

Consultation Summary

Appeals System Practice and Procedures Document

Introduction:

The Appeals Branch welcomed input on its draft enhanced procedural document, titled *Appeals System Practice and Procedures (P & P)* in the spring of 2010. The draft document, a letter to stakeholders, and an executive summary were placed on the website and were also sent out to a list of individuals and organizations who have been interested in receiving such material from the Workplace Safety and Insurance Board (WSIB) in the past. Consultation began on March 4, 2010 and the deadline for submissions was April 29, 2010.

The Appeals Branch received 11 submissions, from both worker and employer communities. See Appendix A. All submissions are available in the WSIB Library, 17th Floor, Simcoe Place, 200 Front Street West, Toronto.

A number of submissions made positive comments on the document as a whole and expressed appreciation that the Appeals Branch chose to consult externally regarding the proposed changes.

This report addresses the submissions by theme, and/or by referencing the specific guideline at issue. Where comments have been made that do not fit either category, they are discussed under the heading of Miscellaneous.

The Appeals Branch thanks all those groups and individuals who took the time to provide their input.

Summary of Comments/Issues Raised:

*Below, the use of italics in the Appeals Branch Response section represents a change that will be made to the final version of the P & P.

Issue	Submission	Appeals Branch Response
Operations front-line service issues	Some submissions commented on front-line service issues and made recommendations for improvement on issues such as the handling of issues in dispute by Business Units, access to file information and case management inconsistencies/gaps.	These comments have been shared with the appropriate Vice-Presidents in front-line Operations.

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Organization of the document	One submission expressed the organization was confusing and it was not clear when a new guideline began.	<i>To address this concern, the heading Practice Guideline will be included at the top of each stand-alone guideline.</i>
Assumption of Representation	One submission suggested the guidelines approach issues with the assumption that objecting parties are represented.	The Appeals Branch believes the guidelines retain enough flexibility to ensure unrepresented workers have fair access to the appeals system.
“Introduction” Guideline	One submission argued that the section on the Appeals Branch mission raised more questions than it answered.	The “Introduction” guideline was meant only to introduce the document in a high level form, with the subsequent guidelines delineating the processes in more detail.
“Appeal Time Limits” Guideline	Some employer submissions expressed concerns about time limits to appeal related to bookmarking, which allows objecting parties to wait years before actively pursuing an appeal.	There were no substantive changes made to the process for appeal time limits, which are stipulated by the legislation.
“Appeals Resolution Officers” Guideline	Two submissions referenced the role of the ARO. One submission expressed concern about the absence of timeline requirements for the ARO at various stages of the appeals process and made recommendations related to additional telephone access to AROs. Another submission requested that if a case is significantly delayed due to ARO unavailability, the case should be transferred to another ARO.	<p>The Appeals Branch strives to resolve worker and employer objections in a flexible, timely and fair manner by offering a range of dispute resolution mechanisms. Although specific timelines for all dispute resolution mechanisms are desirable, it must be recognized that the Branch deals with approximately 10,000 objections annually.</p> <p>Cases vary in complexity and many factors, not all of which are under the control of the Branch, influence the type of resolution method employed and its duration. It is therefore difficult to impose a timeline for all the available resolution methods. However, Appeals Branch</p>

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<p>“Appeals Resolution Officers” Guideline</p>		<p>management employs monitoring and continuous improvement processes to ensure effective and efficient resolution of objections.</p> <p>The Appeals Branch believes the current telephone access to AROs is sufficient, recognizing that they will at times be unavailable due to in-person hearings throughout the province. AROs are expected to respond to their telephone messages within a reasonable timeframe. If a party is having difficulty reaching an ARO, the Manager of the ARO should be advised.</p> <p><i>Regarding the issue of significant delays, a separate stand-alone guideline has been developed that will indicate that if an ARO is going to be unavailable for several weeks due to an extended vacation or a leave of absence, at the discretion of the Appeals Branch management, individual cases will be reassigned to a different ARO and the parties/representative will be advised accordingly.</i></p>
<p>“Appeal Participants” Guideline</p>	<p>One submission indicated the approach set out in the document allows the non-objecting party to potentially delay proceedings.</p>	<p>The part of the guideline which indicates that the non-objecting party can advise of their wish to participate even if a Participant Form has not been provided is not new. The Appeals Branch does not believe a prescriptive element is necessary on this issue, as situations where a non-objecting party is clearly trying simply to delay the proceedings can adequately be dealt with on a case by case basis.</p> <p>The relevant legislation and WSIB</p>

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“Appeal Participants” Guideline	Another submission argued that where a worker or accident employer alleges that a claim should be seen as a recurrence of a prior claim, the prior employer should be given notice and full standing to participate.	policy requires that claim file information is provided to the worker and injury employer when there is an issue in dispute pursuant to their right to reasonably monitor and participate in the WSIB’s compensation process; it also allows much more limited access to others, such as transfer of cost and non-accident employers. In the context of these restraints, the Appeals Branch believes that AROs make every effort to be responsive to employers in the situation described by the submission.
“Representatives” Guideline	One submission suggested that 21 days to obtain a representative is too short. The party asked for a longer time frame to be established and for a statement to be made about extensions beyond the time frame, if appropriate.	The 21 day time frame to seek representation is not new. The Appeals Branch believes the 21 day time period is appropriate, but <i>an additional sentence will be added to advise that at the discretion of the ARO a reasonable amount of additional time may be granted.</i>
“Code of Conduct for Representatives” Guideline	One submission suggested that the Adjudicative Advice document entitled “A Code of Conduct for Representatives dealing with WSIB Situations” ought to be referenced in the P & P.	The Adjudicative Advice document is the WSIB Code of Conduct that is already referenced in the enhanced P & P.
“Appeal Assignment Stage” Guideline	One submission expressed concern about the geographic allocation of AROs and recommended a regular rotation of AROs throughout the province.	Although AROs are assigned to certain geographic areas to promote greater industry specialization and understanding of local community issues, there are always several AROs who provide service in any one geographic area. Also, care is taken to distribute cases across the various AROs to ensure that, with the exception of ADR projects, no one ARO is assigned

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“Appeal Assignment Stage” Guideline		to any one particular employer.
“Special ADR Projects”	One submission argued this is an underutilized resolution method in the Appeals Branch and referenced LSUC and WSIAT mechanisms regarding ADR.	The Appeals Branch intends to consider this issue in the future.
“Raising an Ontario Human Rights Code or Canadian Charter of Rights and Freedoms Question” Guideline	A number of submissions raised issues related to this guideline. One submission argued a policy on the question is required. An unrepresented party argued the Branch should develop special guides and information kits on the subject. Another submission suggested the P & P should include a statement that references the possibility of allowing an issue to be raised without procedural requirements being met. Three submissions suggested that the OEA/OWA should be granted intervener status and argued that WSIB legal counsel should be available for assistance to the decision-maker.	<p>It is not within the mandate of the Appeals Branch to develop information and “how to” kits related to OHRC or Charter issues. The Branch believes the guideline provides sufficient information on the process for initiating an OHRC/Charter challenge.</p> <p>The Appeals Branch has posted all completed Charter decisions on CanLii and will continue to do so, including OHRC decisions, if issued.</p>
“Methods of Resolution” Guideline	<p>One submission referenced the statement made in the document about investigations and argued these additional resources should remain available to AROs.</p> <p>Another submission argued that the section that sets out what parties are required to do to show that a case should be resolved through an in-person hearing ought to be linked to general principles and not very specific issue types.</p>	<p>Appropriate and necessary resources remain available to AROs.</p> <p><i>The Appeals Branch agrees that the section ought to state that the onus will be on the party to establish how the case fits within the general principles below, not the type of cases.</i></p>

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“Appeals Review Stage”	One submission argued the document should make clear that new decisions made by front-line decision-makers meet the standard of being an additional issue that can be addressed.	The Appeals Branch believes the guideline as it is currently written is sufficient.
“Appeal Enquiry Stage”	Two submissions commented on the section that addressed the gathering of medical records. One disagreed with the suggestion that the parties are generally best equipped to obtain medical records. A second submission argued medical records (chart notes) should only be obtained in the most unique circumstances, should never be placed on the file, and should never be provided to the employer.	<p>The use of the word “generally” allows the ARO to be the one who seeks medical records, if the circumstances of the case warrant it.</p> <p>The Appeals Branch currently provides to the parties and places in the claim file only medical information that is relevant to the issue(s) under appeal.</p>
“Hearing Stage”	One submission suggested the title of this guideline was too vague, and suggested there is internal inconsistency, as the document says only in listed circumstances but then gives discretion to the ARO.	<p><i>The Appeals Branch agrees the title should be altered to make clear what is at issue in the guideline.</i></p> <p>The Branch believes the use of the word “generally” ensures the document is not internally inconsistent.</p>
“Scheduling of Hearings”	Two submissions addressed this guideline. One submission argued hearings should be scheduled close to the home of the worker as opposed to where the file is handled.	The guideline allows for in-person hearings to be held other than where the claim file is administered if it makes sense from a customer service and fiscal point of view. However, the WSIB has several offices across the province and in-person hearings should generally be held in these locations, other than when there are exceptional circumstances that warrant an in-person hearing elsewhere.

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“Scheduling of Hearings”	A second submission argued the guideline is too open ended and open to abuse by workplace parties seeking to delay the process.	The guideline puts more discipline and structure into the scheduling timelines than was previously in place. Situations where it becomes clear a party is simply attempting to delay proceedings can be dealt with on a case by case basis.
“Security”	One submission suggested the guideline needed to provide guidance on when it was appropriate to have security present and should make clear the presence of security would have no impact on the adjudication of the appeal.	<p><i>Some additional wording will be added to the guideline to address when a security presence would be required.</i></p> <p>On the second issue, the Appeals Branch believes the ARO Code of Conduct is sufficient to resolve that concern.</p>
“Interpreters”	<p>Three submissions argued that friends and/or family members should never be permitted to interpret.</p> <p>One submission suggested that the guideline should indicate the option of postponing a hearing for an unrepresented worker who did not understand the obligation.</p> <p>One submission argued the document should make clear that interpreters are available throughout the appeals process.</p>	<p>The Appeals Branch routinely utilizes professional interpreters for in-person hearings. A friend or family member is only used on rare occasions where the worker has a reasonably good understanding of the English language but requires some assistance to translate certain information. This is permitted at the discretion of the ARO.</p> <p><i>The Appeals Branch has included wording to address this issue.</i></p> <p>The requirement for an independent interpreter is only required in the case of an in-person hearing. Throughout the rest of the appeals process, family members can assist in ensuring the party understands the process.</p>

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<p>“Summonses and Production of Documents”</p>	<p>Two submissions were received on this guideline. One suggested the ARO should be engaged in a dispute on the issue prior to the hearing and another argued discretion should be granted for less notice when the need for a summons did not become apparent until later.</p>	<p><i>The guideline will be altered to include a statement about engaging the ARO prior to the hearing.</i></p> <p>The Appeals Branch believes that the use of the word “generally” allows for less than 30 days notice in the circumstances described in the submission.</p>
<p>“Postponements”</p>	<p>One submission argued that more flexibility is necessary related to the late provision of medical information, noting that some AROs take a restrictive approach on this issue.</p> <p>The same submission argued that “an unexpected catastrophic event should be added to the list of items that would warrant a postponement.</p>	<p>The Appeals Branch believes the guidelines that deal with postponements and the rules surrounding the provision of information, medical and otherwise, provide considerable flexibility. Workplace parties/representatives that have such concerns should raise them with Appeals Branch management.</p> <p>The Appeals Branch does not think it is necessary to include this item on the list, as it is easy to conclude this circumstance would result in a postponement.</p>
<p>“Guidelines for Conducting In-Person Hearings”</p>	<p>Three submissions addressed this guideline. One submission requested the document grant discretion to allow for more than one employer resource in unique situations.</p> <p>One submission expressed concern about cross-questioning and indicated a witness should never be forced into a yes or no answer.</p> <p>One submission argued the document should define what</p>	<p>The Appeals Branch believes that it is appropriate to allow only one employer resource designate, as other employer experts can appear as employer witnesses. The Branch must be cognizant of the potential for a worker to feel intimidated by several employer resource designates.</p> <p>The Appeals Branch believes the wording in the guideline regarding cross-questioning is appropriate.</p> <p>The Appeals Branch does not believe it is necessary to include</p>

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<p>“Guidelines for Conducting In-Person Hearings”</p>	<p>constitutes prejudice to a receiving party as it relates to late submission of evidence.</p>	<p>examples in the guideline, but it is important to remember that this guideline discusses the provision of documentary evidence within 14 days of the hearing. <i>The Appeals Branch will change the word prejudice to unfair disadvantage, as the legal concept of prejudice is broader than what is meant to be addressed in this context.</i></p> <p>Examples of things that would create an unfair advantage to the extent that it would not be appropriate to proceed with the in-person hearing on the scheduled date are: a substantial document that may need to be explored in testimony, a lengthy surveillance video, or significant new medical reporting that alters the previous understanding of the medical condition; all items that could not reasonably be reviewed and considered by the opposite party on the day of the hearing.</p>
<p>“Failure to Attend an In-Person Hearing”</p>	<p>One submission argued the Appeals Branch should be required to contact the party to seek an explanation for their failure to attend.</p>	<p>The inclusion of this guideline is meant to address those representatives who fail to advise they are unable to attend or are going to be late. The Branch does not believe it is necessary to set out a separate rule for unrepresented parties.</p>
<p>“Recordings/Transcripts”</p>	<p>One submission raised the issue of charging for CDs.</p>	<p>The Appeals Branch has decided not to charge for CDS of in-person hearings at this time. The number of requests will be monitored for the next year and the issue will be revisited at that time.</p>

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“Returns to Business Units”	One submission requested that return procedures be better defined and that the Appeals Branch monitor the Business Unit activity to ensure that the return is being actioned.	Front-line Operations has a process in place to ensure returned cases are actioned in a timely manner.
“Withdrawals” “Withdrawals”	Two submissions referenced this guideline. One submission argued that AROs should have reciprocal obligations to respond to telephone messages left. Another submission argued that for cases withdrawn due to no contact, the objecting party ought to be advised that any reactivation of the appeal is subject to statutory time limits to appeal.	Workplace parties/representatives that have concerns with the accessibility of an individual ARO should raise those concerns with Appeals Branch management. The Appeals Branch has not historically taken such a restrictive position on this issue and the Appeals Branch does not believe that it is necessary to do so.
“Resolution Stage”	Two submissions referenced this guideline. One submission argued that ARO timelines were necessary for decisions/agreements. A second submission indicated a WSIAT Notice of Appeal ought to be attached to the decision letter.	The enhanced P&P outlines that for in-person hearings, a decision can be expected usually within 45 days. If this is not possible, the ARO is required to advise the parties why the decision might require additional time. The 60-Day decisions continue to be issued in 60 days or less. It is not appropriate for the WSIB to keep and send out forms from a separate entity, such as WSIAT.
“Reconsiderations in the Appeals Branch”	Five submissions dealt with the guideline on reconsiderations. Submissions variously argued that an adjudicative advice document ought to be included in the policy on reconsiderations, a timeline for the completion of reconsiderations ought to be adopted, the guideline should state that during the internal	The comments on the policy and implementation during internal reconsiderations have been shared with the appropriate Vice-Presidents in front-line Operations. The Appeals Branch believes the adoption of the same standard of review criteria in both internal and external reconsideration requests

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<p>“Reconsiderations in the Appeals Branch”</p>	<p>reconsideration process, the original ARO decision ought to be implemented, and that internal reconsiderations should be limited to exceptional circumstances. There were two submissions that expressed concern about the two year time limit and one submission that found the threshold test too legalistic.</p>	<p>is appropriate.</p> <p>The Appeals Branch will be reviewing the question of timelines for reconsideration requests but does not believe it is necessary to establish specific timelines in the document.</p> <p>The Appeals Branch believes that a two year time limit is appropriate and quite flexible, when one considers that WSIAT has a 6 month rule in this regard. It is also important to note that the guideline allows for requests made after 2 years to be granted by the Executive Director of the Appeals Branch in exceptional circumstances.</p> <p>On the issue of the threshold test, the current guideline is much clearer in terms of the requirements, and separates out the standard of review criteria from the question of whether the flaw or new evidence leads to a change in the decision.</p> <p><i>The Appeals Branch will add some clarifying language related to the process.</i></p>
<p>“Use of Surveillance Material in the Appeals Branch”</p>	<p>One submission argued that surveillance material should never be allowed in the Appeals Branch.</p>	<p>There is an approved WSIB policy on surveillance and the guideline on this issue supplements that policy.</p>
<p>“Compliance Reviews”</p>	<p>One submission suggested that compliance reviews ought to be postponed until court proceedings are completed.</p>	<p>The guideline makes clear that parties have the option of suspending the compliance review until the disposition of charges.</p>

Miscellaneous:

- Two submissions referenced the suggestion that the procedural document should delineate the process for Appeals Branch specialty teams, for issues such as re-employment and Second Injury and Enhancement Fund (SIEF). These initiatives are corporate initiatives that are supported by the Appeals Branch; as such, we do not believe they should be referenced in the P & P.
- One submission suggested that each page of the document ought to include on the top of the page a statement that all decisions must be made with due respect for valid Canadian law and within the principles of fundamental justice and procedural fairness. The “Introduction” guideline makes clear that decisions will be made consistent with the relevant statute and it is our position that each guideline and the document as a whole incorporate the rules of natural justice.
- One submission (with 2 other responders supporting the submission), recommended that Objection Forms and Participant Forms be available on-line. The WSIB continuously evaluates what forms can and should be made available on line. However, the process as it currently exists is meant to provide every opportunity for discussion to be held by the front-line decision-maker and the objecting party and to allow for a decision to be reconsidered before it is referred to the Appeals Branch.

APPENDIX A
LIST OF SUBMISSIONS

Worker

Office of the Worker Adviser

Henryk Debski, Individual

Health & Safety Legal Clinic

Ontario Legal Clinics' Workers' Compensation Network

Len Brown, Paralegal

Employer

Office of the Employer Adviser

Mike Mitchell, Paralegal

Employers' Advocacy Council

Stephen Roberts, McTague Law Firm LLP

School Boards' Co-operative Inc.

Other

Richard Fink, Fink & Bornstein, Barristers & Solicitors