

**Office of the Employer
Adviser**

151 Bloor Street West
Suite 704
Toronto, Ontario
M5S 1S4

Toll Free: 1-800-387-0774
Tel: 416-327-0020
Fax: 416-327-0726

**Bureau des conseillers des
employeurs**

151 rue Bloor ouest
Bureau 704
Toronto (Ontario)
M5S 1S4

Sans frais : 1-800-387-0774
Tél : 416-327-0020
Télé : 416-327-0726



**Michael Zacks
Director (A) and
General Counsel**

April 13, 2010

Slavica Todorovic
Executive Director, Appeals Branch
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Todorovic:

Re: Appeals System Practice and Procedures Consultation

Thank you for the opportunity to make submissions on the draft Appeals System Practice and Procedures document. The Office Of The Employer Adviser has reviewed the document, and we have several comments and recommendations for changes which are set out below. I would be pleased to discuss any of the comments with you at your convenience.

**Issues In Dispute – Handling By Business Units
Dialogue/Decision Stage – p3**

We are concerned with the limited guidance given by the Practice and Procedures document to Business Unit decision makers. In our view the general guideline for decision writing in the Appeals Branch should also apply to Business Unit decision makers:

Recommendation 1

Business Unit decision makers should be required to follow the same guidelines as appeal resolution officers that are outlined at page 47:

Decisions will be written in a clear and concise manner using plain language and will generally be written in an anonymized style.

Where findings are made on the basis of credibility, reasons must be given for accepting or rejecting the credibility of a statement made by an individual. Where findings are made on the basis of the weighing of

medical evidence, reasons will be given for more weight being placed on one medical report as opposed to another.

Written decisions should follow formats appropriate to the case. In all cases, the decision must set out: the issues under objection; a brief description of how the issues arose; the applicable policy reference; the method of resolution; the evidence considered and how it was weighed; and the conclusion reached.

We submit that this will result in a better informed worker and employer, and better decision making at the initial level.

Access – page 3

The general access provided to an employer in a claim appeal is set out at page 3:

For a claim objection, the access area will provide the party/representative with access to the claim file (in accordance with established WSIB policy) along with an instruction sheet and an Objection Form. An appeal will not proceed until all access issues have been resolved either through consent or by order of the WSIB or by WSIAT (on appeal).

In the case of a revenue objection, access to the firm file is not provided automatically, but the employer/representative is given the opportunity to obtain access if they choose, through the firm file access area. The contents of a firm file are comprised primarily of correspondence between the WSIB and the employer, which makes the need for access to that information less likely.

We are concerned that often relevant information about the claim may not be provided to the employer or the ARO. Information about other claims or previous claims that the employer may not be aware of should be made known to the employer as part of the appeal process. For example, a previous claim with another employer impacting the same area of current injury would be relevant information in an appeal, and should be made know to the employer.

Recommendation 2

Provide the employer with a synopsis of any relevant information about a worker's prior or current claims that may be relevant to an appeal that are not in the claims file.

We are also of the view that an employer should receive complete information about its revenue dispute not just what is in the revenue file. The Appeal

Procedures guide should make it clear that all internal documents relating to a Business Unit's revenue decision including emails, memoranda, and reports should be provided by the access procedure without the need for the employer to make a specific request for the information.

In our experience employers often do not have many of the documents and correspondences that it is assumed they already have in their possession. Accordingly, the revenue file should be provided automatically by access without the employer having to specifically request it. Employers should also be given the opportunity to receive this information in paper or digital format.

Recommendation 3

Provide complete and automatic access to all WSIB information pertaining to an employer's revenue based objection upon receipt of the employer's objection letter.

The Objection Form – p 4

The Board's current practice is to provide the objection form to the parties, but not provide them online. In our submission an objection form and participation form should be available on line for the parties to complete and submit. This is the practice by the WSIAT, the courts, and most other administrative tribunals. We see no reason why objection and participation forms should be treated differently than other WSIB forms. Forms get lost, damaged, or completed erroneously. It would greatly facilitate the efficiency of the process in our opinion if these forms were available on line. We have no objection if the Board continues to provide the forms in paper format, but they should also be available online.

The above comments apply equally to participation forms.

Recommendation 4

Place objection forms and participation forms on the WSIB's website for parties to download and complete.

Appeal Time Limits - Proceeding with the Objection – p6

The *Practice and Procedures* guideline outlines the process for proceeding with an objection as follows:

To recognize the desire on the part of some parties simply to protect their rights of appeal, the decision-maker who receives a notice of objection will

send a letter to the objecting party to acknowledge that the statutory time limit has been met and asking the party to confirm when they wish to proceed.

If the party does not confirm a desire to proceed immediately, no further action will be taken. In a claim objection, if the party confirms a desire to proceed immediately, access and an Objection Form will be sent. Once the completed Objection Form is received, the WSIB will proceed with the appeal in the usual manner. For revenue objections, an Objection Form is sent and access is provided upon request.

These procedures will create a low bar (letter confirming intent to appeal) to meet the time limits and a higher bar (completed Objection Form) to have the appeal proceed.

We are concerned that this procedure creates unfairness and prejudice to employers for the most part as the majority of appeals are worker appeals. It would also be prejudicial to a worker if an employer objected.

The practice essentially allows a worker (or employer) to submit an objection to meet the statutory time limit. However, the fact that the objecting party is permitted under this practice to wait years before pursuing the appeal is unfair to the other party, and to the system.

A rational system should require an appellant to proceed on his objection within a reasonable time. Given the relatively short statutory timelines for making a claim and filing an appeal, and the need for some reasonable degree of certainty and finality, we recommend two years as a reasonable period in which to allow an objecting party to keep an appeal open before submitting an objection form. Any objection that is not proceeded with within two years should be dismissed as abandoned.

Recommendation 5

Dismiss an objection after two years where the objecting party has not submitted a completed objection form within that two year period.

Criteria to be Applied in Determining Time Limit Extensions – p 7

We are concerned with the overbroad exercise of discretion that ARO's will apply in determining time limit extension appeals. The document provides at page 7 that:

- 1) The length of the delay. Broad discretion to extend will be applied where appeals are brought within one year of the date of the decision. Criteria to be considered for longer delays include:

- Serious health problems (experienced by the party or the party's immediate family) or the party leaving the province/country due to the ill health or death of a family member;
- Whether there was actual notice of the time limit. This acknowledges that as of January 1, 1998 decisions specifically refer to the time limits but prior to January 1, 1998, decisions do not;
- Whether there are other issues in the appeal which were appealed within the time limits and which are closely related to the issues not appealed within the time limits;
- The significance of the issue in dispute;
- Whether the party was able to understand the time limit requirements.

2) All decisions to extend time limits will be based on the merits and justice of the case.

Our concern is with the statement that "Broad discretion to extend will be applied where appeals are brought within one year of the date of the decision." In our submission this approach is contrary to the intent of the *Workplace Safety and Insurance Act* (WSIA). The WSIA sets out strict appeal time lines – 30 days for RTW and LMR appeals, and 6 months for all other matters. This was done to reflect the seriousness of bringing appeals within the time frames so as not to impede the case management process, and not to prejudice the other party, particularly in RTW matters.

We also appreciate that in a mass adjudication environment efficiency and expediency are necessary, and that the WSIB is dealing with often unrepresented parties who may be in distress and unfamiliar with the process. However, that interest in our view must be balanced with the legislative intent discussed above. To provide a broad discretion of 12 months in all cases is in our submission effectively applying no discretion, at all.

Therefore we recommend that the AROs should not exercise their discretion in these matters in a blanket way by in essence extending the statutory appeal times in all cases to 12 months. Rather, we make the following recommendation:

Recommendation 6

Where the WSIA provides that an appeal time limit is 30 days that broad discretion should be extended to 90 days which is more reflective of the tight time lines imposed by the WSIA.

We have no concerns with the other criteria for exercising discretion in these matters.

Appeal Participants - Third Party – p 9

This section discusses generally the rights of third parties in the Appeal Process, such as successor employers:

Third parties may be included in certain circumstances (e.g. successor employers or multiple workplace exposures involving more than one employer). When an employer is no longer in business and their account has been closed, they will generally not be included as a participant in the appeal proceeding. AROs may still request information from the former officers or employees of the company where such information is necessary to determine the merits of the appeal.

This discussion omits the role of perhaps the most common third party, namely a prior accident employer in cases where the instant employer is alleging that the worker's claim is a reoccurrence not a new accident. In our experience AROs do not notify prior employers when a reoccurrence is alleged. This should be common practice. It is particularly important when the prior employer is a Sch. 2 employer.

Recommendation 7

When an accident employer or worker alleges that the worker's claim is a reoccurrence of a prior accident with another employer, the alleged prior accident employer should be given notice, and if it wishes to participate to be given full party standing to do so.

Raising an Ontario Human Rights Code or Canadian Charter of Rights and Freedoms Question - p 15

We commend the Appeals Branch for including this new process in its Practice and Procedures document. We recommend that the Appeals Branch consider following the practice of the WSIAT of having Tribunal Counsel participate in these types of hearings.

Including Board Counsel to assist the ARO in the process will ensure that all current and relevant jurisprudence is before the decision maker and the parties. This may be particularly helpful when an applicant is self-represented or not-participating.

It may also be useful in such cases to invite the Office of the Employer Adviser or Worker Adviser to participate as an intervener as is the custom at the WSIAT if the worker or employer is unrepresented or not participating to allow the ARO to

receive general policy submissions to assist him or her in making a fully informed decision.

Recommendation 8

The Appeal Branch should have the assistance of WSIB legal counsel in all human rights and Charter cases as Board counsel.

Interpreters – p 26

The guidelines around the arrangement and use of interpreters provides at page 26 that,

Friends and relatives of appeal participants are not generally permitted to interpret evidence at an in-person hearing.

Our concern is with the use of the term “generally”. It is our submission that friends and relatives of participants are by definition biased in favour of the participant and should in no circumstances act as an interpreter in a hearing.

Recommendation 9

Friends and relatives of an appeal participant should not be permitted to interpret evidence at an in-person hearing under any circumstances.

Summonses and Production of Documents – p 27

Our concern is with the procedure outlined in this section describing the role of the appeals administrator (AA) in the granting of summonses. We assume having the AA make these decisions is for reasons of administrative efficiency.

The concern is that when the AA denies the request for a summons the Procedures document states

Where the AA concludes that the document or the proposed witness is not essential to a determination of the issue in dispute, the AA will communicate this to the parties in writing.

This communication should also advise the party to raise the matter with the ARO at the hearing, in the event that the decision not to grant a summons is disputed.

In our submission waiting to raise the denial of a summons until the hearing is ineffective, and can only serve to delay hearings and waste resources.

Recommendation 10

When an AA denies a party's request for a summons, the AA should refer the matter to an ARO who may make preliminary rulings on the request prior to the hearing.

The Hearing - OPENING THE HEARING PRELIMINARY MATTERS – p 34

The discussion about the obligation on the ARO to receive all documents from the parties at the hearing notwithstanding the 14 day rule is refreshing in that it reflects what actually happens at most hearings.

We understand the WSIB's rationale for this is the merits and justice requirement. It would be helpful to parties to have an understanding what the WSIB considers to be prejudice to the "receiving party":

The ARO may also consider postponing the hearing where the prejudice to the receiving party is so significant that no other procedure can overcome the prejudice;

What criteria would the WSIB consider to be significant prejudice that can not be overcome by any other procedure? An example would be most helpful to parties and, I believe, to AROs.

Recommendation 11

Provide several examples and scenarios of what would constitute significant prejudice to a responding party when a document is submitted into evidence by a party at the outset or during the hearing in breach of the 14 day rule, and the prejudice can not be overcome by another procedure.

Withdrawals – p 46

The discussion on withdrawals causes us concern. The principle appears to be that an appeal once withdrawn either at the request of the objecting party or by the WSIB because the objecting party fails to respond to contact attempts by the WSIB, can be reinstated into active status at any time. This is in our submission highly prejudicial to the responding party and to the WSIB, itself. Responding parties and the Board should not be exposed to an indefinite risk of appeal. We would encourage the WSIB to adopt a practice similar to the one used by the WSIAT.

Recommendation 12

In cases where an appeal is inactive for two years the appeal is dismissed as abandoned. If an objecting party disagrees they can seek reconsideration or have the right to appeal to the WSIAT.

As noted above, we would be pleased to discuss any of the above comments with you at your convenience.

Sincerely,

A handwritten signature in black ink that reads "Michael Zacks". The signature is written in a cursive, flowing style.

Michael Zacks