflicts with the statutory instructions set out in the *Workplace Safety and Insurance Act* ("WSIA") and that the current practice may well exceed the Board's discretionary authority.

**B. The law and policy regarding redactions**

1. **WSIA section 58(1)** instructs the Board to provide the employer with documents in the Board's file that are relevant to "an issue in dispute."

**Employer's access to records**

58 (1) If there is an issue in dispute, the Board shall, upon request, give a worker's employer access to such documents in the Board's file about the claim as the Board considers to be relevant to the issue and shall give the employer a copy of those documents.

2. It is trite to note that this is a mandatory, not discretionary, instruction. The statutory instruction is clear - the Board must provide relevant information pertaining to the issue in dispute to the employer once requested to do so.

wsib ONTARIO | Workplace Safety & Insurance Board

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Mr. Liversidge
L.A. Liversidge, LL.B.
5700 Yonge Street, Suite 200
Toronto ON M2M 4K2

May 3, 2021

Dear Mr. Liversidge

Your enquiry dated March 31, 2021 addressed to Ms. Victoria Hewitson, Director was referred to me to review.

In your letter, you expressed concern regarding redaction of both partial and full pages by our staff prior to copies of claim files being provided to your office. You were enquiring as to whether there had been a change in practice at the WSIB.

Although there has been no change in our practice or expectation of staff regarding redaction of documents when received to a claim file, we have provided reminders to staff on the importance of protecting people's privacy.

We are often provided with personal information about an injured or ill person and possibly other individuals. We have a legal obligation under the WSIA and the Freedom of Information and Protection of Privacy Act (FIPPA) to protect that personal information and ensure it is not disclosed outside of the appropriate ways permitted under legislation.

Our expectation is that the case owner review all documents received to a file for relevancy, personal information and harmful medical information.

Information is considered relevant to a claim file if it has bearing on an injured or ill person's eligibility to benefits, planning or facilitation of recovery and/or return to work.

Under the Workplace Safety and Insurance Act, the WSIB is not obligated to provide you with the rationale for placing redactions on claim files. However, we can generally say that we only redact in cases where there is:

- Irrelevant medical records included in the file;
- Another workers Personal Information; and
- Personal Information belonging to a witness in specific claims.

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5. Key points from March 31, 2021 LAL letter:

   a. Paras. A1-A3;

      i. change in practice observed;

      ii. unusual when contrasted with experience over three decades;

      iii. the WSIB's "new" approach unlawful and conflicts with WSIA.

   b. The law; Paras. B1 – B9.

   c. Reasons redactions incorrect; Paras. C1 – C9. Notice of the approach LAL will take, para. C-6:

> 6. I add that where entire pages have been redacted, or a large portion of a document has been redacted without explanation, we will *prima facie* conclude that the Board has exceeded its statutory authority and has improperly redacted relevant information.

6. Key points from May 3, 2021 WSIB response:

   a. There has been no change in WSIB practice/policy; "reminders" have been issued to staff; the WSIB is not obliged to provide reasons (LAL – outright wrong!)

> Under the Workplace Safety and Insurance Act, the WSIB is not obligated to provide you with the rationale for placing redactions on claim files. However, we can generally say that we only redact in cases where there is:
> - Irrelevant medical records included in the file;
> - Another workers Personal Information; and
> - Personal Information belonging to a witness in specific claims.

## B. The duty to give reasons

1. The WSIA:

**PROCEDURAL AND OTHER POWERS**

**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.

**Notice of decisions**

(4) The Board or the Appeals Tribunal, as the case may be, **shall promptly notify the parties of record of its decision in writing and the reasons for the decision**. The Appeals Tribunal shall also notify the Board of the decision. 1997, c. 16, Sched. A, s. 131.

2. **WSIAT *Decision No. 207/05R* (January 10, 2006) (Tab C)**:

a. Page 17 – 20; para. 53 (see full excerpts):

[53] The **Workplace Safety and Insurance Act requires that the Tribunal provide written reasons for its decisions**. Reasons for decision should contain **sufficient analysis** to show the reasoning process by which the Panel or Vice-Chair reached their decision. **The reasons should also demonstrate that the appropriate law and policy were applied**, that the Panel or Vice-Chair considered and weighed the evidence appropriately and drew reasonable inferences. The decision "must set out its findings of fact and the principal evidence upon which these findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors." [1] In Gray v. Director of the Ontario Disability Support Program, 2002 CanLii 7805, the Ontario Court of Appeal considered the duty to give reasons of the Social Assistance Review Board. McMurtry CJO wrote for the Court at paragraphs 18 and following:

## C. What are the rules for access?

1. WSIA:

**Employer's access to records**
58 (1) If there is an **issue in dispute**, the **Board shall**, upon request, give a worker's employer access to such documents in the Board's file about the claim as the Board considers to be **relevant to the issue** and shall give the employer a copy of those documents.

2. Key is simple and clear - relevance.

3. See **WSIAT Practice Direction** "Access to Workers' Information When the Issue in Dispute is at the Tribunal" **(Tab D)**. The core rule:

**6.0 Other Situations Where Full Access May Not Be Granted**

6.1 The Tribunal may identify personal information in records such as the items identified in Schedule A (see below) that is not relevant to the issues in dispute and will not be released. **Information may also be excluded when the relevance is outweighed by the sensitive or prejudicial nature of the information**. The Tribunal may withhold the information and refer the issue to a Vice-Chair for a decision.

**D. Useful WSIAT decisions:**

1. **WSIAT *Decision No. 891/11* (May 31, 2011) (Tab E)**:

a. Entitlement appeal; Case still at WSIB (ARO); Access dispute considered by WSIAT:

[5] Sections 58 and 59 of the WSIA permit the employer access to all documents in a worker's Board file **which are relevant to an issue in dispute**. This access is provided to allow the employer to assess the evidence relevant to the case and to prepare its arguments accordingly. Granting this access therefore requires that two conditions be met. First, an issue in dispute must be identified. Second, the documents sought by the employer must be relevant to the issue in dispute.

[8] The Tribunal's Practice Direction on Access to Workers' Information When the Issue in Dispute is at the Board states that parties can make submissions to the Tribunal on the issue of whether the information in dispute is relevant to the issue in dispute or prejudicial to the worker and if so in what way. **The Tribunal's Practice Direction on Access to Worker's Information When the Issue in Dispute is at the Tribunal is not directly applicable to a section 59 access proceeding but is nevertheless relevant regarding the factors to consider in determining access questions**. That Practice Direction states that the Tribunal may exclude information when the relevance is outweighed by the sensitive or prejudicial nature of the information. **Tribunal decisions on statutory access have applied this analysis in finding that information that is not relevant or only marginally or peripherally relevant should not be disclosed where its potential relevance <u>is outweighed</u> by its sensitive or prejudicial nature**.

b. Overall significance: WSIAT Practice Direction offers solid guidance; key is relevance; or if only peripherally relevant <u>and</u> outweighed by sensitive or prejudicial nature.

2. **WSIAT *Decision 2387/12I* (January 8, 2013) (Tab F)** for more guidance:

a. This case was at the WSIAT (versus ARO with access dispute), but the principles apply. ARO decided a case with redacted information. **<u>Issue</u>:** *Should the information be redacted at the WSIAT?* The WSIAT granted full access to the employer. **Note:** This case is also useful to outline the process *that should* be applied at WSIB.

[19] However, the Tribunal is not bound by the access determinations of the Board. The question of what documents are to be provided to the employer is incidental to the appeal. **The Tribunal adjudicates the access issue on a "de novo" basis just as it considers appeals made to the Tribunal on a de novo basis. The Tribunal does not give deference to the access decisions made by the ARO**.

[22] I note also that the Tribunal's process is somewhat different from the Board's with respect to how access issues are addressed. At the Board, the access issue was addressed by the ARO who heard the appeal. When the ARO made the determination that certain portions of the medical reporting were not to be released to the employer she had already reviewed those documents and considered their relevance and potential weight in the context of the issues before her. **The Tribunal process is different. The access issue is referred to a Vice-Chair who will not hear the appeal on the merits. Therefore <u>I am determining not only whether the full medical reporting is of sufficient relevance to be sent to the employer, but also whether it will be sent to the Vice-Chair or Panel who will adjudicate the appeal</u>. If I withhold medical reports or part of a medical report, I preclude the opportunity for the Vice-Chair or Panel who hears the appeal to determine whether any weight should be placed on the material that is withheld. Subject to unusual circumstances, it is Tribunal Practice to provide all**

**materials sent to the Panel or Vice-Chair who hears the merits of an appeal to the parties to that appeal. *That is because the rules of natural justice require that the parties know the case they have to meet. Therefore all parties have the right to know the content of all materials to which the other parties, and the hearing Vice-Chair or Panel, have access*. If I decide that material is to be removed from the material sent to the employer because it is not relevant to the issues, that determination means that it will also not be sent to the Vice-Chair or Panel who will hear the appeal on the merits.**

[23] I also consider it possible that a Tribunal Assessor or medical expert may have insight into the relevance of medical factors referred to in a medical report that is not necessarily fully apparent to a lay adjudicator. However, referrals to a Tribunal Medical Assessor generally only take place as part of a post hearing process after an appeal has been heard.

[24] **In my view, in order to withhold portions of the medical reporting from the future adjudicative process, it is necessary for me to be satisfied that the portions of any medical reports withheld are entirely and clearly irrelevant to the issues under appeal**, or that their prejudicial nature outweighs their relevance. For instance, references such as to a worker's time in jail, to sexually transmitted diseases, to gunshot injuries, or similar references may be sufficiently prejudicial that there would be special concerns about their release to an employer or even about whether they might affect how other evidence would be weighed. In my view, if not directly relevant, and depending on the circumstances, it may well be appropriate for such materials to be redacted. There may be other examples of special sensitivity or prejudice which will outweigh the relevance of certain medical reporting. **However, in my view, the fact that medical reporting is personal information and is generally viewed as private in nature is not sufficient to establish in and of itself that its release is prejudicial under the Tribunal's Practice Direction. All medical records are confidential in nature and are personal to the worker or, in some cases, to third party family members**. They are provided to the employer under the WSIA on the understanding that they are to be kept confidential and used for workers' compensation purposes only. However, in my view, the reference to prejudicial content in the Tribunal's Practice Direction is a reference to something other than that fact. In my view, for relevant information to be withheld, the information must be of a highly sensitive nature such that the prejudice resulting from its release outweighs its relevance.

3. **WSIAT *Decision 712/22* (September 2, 2022) (Tab G – LAL case)**;

a. This is the case that gave rise to the March 31, 2021 letter **(Tab A)**; Entitlement issue at ARO; Access appeal considered at the WSIAT; LAL appeal allowed.

[13] Tribunal decisions have accepted that section 59 is directed to decisions on medical records (or documents which contain references to medical records). **See Decision No. 1956/01**, 2001 ONWSIAT 3228 in particular. **The Legislature turned its mind to the question of employer access and has specifically directed that it be dealt with under sections 58 and 59**. As noted above, there is specific provision regarding appeal in section 59(4). **Section 123(1)(c) provides the Tribunal with jurisdiction over such other matters as are assigned to the Tribunal. The Legislature assigned the Tribunal jurisdiction over access appeals under section 59(4)**. Section 59(4) of the WSIA provides for a right of appeal to the Tribunal by a "worker, claimant or employer" in respect of a Board decision concerning access to a report or opinion of a health care practitioner. The Tribunal only decides the access to information issue, and does not adjudicate the issue in dispute.

[14] I have reviewed the specific redactions to the medical reports, opinions and documentation that have been made and to which the employer was not provided access. The redactions relate to medical information about the worker or, in some cases, personal information about the worker that is contained in the health care reports, opinions and documentation. The issues in the worker's objection to the October 8, 2019 decision relate to the commencement date of the worker's compensable psychotraumatic disability diagnosed as PTSD and the worker's entitlement, if any, to LOE benefits as a result of such compensable

condition. The appeal materials indicate that such issues include consideration of the worker's non-occupational pre-existing and co-existing injuries/conditions including a non-occupational psychological injury. **I find that, for the most part, the redactions to the health care reports, opinions and documentation pertain to the worker's psychological condition or other injuries/conditions that could affect her psychological condition. This includes pre-existing conditions or factors which could affect the worker's compensable PTSD condition, her recovery from it and the effects of the compensable condition on her ability to work**.

WSIA:

**123** (1) The Appeals Tribunal has exclusive jurisdiction to hear and decide,
(c) **such other matters as are assigned to the Appeals Tribunal under this Act**. 1997, c. 16, Sched. A, s. 123 (1).

4. **WSIAT *Decision 457/23* (April 20, 2023) (Tab H)**:

[7] **Subsection 58(1) of the WSIA permits the employer access to <u>all documents</u> in a worker's Board file which are relevant to an issue in dispute**. This access is provided to allow the employer to assess the evidence relevant to the case and to prepare its arguments accordingly. Granting this access, therefore, requires that two conditions be met. First, an issue in dispute must be identified. Second, the documents sought by the employer must be relevant to the issue in dispute. Objections to Board access decisions may be appealed to the Tribunal pursuant to section 59(4) of the WSIA and section 71(6) of the WCA.

[8] The Tribunal Practice Direction: Access to Workers' Information When the Issue in Dispute is at the Board provides the following with respect to the submissions that parties may make at the Tribunal in such an appeal from the Board:

> 3.6 The Tribunal only decides if the employer does or does not have access to the information. The Tribunal does not decide the issue in dispute. Parties can make submissions on the issue of whether the information is:
>
> • relevant to an issue in dispute or
>
> • prejudicial to the worker and if so in what way.

[9] As discussed in Decision No. 891/11, 2011 ONWSIAT 1353, the Tribunal may exclude information when the relevance is outweighed by the sensitive or prejudicial nature of the information. Tribunal decisions on statutory access have applied this analysis in finding that information that is not relevant, or only marginally or peripherally relevant, should not be disclosed where its potential relevance is outweighed by its sensitive or prejudicial nature. When information is disclosed, the employer and its authorized representatives shall ensure that any further disclosure of information is in an anonymized form, pursuant to subsection 59(6) of the WSIA.

[14] I have reviewed the documents at issue. They generally consist of Board memos, correspondence and medical documents. I note that **Tribunal jurisprudence takes a broad approach to access to documentation.**

[16] With respect to the Tribunal's jurisdiction in these types of appeals, Tribunal decisions have accepted that section 59 is directed to decisions on medical records (or documents which contain references to medical records). See **Decision No. 1956/01**, 2001 ONWSIAT 3228 in particular. The Legislature turned its mind to the question of employer access and has specifically directed that it be dealt with under sections 58 and 59. As noted above, there is specific provision regarding appeal in subsection 59(4). **Subsection 123(1)(c) provides the Tribunal with jurisdiction over such other matters as are assigned to the Tribunal. The Legislature assigned the Tribunal jurisdiction over access appeals under subsection 59(4)**. Subsection 59(4) of the WSIA provides for a right of appeal to the Tribunal by a "worker, claimant or employer" in respect of a Board decision concerning access to a report or opinion of a health care

practitioner. The Tribunal only decides the access to information issue, and does not adjudicate the issue in dispute.

[17] I have reviewed the specific redactions to the medical reports, opinions and documentation the worker has made and to which the employer was not provided access. **The redactions relate to medical information about the worker or, in some cases, personal information about the worker (or a family member) that is contained in the health care reports, opinions and documentation**.

[18] The issues in the employer's objection to the April 2021 decision relate to the worker's ability to perform modified duties and, generally, her employability. The employer's objection to the decision of March 2022 relates to entitlement to benefits for a psychotraumatic disability. **The appeal materials indicate that such issues include consideration of the worker's non-occupational pre-existing and co-existing injuries/conditions. I find that, for the most part, the redactions to the health care reports, opinions and documentation pertain to the worker's psychological condition or other injuries/conditions that could affect her psychological condition**. **This includes pre-existing conditions** or factors which could affect the worker's compensable psychological condition, her recovery from it and the effects of the compensable condition on her ability to work.

[19] **I find that most of the redactions fall within this category and, as a result, I find that they are relevant and the employer should have access to them**. Of note, the worker has **redacted information concerning a family member**. I appreciate that the worker believes that this information should not be disclosed due to its sensitive nature. However, as noted above, the issues under appeal include the worker's entitlement to benefits for a psychological condition and her ability to return to work. **It is important for a decision-maker considering the merits of those appeals to understand non-compensable factors that may be important to considering entitlement**.

## E. Jurisdictional and WSIB practice and procedural considerations

1. Are WSIB access decisions subject to the WSIB internal appeal process?

   a. **LAL:** Up to the Board; WSIB has control over its P&P (WSIA, s. 131(1)); WSIB can implement its preferred procedure (so long as adheres to procedural fairness and natural law).

   b. However, all the Board is deciding is the level at which it makes a "final decision" and thus at which level the WSIAT assumes lawful jurisdiction (WSIA, s. 123(1)(a)); the WSIB does not establish the WSIAT jurisdiction except through a final decision; the WSIA confers jurisdiction on the WSIAT.

   c. LAL has suggestion as to *how* the Board should manage and apply this discretion (set out later).

2. **WSIAT *Decision No. 1956/01* (October 24, 2001) (Tab I)**; deals with WSIAT jurisdiction to hear interlocutory access appeals; WSIB argued WSIAT has no jurisdiction in access disputes except as expressly set out in WSIA; **Decision:** Jurisdiction is conferred to WSIAT through section 123(1)(c) as "*another matter assigned to the Appeals Tribunal under the Act*"

[22] Mr. Brady also reviewed a number of cases on the issue of natural justice and procedural fairness which, he suggested, made it clear that a party had the right to participate fully in adjudication and had the right to put information before the decision-maker. As noted earlier, he suggested that specific legislative provisions would be required to curtail a parties' right to full disclosure of the documentation used in making a decision.

**(iv) Submissions of the WSIB**

[23] In her letter dated July 24, 2001, Ms. Brown advised:

> In the above matter, the employer is appealing the decision of the WSIB to deny the employer access to the workers' claim files. I understand that, although counsel for the employer specifically raises s. 58 of the Workplace Safety and Insurance Act, 1997 (WSIA), a major concern is access to health records relating to the workers. Consequently, s. 59 must also be addressed.
>
> Access was denied because no entitlement decision has yet been made in any of these claims. Therefore there is not yet any "issue in dispute" as required to trigger sections 58 and 59 of the WSIA. Board policy set out in Document 01-04-11, provides that an issue in dispute exists if a workplace party disagrees, in whole or in part, with a decision of the Board. Where no decision has yet been made, an "issue in dispute" cannot exist. For your convenience, I attach a copy of this policy.
>
> …The WSIB takes the position that the Appeals Tribunal does not have jurisdiction to hear this appeal. **The jurisdiction of the Appeals Tribunal is set out in s. 123(1) of the WSIA**…
>
> The Tribunal has only the jurisdiction that it is given in its governing legislation. That jurisdiction is conferred in s. 123(1). It is the WSIB's submission that none of the clauses in that subsection confers jurisdiction on the Tribunal in this matter.
>
> **The only clause that could possibly confer jurisdiction is s. 123(1)(a). Clause (a) applies to appeals from final decisions with respect to entitlement to benefits under the WSIA**. In this case, the WSIB has not yet made a decision with respect to entitlement to benefits under the Act. It is currently investigating and gathering evidence in order to make a decision with respect to entitlement to benefits under the Act. It is currently investigating and gathering evidence in order to make a decision on initial entitlement. Once that decision is made, clause 123(1)(a) will confer jurisdiction on the Appeals Tribunal to hear an appeal from that decision. Until the decision is made, there is no "decision with respect to entitlement" and therefore there is nothing over which the Appeals Tribunal has jurisdiction to hear an appeal.
>
> Subsection 123(2) further addresses the jurisdiction of the Appeals Tribunal by expressly indicating certain subject matters over which the Tribunal does NOT have jurisdiction to hear appeals. Subsections 123(2) does not refer to sections 58 and 59, the employer access provisions of the WSIA. This silence however, cannot be interpreted as providing jurisdiction in this matter. As the subsection itself states, s. 123(2) was added "for greater certainty". The primary jurisdiction provision is subsection 123(1). Subsection 123(2) merely provides greater clarification in certain areas.
>
> **Moreover, the legislature could not have included the employer access provisions in subsection 123(2) because it did assign a very specific appellate jurisdiction to the Appeals Tribunal in s. 59. Since in the circumstances specified in s. 59, discussed in detail below, the Tribunal does have jurisdiction over employer access issues, it was not open to the legislature to designate these provisions in subsection 123(2).**
>
> **A review of sections 58 and 59, the employer access provisions in the WSIA, suggests that the legislature did not intend s. 123(1) to confer a general jurisdiction over access issues.** Subsection 59(4) specifically confers jurisdiction on the Appeals Tribunal to hear appeals of decisions relating to employer access to a report or opinion of a health care practitioner relating to a worker where there is an issue in dispute. The very fact the legislature conferred express jurisdiction on the Appeals Tribunal in this specific matter suggests that it did not intend to confer general jurisdiction over employer access matters on the Tribunal.
>
> It is a fundamental rule of statutory interpretation that, where the legislature names one specific circumstance or thing and does not name analogous circumstances or things, it intended to exclude those things that were not named. This

> principle is known as the principle of implied exclusion or by its Latin name of expressio unius est exclusio alterius. In this case, the employer access provisions of the WSIA expressly set out when the Appeals Tribunal has jurisdiction in such matters. By, implication the legislature is assumed to have intended that the Tribunal not have jurisdiction in other employer access matters. This conclusion is buttressed by the failure of subsection 123(1) to confer on the Tribunal any more general jurisdiction over access.

[29] Mr. Russell also noted that section 131 gave the Board the authority to determine its own practice and procedure and that it placed few limits on that authority. He suggested that while a party who was dissatisfied with a final Board decision had a right to appeal to the Tribunal, the same could not be said for those who were dissatisfied with a particular Board procedure. In those circumstances, if the Board acted improperly, then the remedy was to apply to the Courts. Mr. Russell submitted that the Tribunal had no authority to regulate the Board processes.

[33] **In our view, it goes without saying that the jurisdiction of administrative bodies like the Tribunal, can extend only as far as is permitted by the legislation which creates it**. The extent of the Tribunal's jurisdiction must be determined with reference to section 123. ***We are satisfied that if the Tribunal has jurisdiction to consider the employer's objection to the Board's decision denying them file access, it would have to originate in either sections 123(1)(a) or (c).*** Clearly, section 123(1)(b) would not provide the necessary authority since it deals only with various "employer-related" matters such as transfer of costs, classification, premiums and penalties. In addition, it is worth noting at this point, that while section 123(2) provides a list of matters which "for greater certainty" are not within the Tribunal's jurisdiction, we do not believe it appropriate to infer from its absence, that the Tribunal must therefore have jurisdiction over access issues like the one before us. On this point, we agree with the Board's position that:

> ...This silence however, cannot be interpreted as providing jurisdiction in this matter. As the subsection itself states, s 123(2) was added "for greater certainty". The primary jurisdiction provision is subsection 123(1). Subsection 123(2) merely provides greater clarification.

[37] In light of the above, it appears to this Panel that **the only means by which the Tribunal could obtain jurisdiction over this type of access question would be through section 123(1)(c) as "another matter assigned to the Appeals Tribunal under the Act".** ***As noted earlier, we are satisfied that the legislature has turned its mind to the question of access and has "assigned" the Tribunal a jurisdiction which emanates from section 59(4) of the Act. Section 59(4) provides that a party may appeal "the Board's decision" to the Tribunal. A reading of sections 57and 58 suggests it is clear that before the Board can give access to documents (which decision can then be appealed to the Tribunal), there must first be an "issue in dispute". Put another way, an issue in dispute is a prerequisite for the issuing of such a decision***.

[42] **In summary, we are satisfied that through the combination of section 123(1)(c) and 59(4), the Tribunal has been provided with jurisdiction to consider access appeals if there is an issue in dispute**. In our view, the legislature clearly intended that disputes about access be determined within the confines of sections 57-59 and before that process can be triggered, an issue in dispute is required. In spite of the fact that the Board has organized its adjudication of these claims somewhat differently, we cannot conclude that there has yet been a decision about entitlement issued and as such, there is no issue in dispute and the employer can not be given access at this point in time.

3. **WSIAT *Decision No. 1169/23I* (August 25, 2023) (Tab J)**:

[17] While I acknowledge that the medical records referenced by the worker's representative described a sensitive and serious medical condition(s), I find that the reports referenced by the worker's representative in his written submissions are relevant to the appeal that has been initiated by the worker. The ARO decision under appeal noted that the worker experienced "severe anxiety and depression" prior to the compensable accident of 2019. The ARO decision further indicated that the worker testified that she experienced a serious medical condition (which is the same medical condition(s) contained in the medical reports that the worker seeks to redact) prior to the compensable accident that contributed to her pre-accident symptoms of anxiety and depression. Finally, I note that the ARO determined that the worker's "mental health issues were a significant barrier to their recovery and return to work". **I find that the**

**reports described by the worker's representative in the June 26, 2023 submissions should be released to the employer. I find that not releasing information about the worker's pre-accident medical conditions which may have caused or contributed to the worker's wage loss subsequent to the compensable accident may prejudice the employer's ability to participate in the appeal and may adversely affect the decision maker's ability to make findings. For greater clarity, I find that *the employer should be afforded the opportunity to explore all of the issues about why the worker experienced a wage loss as a result of the compensable accident*.**

**F. Why did the WSIB change its approach to providing employer access?**

1. That it did is undeniable. The May 3, 2021 WSIB letter to LAL was disingenuous in this respect. It is clear that the Board *did* change and has recently stepped up implementing that change.

2. *Why did the Board change its practice?* There is only one reasonable explanation consistent with the preponderance of information available – the Board acceded to external outreach from segments of the stakeholder community, and adjusted its process unilaterally, itself an affront to consultation conventions. This should have been addressed in a public forum. It must now.

**G. How the WSIB should adapt its P&P to ensure fair process:**

1. The Board is acting in a manner contrary to the Rule of Law, procedural fairness and natural justice.

2. The Board must: a) return to its previous approach to employer access in place for 40 years; and, b) develop a new internal review procedure for access disputes that satisfies the legal duty to be fair and respects the basic tenets of administrative justice and procedural fairness.

3. LAL has such a suggestion. It is simple, not novel and has been in practice by the WSIAT for 40 years.

4. Important to point out this observation: The "position" of the WSIB, i.e., a) there is no right of appeal, and b) no reasons are required to be provided (both quite wrong vis-à-vis procedural fairness and natural justice), is inharmonious to the Board's role to apply the rule of law. The WSIB must allow fair process. (This observation is creeping into other matters that fall within the scope of the Board's jurisdiction and should be concerning.)

5. If the WSIB fails to deliver procedural and substantive fairness, the WSIAT will.

6. The Board has no institutional interest not to change its current approach and every institutional interest to do so.

7. Recall what LAL said in March 31, 2021 letter **(Tab A)**:

> 6. I add that where entire pages have been redacted, or a large portion of a document has been redacted without explanation, we will *prima facie* conclude that the Board has exceeded its statutory authority and has improperly redacted relevant information.

8. I add this; in instances where the Board has adhered to simple and basic requirement to explain and provide reasons, LAL has accepted those reasons and has not proceeded to an appeal, *or*, the Board changed its view after considering our arguments (both have happended).

9. *Why draw this line in the sand?* The WSIB will lose and needlessly expend unrecoverable goodwill capital and be seen as regressing to the pre-1985 state of affairs, when the Board had a (rightful) image of not adhering to the rule of law, and acting in a capricious unfair manner, all of which gained sufficient traction so as to put in motion the turn of events that created the Appeals Tribunal.

10. So, what should the WSIB do? First, the Board must understand, that at a time when it is seeking "efficiency gains" in its decision review and appal process, this has the opposite effect – cases will be delayed as the interlocutory access issue goes to the WSIAT, with the Board likely losing.

11. The ARO already has to deal with this matter, technical appeal or not, as an appeal preliminary issue. However, the manner that the ARO currently addresses these is itself an affront to procedural fairness and administrative justice. The ARO that hears the case also address the access issue. This is wrong.

12. Return to **WSIAT *Decision 2387/12I* (January 8, 2013) (Tab F)**, para. 22. The WSIB must comply with that approach. An ARO deciding the access issue cannot decide the substantive issue. It is simply unfair.

13. LAL strongly urges WSIB to adjust its P&P.

    a. Whether the access dispute is technically an appeal or not is a moot point. The ARO must decide within a fair process.

    b. The Board should consider the access issue an interlocutory issue that must be addressed by a different ARO, adopting the line of reasoning and process as has been common at the WSIAT.

    c. If material is excluded to the employer, it must be excluded to the ARO.

    d. This need not be a complicated process.

**H. What is the WSIB's expertise vis-à-vis file redactions, i.e., does the WSIAT most often agree or disagree with the WSIB?**

1. Is the WSIB aware of the number of access cases that are considered by the WSIAT, either as an appeal of a WSIB decision (i.e., the entitlement issue is at the ARO) or as an interlocutory issue at the WSIAT (i.e., the entitlement issue is at the WSIAT but the WSIB redacted information and the question is whether those redactions should remain?).

2. If so, has the WSIB assessed and tabled the results? What are they?

3. Does the WSIAT generally support or generally disagree with the Board's access decision? LAL's sense is the latter.

**I. The bottom line:**

1. WSIB should stand down its current approach to employer access, implement fair process or risk reputational damage.

**L.A. Liversidge**
**November 07, 2023**

**Appendix: Relevant sections WSIB:**

## Workplace Safety and Insurance Act, 1997

**Employer's access to records**

**58** (1) If there is an issue in dispute, the Board shall, upon request, give a worker's employer access to such documents in the Board's file about the claim as the Board considers to be relevant to the issue and shall give the employer a copy of those documents.

**Same**

(2) The Board shall give the same access and copies to a representative of the employer, if the representative has written authorization from the employer.

**Notice to worker**

(3) The Board shall notify the worker or his or her representative if the Board has given access and copies to the employer (or the employer's representative) and shall give a copy of the same documents to the worker. 1997, c. 16, Sched. A, s. 58.

**Employer's access to health records**

**59** (1) Despite section 58, before giving the employer access to a report or opinion of a health care practitioner about a worker, the Board shall notify the worker or other claimant that the Board proposes to do so and shall give him or her an opportunity to object to the disclosure.

**Objection**

(2) If the worker or claimant notifies the Board within the time specified by the Board that he or she objects to the disclosure of the report or opinion, the Board shall consider the objection before deciding whether to disclose the report or opinion.

**Notice of decision**

(3) The Board shall notify the worker, claimant and employer of its decision in the matter but shall not, in any event, disclose the report or opinion until after the later of,

(a) the expiry of 21 days after giving notice of its decision; or

(b) if the decision is appealed, the day on which the Appeals Tribunal finally disposes of the matter.

**Appeal**

(4) The worker, claimant or employer may appeal the Board's decision to the Appeals Tribunal and shall do so within 21 days after the Board gives notice of its decision.

**Same**

(5) If the Board or the Appeals Tribunal decides to disclose all or part of a report or opinion, the Board or the tribunal may impose such conditions on the employer's access as it considers appropriate.

**Duty of confidentiality**

(6) The employer and the employer's representatives shall not disclose any health information obtained from the Board except in a form calculated to prevent the information from being identified with a particular worker or case. 1997, c. 16, Sched. A, s. 59.

**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. 1997, c. 16, Sched. A, s. 119.

**Objection to Board decision**

**120** (1) A worker, survivor, employer, 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) who objects to a decision of the Board shall file a notice of objection with the Board,

(a) in the case of a decision concerning return to work or a labour market re-entry plan, within 30 days after the decision is made or within such longer period as the Board may permit; and

(b) in any other case, within six months after the decision is made or within such longer period as the Board may permit. 1997, c. 16, Sched. A, s. 120 (1); 2021, c. 4, Sched. 11, s. 42 (6).

**Notice of objection**

(2) The notice of objection must be in writing and must indicate why the decision is incorrect or why it should be changed. 1997, c. 16, Sched. A, s. 120 (2).

**Section Amendments with date in force (d/m/y)**

2021, c. 4, Sched. 11, s. 42 (6) - 19/04/2021

APPEALS TRIBUNAL

**Jurisdiction**

**123** (1) The Appeals Tribunal has exclusive jurisdiction to hear and decide,

(a) all appeals from final decisions of the Board with respect to entitlement to health care, return to work, labour market re-entry and entitlement to other benefits under the insurance plan;

(b) all appeals from final decisions of the Board with respect to transfer of costs, an employer's classification under the insurance plan and the amount of the premiums and penalties payable by a Schedule 1 employer and the amounts and penalties payable by a Schedule 2 employer; and

(c) such other matters as are assigned to the Appeals Tribunal under this Act. 1997, c. 16, Sched. A, s. 123 (1).

**Same**

(2) For greater certainty, the jurisdiction of the Appeals Tribunal under subsection (1) does not include the jurisdiction to hear and decide an appeal from decisions made under the following Parts or provisions:

1. REPEALED: 2011, c. 11, s. 22.

2. Sections 26 to 30 (rights of action) and 36 (health examination).

3. Section 60, subsections 62 (1) to (3) and sections 64 and 65 (payment of benefits).

4. Subsections 81 (1) to (6), 81.1 (1) to (3), 83 (1) and (2) and section 85 (allocation of payments).

5. Part VIII (insurance fund).

6. Part XII (enforcement), other than decisions concerning whether security must be given under section 137 or whether a person is liable under subsection 146 (2) to make payments. 1997, c. 16, Sched. A, s. 123 (2); 2011, c. 11, s. 22; 2019, c. 9, Sched. 13, s. 2.

**Decisions on an appeal**

(3) On an appeal, the Appeals Tribunal may confirm, vary or reverse the decision of the Board. 1997, c. 16, Sched. A, s. 123 (3).

PROCEDURAL AND OTHER POWERS

**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.

**Notice of decisions**

(4) The Board or the Appeals Tribunal, as the case may be, shall promptly notify the parties of record of its decision in writing and the reasons for the decision. The Appeals Tribunal shall also notify the Board of the decision. 1997, c. 16, Sched. A, s. 131.