OBA Submission on the Workplace Safety and Insurance Appeals Tribunal's New Pre-Hearing Process coming in 2023

Submitted to: Workplace Safety and Insurance Appeals Tribunal

Submitted by: Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association (OBA) appreciates the opportunity to provide this proactive submission to the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") on the proposed changes to the pre-hearing process.

The OBA is the largest and most diverse volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to individuals and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public.

This submission was prepared by the Workers' Compensation Section of the OBA. The Workers' Compensation Section includes counsel for employers; counsel for injured workers, both in a unionized and nonunionized environment; and neutral lawyers who work at the WSIB and the WSIAT. Our members represent injured workers and employers before the WSIAT, and this submission has been developed with input and consensus from both employer and worker counsel.[1] We have also prepared this submission in consultation with members of the Administrative Law Section and the Labour and Employment Law Section. We anticipate the WSIAT receiving submissions from other stakeholders and our submissions reflect points that representatives from both the employer and the worker side concur.

Overview

In July 2023, the WSIAT plans to change its pre-hearing process to reflect its commitment to efficiency, sustainability, and timely adjudication. The WSIAT sets out in its consultation documents that it is making these changes to achieve four objectives:

1. Improve the WSIAT's timelines to hearings so that parties can get closure on their issues sooner.
2. Avoid issues, evidence, and testimony from becoming stale.
3. Integrate the WSIAT's processes with electronic initiatives such as E-File and E-Share.

[1] Our neutral members do not get involved in policy development within the workplace insurance system.

4. Make out forms and processes as clear and transparent as possible.

The WSIAT outlines five categories of change to its pre-hearing process to that are intended to support these four overarching objectives:

1. Revised and New Forms,
    a. Revised Notice of Appeal and Response Forms,
    b. New Consent Form to Release a Worker's Information, and
    c. New Hearing Ready Forms.
2. Elimination of the Readiness and Confirmation of Appeal (COA) Forms.
3. Elimination of the 2-Year Notice Period.
4. Revised Pre-Hearing Timelines.
5. Revised Process for Closing Abandoned Appeals.

To provide effective additional feedback, additional time for this consultation would be helpful. We would welcome a meeting to discuss further. Nonetheless we can say that representatives on both sides are strongly opposed to the proposed changes. The OBA represents lawyers, and our recommendations are based on the impacts of this change on both worker and employer representatives. Our main recommendations include:

- **Revised Notice of Appeal (NOA) and Response Forms**
    - Providing representatives with an opportunity to review the Case Record prior to requesting their preference for ADR and hearing method.
- **New Consent Form to Release a Worker's Information**
    - As the authorized representative can sign the form, we recommend that the Consent Form also be sent to the representative where one has been identified.
    - Extending the timeline from 4 to 8-10 weeks to file the Consent Form.
    - Amending the proposed Practice Direction to ensure that workers are provided an opportunity to consent to the releases of the Case Materials where the employer chooses to participate at a later point.
    - Any evidentiary deadline be determined based on the day of the hearing and not on the date that a workplace party receives a Hearing Ready Form.

- **New Hearing Ready Form**
    - Removing the requirement in the Hearing Ready Form for representatives to identify the evidence in the Case Record that supports their appeal and that will be relied on at the hearing.
    - Any evidentiary deadline be determined based on the day of the hearing and not on the date that a workplace party receives a Hearing Ready Form.
- **Revised Process for Closing Abandoned Appeals**
    - We recommend an extended 2-step process for deeming an appeal as abandoned:
        - First, a letter to participating workplace parties advising that the appeal is in the abandoned appeal process with a 30-day deadline to respond; and
        - Second, a telephone call to further verify that the representative is accessible.

Comments

1. Revised and New Forms

a. Revised Notice of Appeal (NOA) and Response Forms

i. WSIAT's Changes

The WSIAT sets out five revisions to the Notice of Appeal and Response Forms:

1. The option to indicate an interest in ADR has moved from the Confirmation of Appeal (COA) form to the NOA form so that the WSIAT can explore whether an appeal can be resolved earlier in the process.
2. The option to receive case materials electronically. The WSIAT can provide interested parties with an electronic copy of their case materials by E-Share.
3. The WSIAT is asking parties if they have any outstanding issues or other proceedings related to their appeal at the WSIB or other agencies to determine the most appropriate way to move forward with the appeal.
4. The option for parties to indicate if they prefer an in-person, written, teleconference, or videoconference hearing. The WSIAT will consider a party's preference but the decision on hearing format will ultimately be up to the WSIAT.
5. The WSIAT is asking parties to identify any accommodation needed to access our services and participate in hearings.

ii. Comments

1. *Asking parties to recommend a hearing method, including ADR in the NOA*

We recommend providing representatives with an opportunity to review the Case Record prior to requesting their preference for ADR and hearing method. Section 3.1 of the *Rule of Professional Conduct* requires representatives to provide competent advice to their clients. Recommending suitability of ADR largely depends on the strength of the evidence. The factors to be considered for recommending a hearing method include issues under appeal and the type of evidence in the Case Record.

Representatives are often retained once the appeal is before the WSIAT. The representative may not have had an opportunity to review materials associated with the appeal and is unable to competently recommend that an appeal be referred to ADR or recommend a hearing method. We therefore recommend moving this request to a point in the hearing process when a representative has had an opportunity to review the Case Record.

Representatives may be retained shortly before the hearing. Similar to the current process, we recommend that representatives have the opportunity to request an alternative hearing method and/or referral to ADR that is subject to the timeliness of the request.

2. *Receiving case materials electronically*

The option to receive case materials electronically is welcome. The ability to still receive paper copies is also appreciated.

b. New Consent Form to Release a Worker's Information

i. WSIAT's Changes

The "consent to release case materials" section has moved from the Notice of Appeal form to its own form so that workers have the opportunity to review the case materials and provide their consent to release the materials to any other participating interested parties.

ii. Comments

1. Feedback regarding the substantive content of the Consent Form

As the authorized representative can sign the form, we recommend that the Consent Form also be sent to the representative where one has been identified.

2. Feedback regarding the timeline associated with the Consent Form

We recommend extending the timeline from four (4) to 8-10 weeks to file the consent form. This allows a worker to find a representative and the representative to review the file.

A worker usually relies on their representative's advice when deciding whether to sign the Consent Form. To competently recommend whether a worker should provide consent to release materials to interested parties, representatives require adequate time to understand the appeal at issue, so they understand the medical information that is relevant to the issues under appeal. A representative subsequently requires adequate time to review the medical documentation, to have discussions with their client, and if required, to draft an argument regarding the relevance of any medical documents that they believe should not be included in the Case Record.

Sending a copy of the file to the representative along with the worker allows a representative to review the file within the time limit provided by the Tribunal. It allows both the worker and the representative to review the file in tandem and to have discussions about the file via zoom conference or telephone call. It also removes any issue associated with the cost the worker may bear in providing a paper file to a representative.

We also recommend amending the proposed Practice Direction to ensure that workers are provided an opportunity to consent to the releases of the Case Materials where the employer chooses to participate at a later point. The WSIAT should also confirm that a worker and their representative will be granted the opportunity to review any additional file materials that are added to the case record before the materials are released to the employer.

c. New Hearing Ready Form – Oral Hearing

i. WSIAT's Changes

After the parties receive the Case Record, WSIAT will review all the information provided and determine if the appeal is ready for an oral hearing. If it is, WSIAT will prepare an Issues on Appeal letter. WSIAT will send it to the parties with the Hearing Ready Form. The Hearing Ready Form requests parties to:

- File any new evidence,
- File written submissions, and
- Advise WSIAT and other parties about witnesses for oral hearings.

Parties must send any new evidence or submissions they want WSIAT to consider in the appeal with the Hearing Ready Form. Evidence may include:

- Medical information such as clinical notes,
- Medical records or reports,
- Employee files,
- Disability claim applications for benefits such as Canada Pension Plan (CPP), Employment Insurance (EI) and Ontario Disability Support Program (ODSP); and
- Sworn affidavits from witnesses.

Workplace parties are required to return the Hearing Readiness Form within four (4) weeks. Any information not provided in the Hearing Readiness Form will be deemed as a preliminary matter and addressed on the first day of hearing. Information in the Hearing Ready Form allows them to schedule an appropriate format and amount of time for a hearing, so that the appeal can be resolved as early and efficiently as possible.

ii. Comments

1. Feedback regarding the Substantive Content of the Hearing Ready Form

a. *Requirement to Identify Evidence in the Case Record that Supports the Appeal*

The Hearing Ready Form requires representatives to identify the evidence in the Case Record that supports their appeal and that will be relied on at the hearing. This requirement increases the time invested in the appeal and, consequentially, the cost of the file.

Requesting representatives to include supporting evidence from the Case Record at this stage of the appeal process requires the representative to prepare for the hearing. This is because a representative likely cannot competently identify relevant evidence without understanding the theory of the case, the additional evidence being submitted, and the ultimate argument that will be made to support the workplace party's position. The representative is therefore required to spend a substantial amount of time completing this section of the Hearing Readiness Form.

By completing this section without adequately reviewing the file and understanding the argument, representatives are not acting consistently with Section 3.1-1 of the *Rules of Professional Conduct*. This section of the *Rules* defines "competent lawyer" as a lawyer who has and applies relevant knowledge, skills, and attributes in a manner appropriate to each matter undertaken on behalf of a client including:

> […]
>
> (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action.

Representatives are required to perform the same work, a second time, as there is often a time lag between the completion of the Hearing Ready Form and the hearing itself. This delay is demonstrated in the proposed new hearing process. Representatives will therefore be required to re-review the Case Record, complete hearing preparation by drafting questions and cross-questions, and preparing for closing arguments. Requiring multiple preparation sessions can more than double the cost of a WSIAT hearing.

Increasing the expense of the hearing may harm access to justice as clients may be unable to afford the increased cost of representation at a hearing. Additionally, representatives may be required to reduce the appeals that they are able to accept, further reducing access to justice. It is unclear how this requirement facilitates expediting the hearing process. Therefore, we recommend that this requirement be removed from the Hearing Ready From.

b. *Requirement to Include all Additional Evidence to be relied on with the Hearing Ready Form*

The Hearing Ready Form requires representatives to include all additional evidence with its submission. Any evidence not collected and submitted with the Hearing Readiness Form is not included in the Case Record. The evidence becomes a preliminary issue to be addressed on the first day of hearing.

This requirement creates additional issues. For example, if "late" material will be left to the decision-maker on the day of the hearing representatives may submit evidence close in time to the date of the hearing. This scenario will result in uncertainty around the evidence that may be considered by decision-makers and less time for a decision-maker and opposing counsel to review the material in advance of the deadline

We anticipate a significant amount of evidence becoming a preliminary issue. Depending on the significance of the evidence being submitted, opposing counsel may require an adjournment to address the issue.

The evidentiary deadline may result in a significant period of the hearing being allocated to preliminary issues and consideration of any admitted evidence. Consequentially, hearings may not be completed in the allotted time, panels may be seized and required to return to additional hearing days at a later date, and evidence and testimony may be presented over an extended time period. Consequently, contrary to being efficient, the proposed process makes adjournments more likely to happen and increase representatives' legal fees.

2. Comments related to the Four (4) Week Timeline of the Hearing Ready Form

The revised hearing process creates a timeline that is effectively driven by the readiness of the WSIAT and not by the readiness of workplace parties. For example, although the appellant initiates the hearing, the WSIAT determines all subsequent timelines. The WSIAT determines if the file is ready for hearing and sends out the Appeal Letter with the Hearing Ready Form and the WSIAT determines if the hearing is ready to be set for a hearing date.

The WSIAT's timeline will likely be significantly influenced by the caseload at the WSIAT. As representatives are not privy to this influence, representative's ability to competently manage their practice is lessened. The significance of the loss of control is increased by the amount of time required to adequately prepare for and complete the Hearing Ready Form and to gather the additional evidence within an unknown and fluctuating time period. This creates additional stress for representatives.

Competently Managing the Appeal at Issue

Four (4) weeks is likely not enough time for representatives to competently review case record materials, to understand the issues under appeal, to determine relevant witnesses and to obtain any additional evidence. Although additional evidence may still be considered, the competence of representation may suffer based on specific panel preference, panel trends, and the transition period as representatives adjust to the new hearing process. These factors are external to the merits of the appeal and reduces procedural fairness.

The timelines created by the Hearing Ready Form create additional issues where a representative is not retained when the Notice of Appeal is filed. If the representative is not initially identified on the Notice of Appeal, we recommend that the practice direction acknowledge that a representative could be retained at later stage and that reasonable extensions are allowed. The pre-hearing process should allow the representative sufficient time to conduct the review on behalf of their client.

Representative Well-Being

The WSIAT's process around the Hearing Ready Form combined with the elimination of the Three-Week Rule requires a representative to prepare for a hearing without an understanding of or control over the hearing preparation timelines. Lack of control over deadlines increases mental stress. The Confirmation of Appeal Form and a backwards-facing evidentiary deadline (the Three-Week Rule) allowed representatives to competently represent clients while managing their case load.

A hearing timeline that is driven by the WSIAT's process and case load creates uncertainty for a representative that may have very large caseloads and/or may be relying on external resources. The uncertainty is emphasized when access to justice constraints require representatives to use external resources that are unable to provide responses quickly.

Representatives governed by the *Rules of Professional Conduct* are required to represent clients in a competent manner. Section 3.2-1 and commentary of the *Rules* states:

> 3.2-1 A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligence, efficient and civil.
>
> […]
>
> [6] A lawyer should meet deadlines, unless the lawyer is able to offer a reasonable explanation and ensure that no prejudice to the client will result. Whether or not a specific deadline applies, a lawyer should be prompt in handling a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client should be maintained to the extent the client reasonably expects.

While we understand that additional evidence can be submitted after the submission of the Hearing Ready Form, the consideration of these materials is treated as a preliminary issue and subject to argument on the first day of hearing. If important evidence is not accepted, the competence of representation is placed in question.

Some of the evidence submitted as a preliminary issue may have cost a significant amount of money to obtain. If this evidence is not considered, a representative may be faced with the cost of paying for the evidence out of pocket. This also increases stress for representatives. The WSIAT has always been mindful of health and wellness and that concern should be extended to the representatives that appear before it.

The final version "The National Study on the Psychological Health Determinants of Legal Professionals in Canada" recommends considering the health of legal professionals as integral to legal practice and the justice system.[2] The study's authors explain that four essential elements appear

[2] Nathalie Cadieux, et al., "National Study on the Health and Wellness Determinants of Legal Professionals in Canada" (2022) at 384, online: Federation of Law Societies of Canada < https://flsc.ca/wp-content/uploads/2022/12/EN_Report_Cadieux-et-al_Universite-de-Sherbrooke_FINAL.pdf.>

to be key to ensuring that professionals' health is seen as integral to legal practice and the justice system in Canada:

1) Include a permanent wellness component is strategic planning,
2) Maintain an ongoing discussion and raise awareness about mental health in the legal profession, and,
3) Prevent violence and incivility in the legal profession, and
4) Promote positive coping strategies.[3]

Worker and Employer Representatives are united in their concern about WSIAT driven hearing timelines. Particularly the uncertain timeline associated with the potential acceptance of evidence. The four (4) week timeline to provide additional evidence and the elimination of the Three-Week Rule provides an evidentiary deadline that does not exist in other tribunal processes. Other tribunals are more consistent with the WSIAT's current practice of use the hearing date as the point to determine the deadline. For example, the *Rules of Procedure* for both the Ontario Labour Relations Board ("**OLRB**") and the Human Rights Tribunal of Ontario ("**HRTO**") both maintain backwards-looking evidentiary deadlines.

The *Rules of Procedure*, under s. 8.3, for the OLRB states:

> 8.3 Each party must file with Board not later than ten (10) days *before the first date set for hearing or consultation* one (1) copy of all documents upon which it will be relying in the case. At the same time, each party must deliver copies of those documents to each of the other parties [emphasis added].

The *Rules of Procedure*, under s.16.3, for the Human Rights Tribunal of Ontario ("HRTO"), states:

> 16.3 Unless otherwise ordered by the Tribunal, not later than 45 days *prior to the first scheduled day of hearing*, each party must file with the Tribunal:
> a. a list of documents upon which the party intends to rely; and
> b. a copy of each document contained on the list [emphases added].

Given the negative impact on representatives, the potential negative consequences for workplace parties, and the lack of precedence for the evidentiary deadline in other tribunals, it is difficult to comprehend the WSIAT's rationale for deeming evidence as "late" and subject to adjudication as a preliminary issue when a hearing date has not been confirmed. For the above-noted reasons, we

[3] *Supra*, note 2.

recommend that any evidentiary deadline be determined based on the day of the hearing and not on the date that a workplace party receives a Hearing Ready Form.

2. Revised Process for Closing Abandoned Appeals

a. WSIAT's Changes

Previously, when parties were not responding to WSIAT's letters, the tribunal would send a 30-day letter. If parties did not respond, the WSIAT would follow the 30-day letter with a 60-day letter, signed by the Vice-Chair Registrar.

In the new process, WSIAT proposes to send a 30-day Notice of Intent to Close letter signed by the Director of Appeal Services or their designate. The WSIAT states that timelines for each stage in processing will be included in every letter WSIAT sends to the parties. WSIAT will not close an appeal if parties are responding to the letters.

b. Comments

Given the shortened hearing timelines and the removal of the two (2) year deadline, we recommend an extended process for deeming an appeal as abandoned. An extended timeline will lead to more missed time limits and create more burdens on the system.

We recommend a 2-step process for closing abandoned appeals. The first step includes sending a letter to participating workplace parties advising that the appeal is in the abandoned appeal process with a 30-day deadline to respond. We recommend that the letter should be followed up by a telephone call to further verify that the representative is accessible.

If a workplace party has not responded within 30-days, we recommend a second letter indicating that the appeal will be closed within an additional 30-day if there is no contact. Again, we recommend that the second letter be followed up by a phone call.

Conclusion

OBA appreciates the opportunity to provide this submission in response to WSIAT's new pre-hearing process. We look forward to opportunities to continue to engage with WSIAT and to provide the insights from both workers and employer representatives. To provide effective additional feedback, additional time for this consultation would be helpful. We would welcome a meeting to discuss further. Nonetheless we can say that representatives on both sides are strongly opposed to the proposed changes. We thank you for considering our input and look forward to responding to any questions you may have regarding our submission.