

APPEALS SYSTEM PRACTICE & PROCEDURES

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PRACTICE GUIDELINE

Glossary of Acronyms

The following items will be described throughout this document using the acronyms set out below:

- WSIB** Workplace Safety and Insurance Board
- WSIA** Workplace Safety and Insurance Act
- WSIAT** Workplace Safety and Insurance Appeals Tribunal
- AB** Appeals Branch
- ARO** Appeals Resolution Officer
- AA** Appeals Administrator
- BU** Business Unit
- RSD** Regulatory Services Division
- WPP** Workplace Parties

Calculation of Time

Time in this document, unless otherwise noted, is delineated in calendar days.

When the due date falls on a weekend or a holiday, the due date will be extended to the next weekday or the next day that is not a holiday.

PRACTICE GUIDELINE

Introduction

The mission of the Workplace Safety and Insurance Board (WSIB) appeals system is to consider and reach final resolutions to claims and revenue objections. Resolutions shall be consistent with the *Workplace Safety and Insurance Act* (WSIA) and WSIB policy, and shall be achieved through a variety of approaches which emphasize the enquiry nature of the WSIB's adjudication system, and shall be transparent, timely, fair and comprehensive.

The AB will continue its commitment to service excellence by demonstrating a responsive appeals system that is committed to providing independent and transparent decision-making services by one independent decision-maker (Appeals Resolution Officer). The AB will provide a variety of resolution methods. In-person hearings, when necessary, are held at locations throughout Ontario to further ensure that the Workplace Parties (WPPs), their representatives and any relevant witnesses are not unduly inconvenienced or the location of the hearing does not form a barrier to a party's right to a fair and timely appeals process.

Statutory Authority

Section 131(1) of the WSIA states:

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.

Section 119 states:

- 1. The Board shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent.*
- 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 and against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits.*
- 3. The Board shall give an opportunity for a hearing.*
- 4. The Board may conduct hearings orally, electronically or in writing.*

AB Practice and Procedures

The AB has exercised its powers under s.131 to adopt the following document. *The Appeals System Practice & Procedures* is available on the WSIB website: www.wsib.on.ca.

Issues In Dispute – Handling By Business Units

Dialogue/Decision Stage

Before issuing a written decision, the decision-maker will ensure that: there are no other issues that need to be addressed; all necessary information has been obtained; and the position of the parties has been clarified. All issues should be dealt with, to the extent possible, in a single decision letter.

When a decision is made, the decision-maker will invite the adversely affected party to contact the decision-maker to discuss any concerns the party may have with the decision. The decision letter will also advise the party of the time limits for appealing the decision.

SEE PRACTICE GUIDELINE on APPEAL TIME LIMITS.

If concerns are raised about the decision, the decision-maker will review the concerns with the party and explain the rationale for the decision and address/review any new information which may be provided.

For a **claim** objection, if the decision is not changed and the party has indicated in writing a desire to appeal the decision (Notice of Objection), the decision-maker will refer the file to the access area.

For a **revenue** objection, access is provided upon request.

Access

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.

For transfer of cost employers, (an employer, not the accident employer, who has been charged all or part of the claims costs due to negligence), access is given to enable effective participation in the decision-making process. Access to transfer of cost employers is provided in the same manner as regular employers, except the worker can object to the disclosure of any information in the claim file, not just health care information.

Objection Form

The party/representative is required to complete a WSIB issued Objection Form and return it to the decision-maker if they choose to proceed with an objection.

The completed Objection Form must specify reasons why the decision is considered to be incorrect, any new information not considered by the decision-maker, and a summary of the further benefits or services which are requested. If the Objection Form is not completed in full, the referral to the AB may be delayed.

For a claim objection, the access area will also send a letter to the non-objecting party/representative along with a Participant Form to be completed and returned to indicate whether they intend to participate, in the event the case proceeds to the AB.

Reconsideration Stage in BU

If the objecting party returns a completed Objection Form, the decision-maker will review the form for completeness and any new information which is provided. Where appropriate, the decision-maker will reconsider the original decision. Where new issues are raised in the Objection Form, the decision-maker will address those issues as well, including obtaining additional information if or when required and communicating the outcome to the parties in writing.

If the decision is not changed and all outstanding issues have been addressed, and the objecting party still wishes to proceed, the decision-maker will refer the file to the AB.

Referral Stage

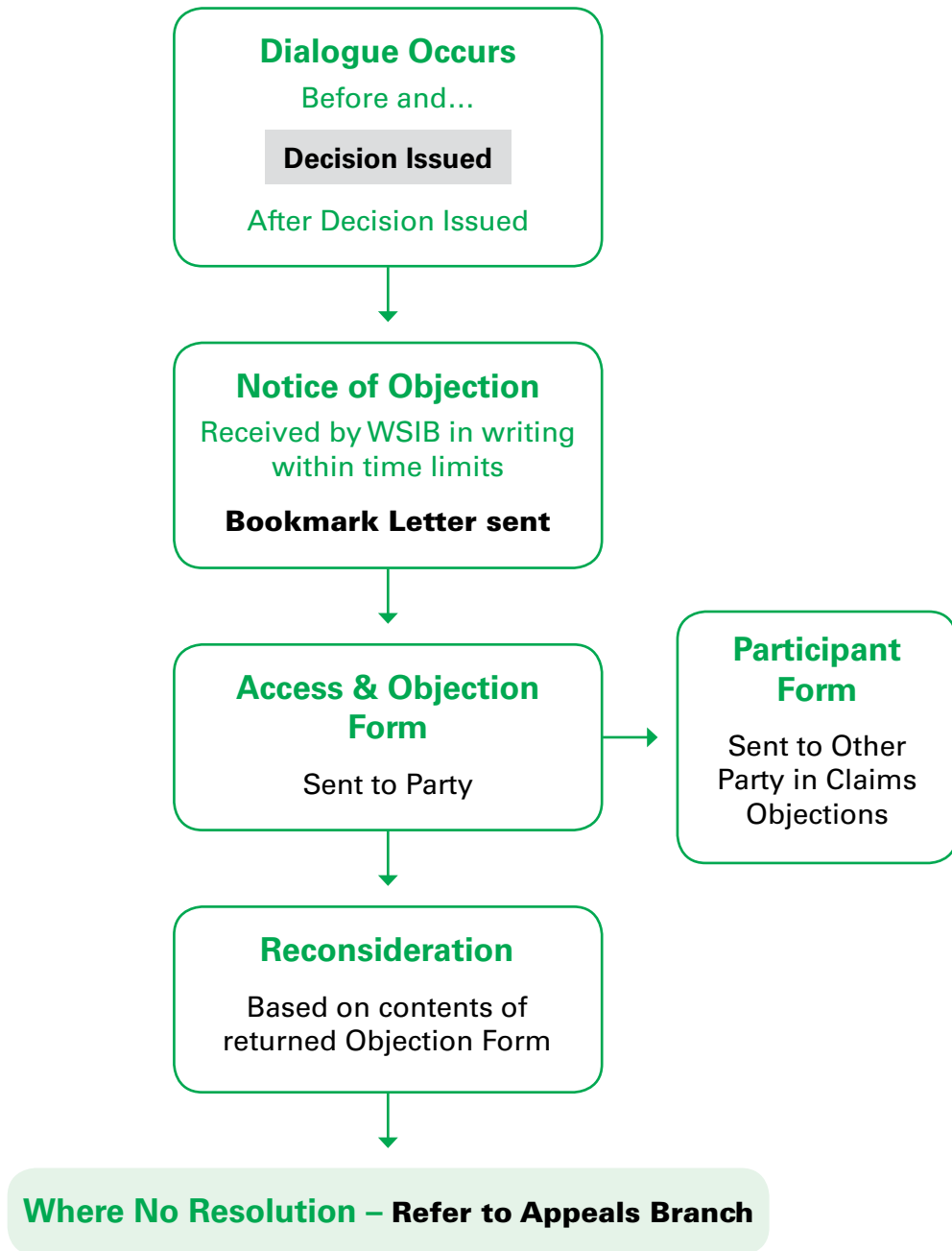
For a claim objection, a dual referral is made through the completion of an AB Referral Memo. The file is simultaneously referred to the access area and to the AB (Desk T8000). The access area will provide access updates to the objecting party/representative and will also provide access to the non-objecting party/representative where they have indicated an intention to participate in the appeal. This “secondary” access function ensures that when the parties/representatives are contacted by the ARO, they will be in a position to discuss the objection in an informed manner.

For revenue objections, the completed AB Referral Memo is forwarded to the AB. Firm file access is provided upon request through the firm file access area.

Early Resolution Process

The Handling of Disputes by the Business Unit

OVERVIEW



Appeal Time Limits

Overview

There is a 30-day time limit on appealing a WSIB decision about Return to Work or a Labour Market Re-entry plan made on or after January 1, 1998.

There is a six-month time limit on appealing any other WSIB decision made on or after January 1, 1998.

A six-month time limit starting from January 1, 1998 applies to the appeal of any other WSIB decision made prior to January 1, 1998.

Notice of Objection

When the WSIB issues an unfavourable decision, the adversely affected party must be advised in a decision letter of the applicable time limits for appealing. In order to meet the statutory requirements, the party must indicate in writing, before the expiry of the relevant time limit, a desire to appeal the decision.

Proceeding with the Objection

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.

Reconsidering Decisions after Expiry of Time Limits

The WSIB has the authority under Section 121 of the WSIA to reconsider any decision “at any time if it considers it advisable to do so.” This contemplates decisions being changed by the WSIB through reconsideration after the expiry of the statutory appeal period.

Authority to Grant Extensions

If reconsideration is not possible and the case has been brought forward for review after the expiry of the statutory time limit, the WSIB has the authority to extend the time limit in appropriate cases.

Requests for extensions will be considered by the BU decision-maker who will notify the party in writing of the outcome of the review.

Appeal Time Limits ... Continued

Appealing Time Limit Rulings

If the party indicates a desire to appeal the time limit ruling, the matter will be referred by the Manager in the BU directly to a Manager in the AB for priority assignment to an ARO.

The completion of an Objection Form is not required but both parties must be notified of the referral. The BU decision-maker has to complete an Appeals Referral Memo and place it on the file. Once the time limit appeal has been received in the AB, the Appeals Administrator (AA) will send a letter to the objecting party providing 21 days to provide submissions on the issue.

The ARO will rule on the time limit issue within 30 days of receiving submissions from the parties.

If the extension is granted, the file will be returned to the BU and the usual access/Objection Form process will be initiated for the substantive issue. **SEE PRACTICE GUIDELINE on ISSUES IN DISPUTE—HANDLING BY BUSINESS UNITS.**

Criteria to be Applied in Determining Time Limit Extensions

Length of 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.

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

Appeals Resolution Officers

All cases entering the AB are dealt with by AROs. Outcomes are reached using a variety of methods determined by the nature of the issue under appeal.

Role of the ARO

AROs are responsible for resolving objections. In discharging their responsibilities, AROs shall comply with the following code of conduct:

- Act in a fair and impartial manner and avoid any conflicts of interest.
- Be diligent and conscientious in the performance of their duties.
- Treat all parties and participants in the appeal process with courtesy, dignity and respect.
- Approach every objection with an open mind, capable of fairly assessing and weighing evidence and avoid doing or saying anything that would cause a well informed reasonable party to think otherwise.
- Conduct such enquiries as may be necessary to properly resolve an objection in recognition of the non-adversarial nature of the WSIB's system of adjudication and to ensure appropriate protection for unrepresented parties.
- Reach conclusions based on objective and independent assessments of fact in accordance with the WSIA and WSIB policy.

Appeal Participants

Objecting Party

The objecting party is a participant in the proceeding.

Non-objecting Party

The non-objecting party is also a participant where they have confirmed on the Participant Form or in writing that they intend to participate.

Where the non-objecting party has chosen not to participate on the Participant Form or does not return the Participant Form, there is no obligation to include that party in any of the proceedings; however, the party will be sent a copy of any decision or agreement which is reached at the conclusion of the proceeding.

Where a party does not submit a Participant Form but subsequently advises the WSIB of an intention to participate in the appeal process, they will be included in the process. In this situation, the party must advise the AB of their intention by telephone/fax, and forward a Participant Form or letter directly to the AB to ensure the ARO is aware of their participation.

In circumstances where the ARO determines it is advisable to have the non-participant party involved in the appeals process, the party will be encouraged by telephone and/or in writing to participate. If necessary, a summons will be issued.

Third Party

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.

Representatives

Right to Representation

All parties have a right to be represented by a representative of their choice.

Both claim file and employer information can only be released to worker and employer representatives if such representatives/parties have provided the WSIB written authorization. Please see the relevant links to the WSIB website below.

[Direction of Authorization](#)

[Employer's Direction of Authorization](#)

Licensing Requirements

In order to provide legal services related to WSIB matters, representatives must have a license required and issued by the Law Society of Upper Canada. The only exceptions are those persons who are exempt from the licensing requirements either under the *Law Society Act* or pursuant to a bylaw passed by the Law Society of Upper Canada.

The WSIB will not accept unlicensed representatives who are not otherwise exempt from the licensing requirement. A common exemption is that of a friend, which the LSUC describes as a person not in the business of providing legal services that occasionally provides assistance to someone for no fee.

Additional information on licensing requirements is available on the WSIB website: www.wsib.on.ca, and on the Law Society of Upper Canada website: www.lsuc.on.ca.

Requests for Representation

In cases where an appeal has been referred to the AB and a party requests that the ARO delay the proceedings in order for a representative to be arranged, a delay of up to 21 days may be granted.

In the case of a request by the objecting party, if no representative has been arranged within 21 days of first contact with the ARO, the party will be given the option of proceeding without a representative or having the objection withdrawn. Where the case is withdrawn, it can re-enter the AB as a new appeal at a later date but will not be given priority status and will generally be assigned to the same ARO. **SEE PRACTICE GUIDELINE on WITHDRAWALS.**

In the case of a non-objecting party who has been unable to arrange for a representative within **21 days** of first contact with the ARO, the ARO will proceed with the case. The non-objecting party may continue efforts to arrange for a representative as the case proceeds.

**At the discretion of the ARO, a reasonable amount of additional time to obtain representation may be granted.*

Code of Conduct for Representatives

Representatives are expected to make good faith attempts to resolve issues in dispute at the BU level and to be prepared and ready to proceed once they move appeals forward to the AB.

The AB recognizes and enforces the Code of Conduct established by the WSIB for representatives. The WSIB Code of Conduct can be found on the WSIB's website at www.wsib.on.ca.

AB Code of Conduct For Representatives

As there is greater interaction with representatives at the AB level, a more detailed delineation regarding the expected standard of behavior has been developed.

Representatives at the AB level are expected to:

- Be aware of and comply with the *Appeals System Practice & Procedures* document;
- Be prepared to comply with the disclosure requirements set out in the *Appeals System Practice & Procedures* document;
- Be courteous and respectful to the opposing party, witnesses, and AB personnel;
- Respect the confidentiality of the file information and related information submitted in the appeals process;
- Respect the privacy of the individuals involved in the appeals process; and
- Be punctual when attending in-person hearings.

Please also see the Law Society of Upper Canada *Rules of Professional Conduct* at www.lsuc.on.ca.

PRACTICE GUIDELINE

Appeal Assignment Stage

Once registered in the AB, a file will be assigned to the appropriate appeals team based on geographical location and business sector or subject matter.

For all objections (except for time limit to appeal objections and compliance reviews), the objecting party/representative will be forwarded a 60 Day Decision Option Form. If the form is completed and returned, an ARO will be promptly assigned the case and a decision will be reached within 60 days of the completed option form being received. **SEE PRACTICE GUIDELINE on the 60 DAY DECISION OPTION and APPEAL TIME LIMITS.**

Files which have been allocated to teams but not yet assigned to AROs are the responsibility of the AA, who will respond to questions about status and the appeals process.

60 Day Decision Option

General

The 60 Day Decision Option is intended to be utilized for more straightforward cases. Upon entering the AB, the 60 day option letter and form is sent to the objecting party/representative.

Where this option is chosen, a decision is made within 60 days based on information contained in the claim file and any additional information submitted by the parties in writing and attached to the 60 Day Decision Option form. This approach provides all objecting parties with the opportunity to choose an expedited process of review and places the onus on the objecting party/representative to submit any new information to be relied upon. These cases are intended to be non-enquiry in nature. Generally, the ARO will not contact the objecting or responding party when the objecting party has chosen this expedited option.

The expedited decision process is activated when the completed and signed 60 Day Decision Option Form is received by the AB.

The procedures set out below apply in all 60 day cases.

If the case is not allowable based on the contents of the claim file and any additional information submitted with the 60 Day Decision Option form, a decision will be issued.

If the case is allowable and the non-objecting party is not participating, **or** the outcome has no consequences for the non-objecting party (i.e., late filing charge to an employer), a decision will be issued.

The procedure set out below applies in 60 day cases where the non-objecting party is participating.

If the ARO views the case as allowable, the non-objecting party will be contacted to determine if they have additional information to submit. If they do not, a decision will be issued. If they do have information to submit, the ARO will give the party/representative 21 days to provide the information. If this information may reasonably cause the ARO to deny the appeal, the objecting party/representative will be given an opportunity to reply.

Issue Agenda in 60 Day Decision Option Cases

Issues not ruled on by the BU will not be added to the issue agenda where the 60 Day Decision Option is chosen.

If additional issues are raised, they will be referred back to the BU to rule on after the 60 day decision has been issued.

Removal from the 60 Day Decision Option Stream

On occasion, cases in the 60 Day Decision Option stream involve issues that would generally be addressed through further enquiry or an in-person hearing. In these cases, the ARO has the authority, after discussion with the objecting party, to remove the case from the expedited stream and resolve the appeal through the use of other resolution methods. **SEE PRACTICE GUIDELINE ON METHODS OF RESOLUTION.**

Special ADR Projects

Special Alternative Dispute Resolution (ADR) projects are offered by the AB. Appeal cases arising from larger employers are sometimes dealt with through special projects which are aimed at reaching outcomes more efficiently and more consensually. These projects depend upon the willingness of the employer and the union to seek constructive ways to resolve appeals.

Each project is developed in consultation with the employer and union and procedures vary based on the needs of the parties.

For larger employers and unions where an ADR project has been implemented, the project involves a dedicated ARO who typically provides a written “view” or opinion of the case to the employer and union representatives. A meeting is held with the employer and union representative where multiple cases are considered. The discussions focus around the “view” and most cases are resolved through this process. A small number of cases proceed to an in-person hearing. In some cases, additional enquiries may be identified as necessary before a resolution can be reached.

More information about the opportunity to develop employer-specific ADR projects should be raised with the Executive Director of the AB.

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

A human rights or constitutional question raised at the AB will be addressed only after a decision has been made on the substantive issues under appeal under the relevant statutory provision and/or policy (merit review).

If the merit review leads the substantive appeal to be allowed, the AB will not rule on the human rights or constitutional question.

If the substantive appeal is denied, the AB will address the human rights or constitutional question.

Ontario Human Rights Code

The AB has the jurisdiction to consider a question under the Ontario *Human Rights Code* (Code) pursuant to the *Supreme Court of Canada* decision in *Tranchemontagne v. Ontario*.

Where a party to an appeal intends to raise a human rights question under the Code, the party must file a written notice to the AB providing:

- A detailed explanation of the human rights question being raised along with the material facts;
- The section of the Code relied on, or the legal basis for the argument;
- The desired remedy; and
- The contact information for the party's representative, if any.

Canadian Charter of Rights and Freedoms

The AB has the jurisdiction to consider a question under the *Canadian Charter of Rights and Freedoms* (Charter) pursuant to the *Supreme Court of Canada* decision in *Nova Scotia (Workers' Compensation Board) v. Martin*.

Where a party intends to raise a question under the Charter, with respect to the legislation or policy applicable for review by the AB, the party must comply with s.109 of the *Courts of Justice Act*. Section 109 requires a party to serve a notice of constitutional question on the Attorney General of Canada and the Attorney General of Ontario. The notice must be served as soon as the circumstances requiring it become known. A copy of the notice of constitutional question must also be provided to the Executive Director of the AB and all parties to the appeal.

The notice should be similar to the form provided in the *Ontario Rules of Civil Procedure*. The notice must contain:

- A detailed explanation of the Charter question raised along with the material facts;
- The section(s) of the Charter relied on, or the legal basis for the argument (constitutional principles to be argued);

Code and Charter Questions ... Continued

- The desired remedy; and
- The contact information for the party's representative.

Disclosure Requirements

Parties to these appeals must comply with the same requirements as established in the **PRACTICE GUIDELINE on RULES OF DISCLOSURE AND WITNESSES**.

Written submissions and evidence regarding the human rights or constitutional question will not be required until such time as the AB deals with those issues.

Failure to Follow Procedure

If the above procedures are not followed, the party will not be permitted to raise the human rights or constitutional question in any proceeding before the AB.

Methods of Resolution

The AB provides a number of resolution methods. The review/enquiry/in-person hearing options represent the most common approaches to resolving objections.

Review Stage

In cases where a 60 Day Decision Option is not chosen, the case is assigned to an ARO who will contact the participating parties, confirm the issues and determine the most appropriate method of resolving the objection. If it is agreed that the case can be resolved on the basis of information on file and verbal submissions from the parties, the case goes to the Resolution Stage for a final outcome.

Enquiry Stage

If any of the parties wish to make submissions and/or present additional evidence the case goes from the Review Stage to the Enquiry Stage. The parties are ordinarily given 21 days to make additional submissions or provide new evidence. Extensions can be granted by the ARO. The enquiry stage may also be used when the ARO directs additional activity or enquiry such as a medical review, assessment or field investigation.

Hearing Stage

A case which requires an in-person hearing goes from the Review Stage to schedule the hearing.

In-person hearings contribute significantly to delays and can lead to an adversarial relationship between the WPPs. While the AB recognizes that, especially for workers, in-person hearings can be seen as the preferred option to present a case, most cases can and should be resolved without the need for an in-person hearing. However, the variety of methods of resolution do allow for the resolution of many workplace party appeals in a timely, fair, transparent and comprehensive manner without an in-person hearing.

Cases that would generally not require an in-person hearing involve a discrete issue(s) under appeal. The facts are generally not in dispute and/or testimony would not add to the information already in the claim file record.

The following issues would **not** generally **require** an in-person hearing:

- pension commutations
- pension or non-economic loss (NEL) award quantum/redetermination
- level of impairment for hearing loss claims
- entitlement to health care benefits
- an employer request for Second Injury and Enhancement Fund (SIEF) relief
- assessable earnings and penalties
- retroactivity in revenue assessments.

Methods of Resolution ... Continued

If the objecting party requests an in-person hearing for any of the issues set out on page 17, the onus will be on the party to establish how the case fits within the general principles set out directly below regarding when an in-person hearing would be necessary.

Cases that would generally require an in-person hearing involve complex fact situations, multiple issues, or multiple claims that can only be addressed through an in-person hearing, situations where the decision under objection turns on an issue of credibility which can only be properly assessed through an in-person hearing, or where direct testimony from the objecting party or material witness(es) is necessary to address the issue in dispute.

It is important to note that a case with multiple issues would not necessarily result in a need for an in-person hearing if, for example, the case turned on a policy interpretation or a medical issue.

The following issues would more likely **require** an in-person hearing:

- conflicting/inconsistent information related to disablements
- proof of accident
- complex non-organic conditions
- return to work/job suitability, co-operation, labour market re-entry issues
- transfer of costs
- independent operator/worker status.

Appeal Review Stage

ARO Contact

The ARO reviews the file to determine the facts, the nature of the issues under objection, the identity of the participating parties, and resolution options.

The ARO contacts the participating parties/representatives in order to explain the objection process and the role of the ARO.

Discussions occur at this stage to identify/confirm the issues under objection, the appropriate method of resolution and possible enquiries which may be needed.

An opportunity may arise during the initial contacts for an agreement to be reached on the outcome. The participants may come to a common understanding of how the facts of the case match relevant law/policy. Under these circumstances, an agreement regarding the outcome of some or all of the presenting issues may result. Any agreement reached will be issued in writing using the approved format. **SEE PRACTICE GUIDELINE ON RESOLUTION STAGE.**

Where an agreement on an outcome does not occur but it is agreed that no additional information is required and the ARO may proceed with a decision, the case proceeds to the Resolution Stage.

Setting the Issue Agenda

One of the key features of the appeal system is a comprehensive review of the file by both the BU and the AB. Before qualifying for consideration by the AB, the objecting party will have first completed an Objection Form which identifies all issues in dispute, suggests a preferred remedy, and ensures that all presenting issues are addressed in the BU.

Additional stand alone issues may still present themselves at the appeal stage.

Where additional issues present themselves at the appeal stage and have been ruled on by the BU but have not been outlined on the Objection Form or referred to the AB, the issues may be added to the issue agenda for resolution by the ARO if:

- the participating parties agree to have the issues added; **and**
- information necessary to resolve the issues is available to the ARO and to the other party without extensive additional enquiry; **and**
- there is no prejudice to the non-objecting party; **and**
- the issue is not excluded from review by the statutory time limit for appeal.

Where additional issues do present themselves but have not been ruled on by the BU, they may be added to the issue agenda for resolution by the ARO if:

- the participating parties agree to have the issues added; **and**

Appeal Review Stage ... Continued

- information necessary to resolve the issues is available to the ARO and to the other party without extensive additional enquiry; **and**
- there is no prejudice to the non-objecting party.

The above approach related to additional stand alone issues is to be differentiated from the approach delineated below surrounding the concept of “benefits flowing from a decision.”

Situations may occur where, regardless of whether the issue has been raised by either party, the issue is determined by the ARO as necessary to deal with in order to give proper effect to the real merits and justice of the case. The ARO has the authority to add such an issue to the issue agenda but must notify the parties/representatives.

There may be cases in which the ARO identifies a downside risk. In such circumstances, the ARO will advise the party/representative of the downside risk.

In all cases, the benefits which flow from a decision will be considered part of the issue agenda and the ARO will be responsible for ruling on benefits to the extent that reliable information is either contained in the file or readily available to the ARO. Therefore, where the ARO accepts entitlement for impairment or for a period of disability, the ARO will also resolve the nature, level and duration of benefits to the extent that available information permits.

If the objecting or responding party requests that “benefits flowing” from a decision not be addressed by the ARO, the ARO will make a preliminary determination on the question at the time the request is made and will reference in the decision why he/she decided to either address or not address “benefits flowing.” There is no requirement in the above scenario that both parties must agree before the ARO rules on benefits flowing from a decision.

In cases where an additional issue is presented at the appeals stage and the time limit to appeal has expired, the ARO may deal with that issue as a preliminary matter. The ARO will make a ruling in writing within 30 days of receiving submissions from the participating parties. In these cases, it is understood that regardless of the ruling (allowed or denied), the same ARO will also be responsible for making rulings on all of the other substantive issue(s) in dispute.

Possible Outcomes

Proceed to Resolution Stage

Where the ARO and the parties/representatives are satisfied that additional enquiries are not necessary, and a consensual agreement cannot be reached, final submissions will be requested and the case will move directly to the Resolution Stage.

Proceed to Enquiry Stage

If it is determined that additional information is required, which can be obtained through non-hearing enquiries, the case will proceed to the Enquiry Stage.

Appeal Review Stage ... Continued

Proceed to Scheduling Stage

If it is determined that an in-person hearing is required, the ARO will discuss with the parties the appropriate location for the hearing, any witnesses that may be required and any additional information that should be obtained prior to the hearing. **SEE PRACTICE GUIDELINE on RULES OF DISCLOSURE AND WITNESSES.**

At the time of this discussion, the WPPs should alert the ARO regarding any special requirements related to the following: security, interpretation, summonses, travel, and special needs (i.e., mobility, allergies). **SEE PRACTICE GUIDELINES on SECURITY, SUMMONSES AND PRODUCTION OF DOCUMENTS, AND INTERPRETERS.**

Appeal Enquiry Stage

Methods of Enquiry

It is recognized that a variety of methods are available to obtain information including:

- telephone,
- teleconferencing,
- letter/fax,
- investigations conducted by WSIB staff, and
- referral for assessments, tests and opinions from internal and external health care professionals, workplace specialists, and industrial hygiene specialists.

It is the ARO's responsibility to determine what information is needed to resolve the case and to choose the most efficient and timely method of obtaining that information. Generally, the best way to obtain information is through the parties themselves. For example, where copies of medical records or reports are required, the worker or worker's representative is likely able to obtain the documentation more efficiently than the WSIB.

Documentation and Communication

Most information received at the Enquiry Stage will be in written form, including reports, records, letters and WSIB memos; however, other information will be received over the telephone. Information received orally will be appropriately documented.

The ARO is responsible to follow-up on outstanding enquiries in order to ensure that information requests are responded to in a timely manner. It is also the responsibility of the ARO to keep the participating parties advised of the status of all enquiries being conducted.

Outcome

Once all enquiries are completed and submissions received, the case will proceed to the Resolution Stage.

There may be cases where the enquiries lead the ARO to proceed to an in-person hearing. This will be appropriate where significant credibility issues become apparent or where complex issues of fact arise as a result of the enquiries. In such cases, the ARO will refer the file to the Hearing Scheduler. **SEE PRACTICE GUIDELINE below on SCHEDULING OF HEARINGS.**

Hearing Stage – Adding Issues to the Agenda

**Hearings in this guideline could include both in-person hearings and hearings by teleconference.*

Once it has been determined between the ARO and the parties to the appeal that a hearing is necessary, and the issue agenda has been discussed, the ARO will confirm in writing to the participating parties the issues that will be addressed at the hearing.

Generally, no additional issues will be added to the hearing agenda that was confirmed by correspondence. The adding of issues to the hearing agenda should only occur in the following circumstances:

- the new issue(s) to be added has been discussed and added to the agenda at least **14 days** before the in-person hearing is scheduled to occur in two party cases and at least **7 days** before the in-person hearing is scheduled to occur in single party cases, and
- the issue(s) is one where the participating parties and the ARO have sufficient time to prepare to argue and prepare questions of the worker/potential witnesses, and also have time to call and prepare any witnesses that might arise out of this new issue(s).

The ARO will make a final determination on any question regarding the adding of an issue or issues to the hearing agenda in exceptional circumstances that are outside of the parameters set out above.

Scheduling of Hearings

**Hearings in this guideline could include both in-person hearings and hearings by teleconference.*

Initial Scheduling

Once it is determined that a hearing is required, the ARO will refer the file to a Hearing Scheduler who will proceed to arrange for a mutually convenient hearing date.

When contacted it is expected that the participants will be available to attend a hearing within **3 months**.

If one or more of the parties are not available, the timeline can be extended for a reasonable period of time depending on the circumstances to accommodate the personal schedules of the ARO/representatives/parties.

Scheduling beyond 6 months

Cases will generally not be extended beyond 6 months. In exceptional circumstances*, at the discretion of the ARO, hearings can be scheduled beyond the 6 month mark.

Examples of circumstances that **would not be considered exceptional include date conflicts with other like agencies, any appeal participant being out of the country, a full calendar and a backlog of work.*

If it is the objecting party who is not able to provide a hearing date within 6 months of the date of first contact by the Hearing Scheduler, it will be assumed they are not ready to proceed, and the case will be withdrawn without prejudice. The ARO will issue letters to the appeal participants to advise of the withdrawal. Once the case is withdrawn, the objecting party will be required to go through the normal process in the BU to have the file reactivated in the AB.

If it is the non-objecting party who is not ready to set a hearing date or is not prepared to provide available dates consistent with the 6 month time period, the Hearing Scheduler will set the date on the basis of the availability of the objecting party.

If it is a dual objection, the objection for the party who is unable to provide available dates within the 6 month time period will be withdrawn from the issue agenda, without prejudice. The Hearing Scheduler will set the date on the basis of the available party. If the previously unavailable party becomes available, their issue(s) can be added to the agenda up to 14 days before the date of the scheduled in-person hearing, as long as the issue is one where both WPPS and the ARO have sufficient time to prepare. **SEE PRACTICE GUIDELINE on HEARING STAGE.**

If a case is reactivated after it has been withdrawn due to scheduling issues, the objecting party must be able to provide hearing dates within 3 months of date of first contact with the Hearing Scheduler.

Upon reactivation, if the non-objecting party is not available to schedule a date within 3 months, the time period to schedule can be extended up to 6 months.

Scheduling of Hearings ... Continued

Date has been scheduled

Once a date has been arranged, the Hearing Scheduler will send a Notice of Hearing to the parties setting out the date, time and place for the hearing. Generally, hearings will be held in the city where the WSIB's file is administered or the city closest to that location where hearings are generally held. Exceptions are dealt with on the basis of improved customer service and must be fiscally responsible.

NOTE: At the time of scheduling, the special requirements related to the following should be confirmed with the Hearing Scheduler, if warranted: security, interpreter, and summonses.

Security

At the request of the ARO, WSIB or outside security may attend an in-person hearing without the consent of the participating parties. The parties will be notified in advance that security officers will be present at the hearing. Requests by the WPPs for the presence of security at an in-person hearing should be confirmed at the time the hearing is being scheduled.

Requests for security must be based on real and substantial concerns.

Interpreters

The AB will arrange for an independent and objective interpreter to be in attendance at an in-person hearing where it is requested by the parties.

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

Once the in-person hearing is opened, and before interpreting begins, the interpreter will swear an oath or affirm their intention to interpret the proceedings to the best of their abilities and to maintain the confidentiality of all personal information they receive while they are interpreting.

The parties must tell the AB if they or their witnesses require an interpreter at the time the in-person hearing is being scheduled or as soon as possible before the date of the hearing so the AB has enough time to make arrangements for the attendance of an interpreter.

The parties must provide precise information about both the language and the dialect spoken by the party and/or witness. If the party requesting an interpreter does not advise of the need for an interpreter at least 14 days prior to the date of the scheduled in-person hearing, the case may go ahead without the presence of an interpreter or, at the discretion of the ARO, the case may be withdrawn from the AB, without prejudice. For clients who are unrepresented, if the ARO accepts that the failure to advise of the need for an interpreter was caused due to language difficulties, the in-person hearing may be postponed.

Interpreters are expected to provide verbatim interpretation of testimony unless he or she is directed to do otherwise by the ARO. This alternative direction will only occur if and when the ARO and the parties agree that the individual providing testimony requires only occasional assistance from the interpreter as opposed to verbatim interpretation.

If the interpreter is unable to translate a word or phrase in testimony, or does not understand the testimony, the interpreter must inform the parties in attendance at the in-person hearing and await further instructions after a discussion is held between the parties and the ARO.

If an interpreter does not arrive for the in-person hearing or if, mistakenly, an interpreter was not arranged, it will be up to the ARO and the parties to determine whether it is appropriate to proceed with the hearing without an interpreter or if the hearing must be adjourned and re-booked.

Summonses and Production of Documents

Criteria

In determining whether a summons is essential and should be issued, the following facts should be considered:

- whether the evidence is relevant to the issue(s) in dispute;
- whether the evidence is likely to be significant to a determination of the issue(s) in dispute;
- whether the request to summon a witness will be used for the bona fide purpose of giving evidence before the proceeding or whether it will likely be used to harass or inconvenience the witness;
- whether the oral or written evidence can be obtained in a more reasonable manner. For example, in situations involving physicians or LMR Service Providers it is generally more appropriate to obtain necessary information or clarification through written questions.
- whether the summons request is being used for the purpose of “fishing” in the hopes of obtaining relevant information;
- whether the person receiving the summons has access or control of information/ documents, relevant to the case. The summons should be issued against the person with custody of the necessary documents;
- whether the prospective witness is compellable in the proceedings (WSIB policy has established that WSIB employees are not compellable witnesses and other statutes limit the compellability of certain witnesses).

In complex cases, advice and direction in deciding if a summons should be issued may be sought from the Executive Director or Manager(s) of the AB.

Procedures

A request to summon documents or a witness must be made in writing to the AA as early in the process as possible but generally no later than **30 days** prior to the scheduled date of the in-person hearing.

In the case of documents, the request must identify the document(s) and indicate who has possession of the document. The request should also state the relevance and likely significance of the document. The request in relation to a witness must indicate the name and address of the proposed witness and an indication as to the nature, likely significance and relevance of the evidence to be given by the witness.

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 well in advance of the in-person hearing, in the event that the decision not to grant a summons is disputed.

Summonses and Production of Documents ... Continued

The Process Service Provider (PSP) will arrange for the summons to be served and provide the AB with an Affidavit of Service, which will be duly witnessed by a Commissioner.

At the in-person hearing, should the summoned document or witness not be produced or attend, as the case may be, or where the AA has refused to issue a summons, the ARO may:

- proceed without the evidence or the witness if it is determined that the evidence in question is not essential to the disposition of the issue(s) in dispute;
- proceed with the in-person hearing, indicating that a decision on the need for the production of evidence or attendance of a witness will be reserved until the conclusion of the hearing. Where, at the conclusion of the hearing, it is determined that the evidence in question is essential, the ARO will direct the information be obtained by other means, or direct that the hearing be re-convened and that appropriate summonses be issued;
- decide at the outset that the summons should be issued and postpone the in-person hearing for that purpose. This course of action should only be taken where the evidence in question is so critical as to make proceeding to hear the available evidence unreasonable.

If the summoned witness does not attend and the ARO is satisfied the evidence to be given is essential, then the ARO may decide to re-issue the summons with instructions to the PSP to communicate to the witness the necessity of attending a future hearing, or the ARO may recommend that the WSIB proceed with contempt proceedings against the witness. Such a decision shall be made in consultation with the AB Executive Director and the WSIB's General Counsel.

Hearing by Teleconference

Hearing by teleconference can be used instead of an in-person hearing. However, the ARO must ensure:

- there is agreement amongst the parties and the ARO that the case is clear and uncomplicated enough to be addressed without the personal attendance of one or more of the parties;
- a copy of the updated file and other relevant documents needed for the hearing are available to all parties prior to the teleconferenced hearing;
- the ARO has determined that proceeding in this manner will not result in any significant prejudice to a party; and
- if there are issues of credibility they can be addressed through a teleconference.

Hearing by teleconference can be useful in situations where a party is physically unable to travel, lives in an area where in-person hearings are not generally held, where transportation is difficult, where an expedited decision is required, or where all parties and the ARO agree.

During the course of a hearing by teleconference, the ARO may determine that another hearing format would be more appropriate and may direct that the hearing be rescheduled accordingly.

Parties must comply with the same disclosure and scheduling requirements as exist for an in-person hearing.

PRACTICE GUIDELINE

Postponements

**Hearings in this guideline could include both in-person hearings and hearings by teleconference.*

A postponement means the hearing will not go ahead on the date it was scheduled and will need to be re-booked for another date.

Hearings are scheduled in consultation with the WPPs. The AB expects parties to be prepared for the hearing and ready to attend once a date is set.

Once a hearing date has been established, postponement requests should be made as soon as possible, and reasons for the request must be compelling.

The exceptional criteria set out below establish that “exceptional,” for the purposes of this guideline, surrounds issues of a last minute or urgent nature.

Pre-hearing Requests For Postponement – Exceptional Circumstances

The AA will deal with all pre-hearing requests for postponements. The AA has the authority to grant a postponement request where it meets one of the following criteria:

- sudden illness of the worker;
- sudden illness of the worker’s representative where no replacement is reasonably available;
- sudden illness of the employer where the employer is to act as the representative and there is no one else who could reasonably represent the employer at the in-person hearing;
- sudden illness of the employer’s representative if no replacement is reasonably available;
- death of one of the parties or a member of his/her immediate family;
- death of the representative or a member of his/her immediate family if no replacement is reasonably available;
- unusual adverse weather conditions on the day of the hearing or an accident while en route to the hearing.

Where a postponement request just prior to the hearing is granted pursuant to the exceptional criteria set out above, the AA will notify the WPPs and the relevant WSIB office(s), and will return the file to the Hearing Scheduler to arrange for another hearing date. The objecting and/or responding party are required to inform their own witnesses that the scheduled hearing has been postponed.

At any stage of this process, either the AA and/or the party requesting a postponement can engage the ARO to assist with the discussion surrounding the issue. However, all WSIB staff are expected to apply the postponement criteria set out above.

Please note that requests for postponements due to the denial of a late request to add a new issue to the hearing agenda do not fit within the exceptional criteria set out above in the **PRACTICE GUIDELINE on HEARING STAGE.*

Postponements ... Continued

Pre-hearing Requests for Postponement – Other than Exceptional Criteria

If either the objecting party or non-objecting party requests a postponement at any time after the hearing date has been set, and the reason does not meet the exceptional criteria set out above, a postponement may be granted but the request must:

- be made in writing and forwarded directly to the AA, by fax to 416-344-3600, or by mail to the WSIB address, Attention: Appeals Branch;
- set out the compelling reason for the request; and
- be sent to the other party and/or representative, asking the other party to consent to the postponement.

**Please note a telephone call alone will not be sufficient. A telephone call must be followed by a written request.*

After review of the above, the AA will make a determination as to whether the postponement request will be granted or whether the case will be withdrawn.

Where a postponement request is granted for reasons other than the exceptional criteria set out above, the requesting party will be expected to have an available hearing date within 3 months of date of the subsequent first contact with the Hearing Scheduler. If it is the objecting party who requests the postponement, the case will be withdrawn if they are not available within 3 months of the date of the subsequent first contact with the Hearing Scheduler. If it is the non-objecting party who requests the postponement, if a mutually convenient date within the 3 month period cannot be found, the Hearing Scheduler will set the date on the basis of the availability of the objecting party.

Postponement Requests at the Hearing

Postponement requests made at the hearing will be ruled on by the ARO after giving full opportunity to both parties/representatives to present arguments with respect to the request.

The reasons for granting or denying requests for postponement must be communicated to the parties orally at the time of the hearing.

The following criteria will be weighed by the ARO in determining whether to grant a postponement request. It should be noted that the consent of the other party does not, by itself, constitute sufficient reason to grant the postponement request:

- was adequate and sufficient notice of the hearing date provided to the parties seeking the postponement;
- was the hearing date arranged by mutual consent;
- are the facts giving rise to the request for the postponement compelling and reasonable;
- to what extent does the need for the postponement arise out of the intentional actions or neglect of the party/representative requesting the postponement;
- what prejudice will result to both parties if the request is either allowed or denied;

Postponements ... Continued

- how long has the party requesting the postponement been aware of the facts giving rise to the request and what steps were taken prior to the hearing to remedy the situation and to inform the WSIB;
- can any procedural defects, such as the late receipt of written materials, be remedied through delaying the starting time of the hearing, permitting post-hearing submissions, or making any other direction that will minimize or eliminate the prejudice of not granting a postponement; and
- whether the party requesting the postponement has a history of previous postponements in this case or other cases dealt with in the AB.

If the ARO denies the postponement request at the time of the hearing, the hearing will proceed. However, if the objecting party does not wish to proceed, the appeal will be withdrawn from the Appeals Branch.

Where a postponement request is granted at the hearing, the requesting party will be expected to have an available in-person hearing date within 3 months of the date of the subsequent first contact with the Hearing Scheduler. If it is the objecting party who requests the postponement, the case will be withdrawn if they are not available within 3 months of the date of the subsequent first contact with the Hearing Scheduler. If it is the non-objecting party who requests the postponement, if a mutually convenient date within the 3 month period cannot be found, the Hearing Scheduler will set the date on the basis of the availability of the objecting party.

Guidelines for Conducting In-Person Hearings

**It is important to note that the circumstances of each case will determine the extent to which all procedures will be followed.*

Receiving Evidence

Evidence will be received by the ARO if it is relevant to the issues under objection and there is no statutory exclusion or privilege which applies to the evidence.

It will be up to the ARO to determine the reliability and weight of the evidence.

See PRACTICE GUIDELINE on RULES OF DISCLOSURE AND WITNESSES.

In-person Hearing Procedures

Purpose

The purpose of an in-person hearing is to gather information in a thorough, fair and courteous manner. In doing so, every effort should be made to create and maintain a non-adversarial atmosphere.

PRIOR TO ENTERING THE HEARING ROOM

Prior to entering the hearing room, the ARO shall:

- determine the presence of and identify all individuals who will be participating in the hearing and ascertain their roles;
- explain that witnesses will be excluded from the hearing room until they are required to give testimony. This does not apply to the worker and/or an individual designated by the employer as its resource person. An employer is permitted to have one designated resource person. This individual is allowed to remain in the hearing room throughout the proceedings.
- decide whether or not observers will be permitted to be present at the hearing. As a general rule, AB hearings are held “in camera,” which means they are not open to the public. However, the AB generally permits observers to attend where all parties consent, unless there are compelling reasons for excluding observers (.i.e., sensitive factual issues, matters of space, potential security problems).The ARO will instruct observers that they are not entitled to participate in the hearing or record the hearing.

IN THE HEARING ROOM PRIOR TO GOING ON THE RECORD

Before going on the record, the ARO shall:

- outline the purpose of the hearing and how it will proceed (i.e., the order of presentations);
- discuss/confirm with the parties the issues to be dealt with and advise the parties of information or facts which are already established from the evidence and of the specific areas of enquiry which will be necessary in order to deal with the issues under objection;

Guidelines for Conducting In-person Hearings ... Continued

- clarify with both parties which witnesses will be called and the nature of their testimony. The ARO should not hear from witnesses whose evidence is irrelevant to the issue under objection or relates to non-contentious matters of fact already accepted by the ARO.

If multiple witnesses are being called to provide the same information, the ARO should seek agreement from the parties with respect to those facts;

- explain that the information received from the witnesses will be given under oath or affirmed as the witnesses prefer;
- indicate that a recording device will be recording everything that is said during the course of the hearing; and
- if an interpreter is present, explain that the interpreter is not an employee of the WSIB and explain how the interpreter will be used.
- if both parties request the ARO engage in mediation (or agreement) discussions, the ARO must first secure consent from the parties about his/her ability to make a decision if a consensual outcome is not reached. If the parties will not allow the ARO to make a decision, before beginning any mediation (or agreement) discussion, the ARO must explain to the parties that if a consensual outcome is not reached, the issue under appeal would then need to be re-assigned to another ARO.

If a question arises as to whether or not the matter should be returned to the BU, withdrawn, or postponed, the principles and procedures outlined in PRACTICE GUIDELINES on RETURNS, WITHDRAWALS AND POSTPONEMENTS, will apply.

The In-person Hearing

OPENING THE HEARING PRELIMINARY MATTERS

The in-person hearing shall proceed in the following manner:

- the ARO shall state for the record the name, claim or firm number, date of decision being objected to and whose objection it is;
- the ARO will identify for the record all those in attendance at the hearing and their role;
- the issue(s) under objection will be confirmed;
- the ARO will determine if any party has any additional written documents to submit. Where they do, and that material is relevant, it will be received and marked as an exhibit. Exhibits are to be numbered and each will bear, in the case of a claims objection, the worker's name, claim number, date received and the initials of the ARO, and in the case of a revenue objection, the employer's name, firm number, date received and the initials of the ARO.
- written documents received at this time will not meet the 14 day before hearing disclosure requirement; see PRACTICE GUIDELINE on RULES OF DISCLOSURE AND WITNESSES for information on the timing of receipt of evidence. However, it is inappropriate not to receive the information considering the statutory requirement

Guidelines for Conducting In-person Hearings ... Continued

to determine cases on their real merits and justice. The ARO will have to determine appropriate procedures for ensuring fairness to the receiving party. This may include delaying the start of the hearing to give the representative an opportunity to review and discuss the documents with the party and/or witness(es). The ARO may also offer an opportunity to make post-hearing submissions on any of the documents submitted. The ARO may also consider postponing the hearing where the unfair disadvantage to the receiving party is so significant that no other procedure can overcome the disadvantage.

- the parties will be asked if there are any preliminary issues to be raised and the ARO will receive submissions and make rulings with respect to such matters. The ARO may also reserve ruling on any preliminary issues where a decision does not have to be made in order for the hearing to proceed. A request that a summons be issued, for example, may be deferred by the ARO until after all evidence has been heard at which time the necessity of the information in question may be clearer.

PRESENTATIONS

In cases where the appeal participants are represented, the ARO will receive the presentations of the parties in the following order:

- each party/representative will be given an opportunity to make a brief opening statement which will be a summary of their respective positions, with the objecting party first, followed by the non-objecting party;
- the interpreter is sworn in;
- the objecting party will be sworn/affirmed and give evidence through questioning by the representative, the opposing representative and then the ARO. Following the ARO's questions, the opposite representative and the party's representative will have an opportunity to ask follow up questions. The opposing party will ask questions which arise from the questions asked by the ARO while the party's representative will have an opportunity to ask questions arising from the questions of the ARO and the opposing representative.
- after the objecting party has testified, the other witnesses for the objecting party will be called, sworn/affirmed and questioned in the same order as above;
- the non-objecting party will then be given an opportunity to present information through its witnesses. The non-objecting party/representative will ask questions first, followed by the objecting party/representative, followed by the ARO, with follow up questions after that. It should be noted that for an employer's case, the decision on whether or not to call the resource person first is to be made by the employer's representative, but if that individual is not called first and remains in the hearing room while the other witnesses testify, the ARO should advise that their presence will be considered when weighing their testimony.
- in the case of a worker appeal, where the employer resource is also going to provide testimony, the employer resource person will be asked to testify before the worker testifies. If the employer representative submits that the worker should testify first, the employer resource/witness will be allowed to remain in the room while the worker testifies but will

Guidelines for Conducting In-person Hearings ... Continued

be advised by the ARO that in the event that credibility is an issue, their presence will be considered when weighing their testimony.

- each witness should be sworn/affirmed when they enter the hearing room and before questions are asked;
- the ARO must ensure that the questions asked of witnesses are relevant to the issues under objection and will refuse to permit questioning in relation to matters considered to be irrelevant. Cross examination is not permitted although cross questioning is allowed. The distinction between cross examination and cross questioning is discussed later in these guidelines.
- in appropriate cases, to be determined by the nature of the issue and the relative abilities of the representatives, the ARO may suggest to the parties that, having reviewed the contents of the file, the ARO wishes to clarify certain information in order to assist in focusing the enquiry. If parties agree to this approach, the ARO will proceed to question the worker/witnesses first. The parties/representatives will then follow with additional questions as may be necessary. If the parties/representatives object to this approach, the ARO will follow the normal hearing protocol set out above.
- witnesses are dismissed from the hearing room (except worker and employer) after giving testimony;
- after all testimony has been received, the ARO will invite closing submissions from each representative/party with the objecting party first followed by the non-objecting party;
- each representative may want to respond to the other representative's closing submissions. This is permissible as long as the representatives do not rehash old ground and limit themselves to responding to the specific areas covered by the other side that were not addressed in their own final submissions.
- in some cases the representative(s) may agree to submit the closing argument in writing. In these situations the written presentation should not introduce new evidence and must be shared with the opposing party. The time frame for the post-hearing submission is up to **21 days** unless indicated otherwise by the ARO.

In circumstances of an unrepresented party(ies), opening statements and closing submissions will be invited and the ARO will likely be the only one asking questions.

RECESSES – GOING OFF THE RECORD

Where the hearing continues for more than 1½ to 2 hours, it will likely be necessary to take a break.

Where possible, breaks should not occur in the middle of a witness' testimony. Where this is unavoidable, the ARO should advise the witness to refrain from discussing their testimony with anyone during the break

Where, for any reason during the hearing, it becomes necessary to go off the record (turn off the recording device), the ARO should state at the outset the reason for going off the record and, when back on the record, disclose the nature of any discussions or activities that occurred off the record.

Guidelines for Conducting In-person Hearings ... Continued

CLOSING THE HEARING

The ARO will conclude the hearing as follows:

- explain that all evidence presented at the hearing as well as the information on file will be considered in reaching a decision;
- explain that a written decision will be made and sent to all parties and representatives;
- advise the parties when a decision can be expected, usually within 45 days. If no post-hearing activity is required but the ARO is aware there are reasons the decision may not be completed within 45 days of the in-person hearing, the ARO will advise why the decision might require additional time and the date the decision is expected to be issued.
- if it is clear that additional information will be required before a decision can be made, advise the parties of the steps that will be taken to obtain the information and the likely duration of the delays involved;
- if additional information will be obtained, indicate that the parties will receive post-hearing access and will be given an opportunity to make a submission before a decision is made;
- if any post-hearing inquiries will involve obtaining medical information, confirm with the worker their consent to release this information to the employer. If the consent is not given, the issue will have to be dealt with by the AA pursuant to s.58 of the Act.
- thank the parties for their attendance and advise them “the hearing is closed”

CROSS QUESTIONING V. CROSS EXAMINATION

It is a long-standing practice of the WSIB not to permit cross-examination at hearings. Cross-examination is an integral part of the adversarial approach relied upon in the court system, but is not consistent with the enquiry-based adjudication approach of the WSIB.

Rules of procedural fairness and the need to determine the merits and justice of the case require that an opposing party/representative be given an opportunity to question witnesses with adverse interests. The opposing party/representative is limited, however, to questions which seek to clarify information relevant to the case. The process of clarification is done through cross-questioning.

Cross-examination represents a more adversarial approach to questioning which is reflected in efforts to badger, attack or argue with the witness. This approach may intimidate parties and witnesses from coming forward with information and participating in the proceedings. It also creates an atmosphere which is more formal and more confrontational and can result in a significant disadvantage to individuals who are unrepresented.

DISRUPTIVE BEHAVIOUR

In cases where one or more of the parties or representatives conduct themselves in a disruptive manner that prevents the reasonable conduct of the hearing, the ARO shall put the individual(s) on notice that their behaviour is unacceptable and advise them of the ARO's authority to exclude them from the hearing room if the behaviour continues. If the behaviour does continue, the ARO has the authority to order the exclusion of the individual.

Guidelines for Conducting In-person Hearings ... Continued

Where an exclusion order is made against one of the representatives, and to avoid prejudice to the affected party, the ARO has the authority to adjourn the in-person hearing to a later date. It is up to the ARO to determine if this is necessary to permit the party whose representative has been excluded to obtain a new representative.

Post-Hearing Activity

Post-Hearing Information/Contact

With the consent of the parties at the in-person hearing, it is open to the ARO to arrange a conference call with the parties to receive final submissions if it is more expedient to do so, or to permit final submissions to be received in writing. Generally, it is expected the submissions will be made no later than **21 days** after the date of the in-person hearing.

In exceptional cases, additional information will have to be obtained following the in-person hearing. Post-hearing enquiries should be conducted using the same methods, procedures and guidelines as apply at the Enquiry Stage.

Access to new information obtained through post-hearing enquiries will be provided to the parties and final written submissions invited.

Following the closing of an in-person hearing, contact by the participating parties with the ARO should generally be in writing and the opposing party must be copied.

Failure to Attend an In-Person Hearing

It is expected that WPPs and their representatives will arrive for the in-person hearing and that the hearing will start at the time stated on the hearing notice.

If an unforeseen circumstance/emergency causes a workplace party to arrive late for the in-person hearing or not to be able to attend at all, the party is expected to contact the WSIB/AB as soon as they are aware they will be late/absent and definitely prior to the time the hearing is scheduled to commence.

In Toronto, the party should contact the responsible AA. For district office in-person hearings, the party should contact either the responsible AA or personnel at the District Office.

If telephone contact is made, it is at the ARO's discretion, after discussion with the party who is in attendance, to determine whether the in-person hearing will be delayed or cancelled and then re-scheduled.

If the non-objecting party has not contacted the relevant WSIB personnel by the time of the scheduled hearing, the ARO will wait another 15 minutes and then proceed with the in-person hearing. If the non-objecting party arrives after the start of the hearing, they will be permitted to join the hearing in progress but there will be no obligation on the part of the ARO to restart the proceedings.

If the objecting party has not contacted the relevant WSIB staff within 30 minutes of the scheduled time of the in-person hearing, the hearing will be cancelled. The objecting party will be required, within 3 business days after the scheduled hearing date, to provide reasons in writing **to the ARO**, for the failure to attend. If an explanation for the failure to attend is received, the ARO will then decide whether to:

- reschedule the in-person hearing;
- resolve the appeal based upon written evidence alone; or
- withdraw the appeal from the AB.

If a response in writing is not received, the case will be withdrawn from the AB.

If the representative of either party arrives at the in-person hearing with instructions to proceed without their client, the ARO has the discretion to proceed or reschedule.

Recordings/Transcripts

The WSIA does not require in-person hearings to be recorded. However, the WSIB generally makes audio recordings of in-person hearings. In case of technical difficulties with the digital recording equipment*, the hearing will continue despite the inability to record the proceedings.

Parties are not permitted to record in-person hearings.

The *Workplace Safety and Insurance Act* does not require that the WSIB provide transcripts of hearings and the WSIB does not generally produce or use transcripts of its hearings.

Once a decision has been reached, parties to an appeal may request a copy of the audio recording of the in-person hearing. In order to obtain a CD copy of the recording, a party to an appeal must contact 416-344-1014 to make the request.

A CD copy of the in-person hearing is considered personal information under the *Freedom of Information and Protection of Privacy Act* (FIPPA) and the release and use of this information is governed by s.58 and s.59 of the WSIA.

Parties wishing to obtain a written transcript of the in-person hearing will need to make their own arrangements to have this done, once they receive a CD copy of the recorded hearing.

**Digital recording equipment is now being used in the AB. CD copies are not available for in-person hearings that were recorded on cassette tapes.*

Rules of Disclosure and Witnesses

**Hearings in this guideline could include both in-person hearings and hearings by teleconference.*

Section 131 of the *WSIA* allows the WSIB to determine its own practice and procedure.

Section 132 allows the WSIB to summon witnesses and requires parties to provide documents and items which the WSIB considers necessary to make a decision.

The purpose of the rules set out below is to ensure all participants and the decision-maker have the same information and can determine the issues under appeal, identify any additional information that might be required, and prepare for the hearing if that is the determined method of resolution.

During the appeals process, the WPPs are obliged to submit all relevant information/evidence that is available to them.

Review and Enquiry Stage

The WPPs are responsible for disclosing to the opposing side all documentary information, including medical information, that is sent to the file once an appeal is already active in the AB. If this does not occur, the ARO will rule that such disclosures are necessary and will direct the party with the information to disclose it to the other party and will provide a timeframe in which to do so.

Hearing Stage

General

Once an appeal is at the Hearing Stage, the AA is responsible for taking appropriate steps to ensure that all necessary documents and witnesses will be available at the hearing and for dealing with any procedural issues that may arise prior to the hearing.

Generally, it is the responsibility of the parties to obtain any outstanding information; however, the AA will receive and consider written requests by the parties for the production of additional information/documentation for the hearing. When considering whether or not to obtain information requested by the parties, the AA must determine whether the information is relevant and necessary.

In determining whether or not to issue a summons, the criteria set out in **PRACTICE GUIDELINE on SUMMONSES AND PRODUCTION OF DOCUMENTS** will apply.

Documentary Evidence

All documentary evidence submitted by the parties prior to the hearing should be received by the WSIB and the other party, at least **14 days** prior to the scheduled hearing date.

Where documentary evidence is submitted prior to the hearing, and the other party has not been copied, the AA is responsible for ensuring that access to these documents is provided to the other party. While the overall responsibility for the provision of documents would

Rules of Disclosure and Witnesses ... Continued

still remain with the party forwarding the document(s), it would be more important at this stage to ensure the other party has access to the documents in time to ensure they will not be prejudiced in the preparation and presentation of their case.

The 14 day rule for disclosure of documentary evidence does not apply to items such as:

- WSIB policy
- WSIAT decisions
- Published decisions of other AROs.

Related Issues or Appeals

Both the objecting and responding parties have a continuing obligation to advise the ARO of any related issues or appeals that are currently being pursued either in the BU or at the Workplace Safety and Insurance Appeals Tribunal (WSIAT) that may have some potential impact on the appeal currently active in the AB. If there is a scheduled hearing date, the parties must advise of an issue described above that may or likely will prevent the hearing from proceeding as scheduled at least 21 days prior to the scheduled hearing date.

Witnesses

If any of the appeal participants intend to have witnesses testify at the in-person hearing, the AA must be advised of this in writing at least 30 days prior to the scheduled in-person hearing date.

The written notification must provide a list of the witnesses and a brief summary of the evidence that each witness (other than the worker or employer), will provide at the hearing (a “will say” statement), and should also indicate if a summons will be required.

The general approach to the allowance of witnesses is that it is not necessary to have more than two witnesses, in addition to the worker or employer, who are going to provide testimony on the same facts in dispute.

A balanced approach will be taken on the number of witnesses for both the objecting and non-objecting party and in both claims and revenue appeals.

The AA will confirm within 5 days whether the witnesses have been approved. In the circumstance where one or more of the requested witnesses have been denied by the AA, further discussions can be held between the workplace party and the AA, and these discussions will be documented for the file. After further discussion, if the party requesting a witness continues to disagree with the decision to deny a witness, the AA should seek further guidance from the ARO.

Parties must advise the AB and other parties of the removal of a witness from the witness list at least 7 days prior to the scheduled in-person hearing date.

Rules of Disclosure and Witnesses ... Continued

Surveillance Material

Video evidence must be submitted, in an acceptable format, to the AB/other participant at least **21 days** prior to the scheduled in-person hearing date and the party wishing to rely on the evidence is responsible for ensuring that the evidence is in a format that is accessible to all parties to the appeal. For more information on the use of surveillance material in the AB, see **PRACTICE GUIDELINE on USE OF SURVEILLANCE MATERIAL IN THE APPEALS BRANCH.**

Medical Reports

In circumstances where a party or representative has provided an opinion medical report on their own initiative, the individual is required to provide to the ARO and the non-objecting party if they are participating, the letter or memo sent by the requesting party or representative, to the doctor asking for his/her opinion, along with the medical report received.

There is no such requirement when medical records are being provided. The 14-day rule for the disclosure of documentary evidence applies to medical reports and medical records, unless the medical reports/records relate to a medical assessment/procedure that occurred within 30 days of the hearing date.

Returns to Business Units

General

Where a case is returned to the BU for further action without a resolution being reached, significant delays can occur in the process, causing distress to the parties. The appeal system is designed to reduce instances where “returns” occur.

In general, a return to the BU only occurs when it is not possible for the ARO to conclude on the presenting issue(s) due to either a significant deficit in the information that cannot be reasonably overcome through inquiry or testimony, or in circumstances where there are other issues that may reasonably impact the issue in dispute that have not yet been ruled on by the BU.

Criteria

Returns will generally only occur for the following reasons:

- a relevant entitlement issue has not been ruled on by the BU and the ARO is unable to add it to the issue agenda (e.g., non-organic entitlement was not considered by the BU); **see PRACTICE GUIDELINE on SETTING THE ISSUE AGENDA;**
- in revenue cases, a relevant underlying or substantive issue has not been ruled on by the BU;
- another claim (prior or subsequent injury) is identified which would likely impact on the issue in dispute and that claim was not reviewed by the BU prior to reaching its decision. This is to be distinguished from situations where prior or subsequent relevant claims were reviewed but simply not referred with the file under objection. In those circumstances, the ARO will arrange to have any additional relevant claim files obtained without the necessity of the case being returned to the BU or
- there is a significant deficit in the information used by the BU decision-maker to decide the issue(s) under objection (see information below on what constitutes a significant deficit of information);

A *significant deficit* of information would include but is not limited to:

- Relevant witness(s) identified but not contacted for statements;
- Situation where a prior or subsequent relevant claim(s) was not considered in the decision making or where alternate entitlement arguments could reasonably be made under the prior or subsequent claim and entitlement was not ruled on;
- A competing issue, such as non-organic entitlement, was not considered or ruled on;
- A substantive variance in medical opinions on file with no attempt to clarify or provide rationale as to why one opinion was favoured over others.

Returns to Business Units ... Continued

Procedures

A return will not be made without a discussion first occurring with the parties. Where a return does occur, the ARO will complete a memo outlining the reasons for the return. The “return” memo will be sent to the BU and a copy will also be sent to the parties/representatives and to the appropriate Appeals Manager.

Where the action required to be taken by the BU is completed but one or more issues remain in dispute, the case will be sent back to the AB and assigned to the same ARO on a priority basis without the requirement that the objecting party complete another Objection Form. A new AB Referral Memo is required.

Returns can occur at any of the various appeal stages (Review, Enquiry, and Hearing). The same principles and procedures apply.

Withdrawals

General

Withdrawn cases may ultimately re-enter the AB. Withdrawn cases occupy the resources of both the WPPs and the AB and cause significant delays in the appeals process.

The same principles and procedures apply for withdrawals which occur at any of the various appeal stages (Review, Enquiry, and Hearing).

Objecting Party Request for Withdrawal

Where the objecting party/representative indicates to the ARO either by letter or by telephone that they do not wish to proceed or are not ready to proceed with the objection, the ARO will send a letter to the parties confirming this and advising the objection will be treated as withdrawn. The ARO will also place a memo in the claim or firm file regarding the withdrawal.

Withdrawal Due to No Contact

Cases can be withdrawn from the AB in circumstances where the objecting party/representative fails to respond to contact attempts made by the ARO/Scheduler.

In general, the objecting party/representative will be required to respond to contact from the ARO within 21 days of the date of first contact.

Once an ARO makes initial contact, either by telephone or in writing (with the number of telephone calls left to the discretion of the ARO), the ARO should await a response for at least 7 days from the date of the initial contact. At the beginning of the second week, the ARO will send a letter/fax asking for a response within 14 days of the date of the letter, with the exact date set out in the letter/fax. If no contact is made within that 14 day period, the ARO will send a letter to the objecting party and the representative, if any, advising that the appeal has been withdrawn from the AB and will place a memo to the claim or firm file outlining the reasons for the withdrawal.

If the objecting party/representative or the ARO is unavailable for a defined period for reasons such as a scheduled vacation/holiday season, the timelines will be adjusted as determined by the ARO.

Re-entry to the AB

Where a case has been withdrawn, it can re-enter the AB at a later date. If the case does re-enter the AB, it will not be given priority status, but generally, the same ARO will be assigned to the case once it reaches the top of the assignment queue.

Resolution Stage

Decisions

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.

Once the decision has been signed, a copy will be sent to the parties. A copy will also be placed on the claim or firm file and sent to the appropriate BU.

In the covering letter sent with the decision, the parties will be advised of the relevant time limit for appeals to the WSIAT.

Agreements

Agreements are reached when the participating parties and the ARO agree on an outcome.

The parties will be advised at the time of the resolution that the agreement constitutes a final decision of the WSIB.

A document confirming the agreement will be prepared by the ARO. It will cover the same information as a decision (see paragraph #3 under “Decisions” above) in order to show how the agreement is consistent with the WSIA and WSIB policy.

In the covering letter sent with the confirming document, the parties will be advised of the relevant time limit for appeals to the WSIAT.

Transfer of Active Cases in the Appeals Branch due to ARO Unavailability

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.

Reconsiderations in the Appeals Branch

Authority

Section 121 of the WSIA states the WSIB may reconsider any decision made by it and confirm, amend or revoke the decision. WSIB Policy 11-01-14 confirms this authority and gives the decision-maker and the decision-maker's Manager the right to reconsider.

Principles

An ARO decision is the final decision of the WSIB. In an enquiry-based system, the information gathering activities leading up to the final decision engage the WPPs in the process. This allows every opportunity for the parties to provide information and evidence in support of their respective positions.

The reconsideration authority is not intended to be used to simply rehash the arguments of the WPPs or act as another level of appeal and is only applicable in certain circumstances.

In the AB, the individuals who could be asked to undertake a reconsideration are: the ARO, an Appeals Manager, and the Executive Director of the AB.

Requests for Clarification

There may be cases where an ARO decision is perceived by the WPPs or other WSIB staff to be unclear, incomplete or to have an obvious error (example, a typographical error that does not impact the decision).

The criteria surrounding the reconsideration of decisions does not prevent an ARO from issuing an addendum to clarify a decision or complete an incomplete decision. This may be done where the text of the decision did not correctly reflect the ARO's intent or include a decision on all the issues that were required to be decided.

The clarification process must not be used as a disguised challenge of the decision or as a means of having the ARO decide an issue that was not part of the original appeal issue agenda.

The request for clarification must be made directly to the ARO who made the decision and must be made in writing. If the ARO is no longer in the AB, the request should be sent to the Appeals Manager.

Standard of Review

The criteria which would cause a decision to be reconsidered are:

- a substantive defect in the decision or the decision-making process which may reasonably affect the outcome;
- failure to properly apply the Act or approved WSIB policy;
- significant new evidence; or
- a typographical error which impacts the decision.

Reconsiderations in the Appeals Branch ... Continued

Application Procedure from Workplace Parties

An application for reconsideration from any of the WPPs must be submitted in writing, generally to the ARO or the Manager. The submission must state the reasons for the request and reference which standard of review criteria have been met. The party making the reconsideration request are expected to be detailed and comprehensive in their written submissions.

Application Procedure from BU

If the BU is submitting the request, it too must be made in writing, outlining clearly the reasons for the request and referencing which of the standard of review criteria have been met. The parties must also be advised of the internal reconsideration request, through the provision of a copy of the detailed reconsideration request memo at the same time it is being forwarded to the AB. The internal reconsideration request memo must be signed off by the Director of the BU prior to notification to the parties and must be forwarded to the Executive Director of the AB.

Reconsideration Process in the AB

The process involves two steps. It must first be decided whether it is appropriate to reconsider a decision. This is the threshold test. If the threshold has been met, the person reconsidering the decision must determine if, even though the threshold has been met, it results in the decision being changed in a substantive way.

No matter the origin of the reconsideration request, the request will first be considered by the ARO. If no grounds are found to warrant reconsideration, that is, if the threshold test has not been met, the parties will be advised in writing, with rationale and explanation provided. If grounds appear to exist, the ARO will notify both parties that the threshold has been met, and establish the procedures to be followed in conducting the reconsideration. The reconsideration procedure is flexible and can be varied to fit the needs of each case. The person responsible for the reconsideration has the ultimate authority to determine how best to conduct the reconsideration. There will be no opportunity to request a concurrent reconsideration at the Appeals Manager or Executive Director level until both the process to be followed in the reconsideration and the reconsideration itself has been fully completed.

In most cases, a reconsideration can be dealt with on the basis of written submissions. Generally, the AB will provide 21 days to make a written submission.

Especially in cases where the threshold test has been met based on a defect in the decision-making process during an in-person hearing, it is possible the person doing the reconsideration will proceed through an in-person hearing.

Following reconsideration by the ARO, the Appeals Manager or Executive Director may also be asked to reconsider the decision. The additional levels of reconsideration will not be undertaken automatically. Whoever is requesting that an Appeals Manager or the Executive Director reconsider a decision, must make the request in writing and outline the standard of review criteria which has been met and the reasons for the request. The ARO's Manager and the Executive Director have the authority to reconsider and change a decision on the same

Reconsiderations in the Appeals Branch ... Continued

grounds as noted above and will follow the same procedures as the AROs for dealing with reconsideration requests. This is not an additional level of appeal and is not intended to be used simply to substitute management's judgment for the judgment of the original decision-maker.

Regardless of who in the Appeals Branch is reconsidering a decision, at the completion of the reconsideration review, the WPP's, the representatives (if any), and the BU will be notified of the outcome in writing, with reasons provided.

Limit on Reconsideration Requests

Generally, only one reconsideration request should be made by each party at each level of reconsideration (the ARO, the ARO's Manager, and the Executive Director). The AB will not grant a further request for a reconsideration from the same party made to the same individual unless there are exceptional circumstances (e.g., the failure to grant a subsequent reconsideration would result in a serious procedural or substantive unfairness to a party).

Reconsideration Time Limit

As of January 1, 2011, the AB will not reconsider a decision after more than 2 years have passed since the date of the decision. Reconsideration requests made after 2 years will be undertaken only in exceptional circumstances, with those circumstances determined by the Executive Director of the AB.

In-person Hearing Fees and Expenses

When an in-person hearing is undertaken, the ARO considers requests for the payment of expenses for the worker, the worker's witnesses and any summoned witnesses. Travel, meal and accommodation expenses are paid to workers, their witnesses and summoned witnesses who are required to attend hearings outside their area of residence or employment. All witnesses who are not summoned by the AB must have their attendance pre-authorized by an AA/ARO if they wish to be paid. Such requests should be made prior to the hearing or at the time of the in-person hearing, not after the hearing has been completed.

Employers and their witnesses are not entitled to the payment of hearing fees and expenses.

Travel expenses are limited to the equivalent of travel within Ontario borders. The AB may pay for a portion of travel costs outside of the province. Generally, the WSIB will pay only from Winnipeg in the west and Montreal in the east, to the location of the in-person hearing. If travel is from destinations farther away than either of these two cities, the travel costs will be limited to the equivalent of: the actual travel costs, or the cost of a return flight from either Montreal or Winnipeg and the in-person hearing location, whichever is less.

AROs will attend to the various potential expenses/payment requests either during the preliminary discussion at the in-person hearing or once the in-person hearing has been closed.

Travel and Related Expenses

Allowances for travel, meals and accommodation expenses are paid at the prevailing rates established in the WSIB policy 17-01-09, *Travel and Related Expenses*.

Non-Professional Witness Fees

A witness fee, if there are lost wages, will be paid at a rate authorized by the AB; a set amount for a half day and a set amount for a full day. A witness fee will not be paid to workers or their witnesses if:

- the worker is entitled to full WSIB benefits for the same day; or
- the worker/witness has been paid for the lost time by the employer; or
- the worker/witness suffers no wage loss while attending the hearing.

The expenses shall be recorded on a standard expense form which is to be signed by the party requesting the expenses and the ARO.

In-person Hearing Fees and Expenses ... Continued

Professional Witness Fees

Professional witnesses will be paid a set fee as prescribed by the AB. Professional witnesses include, amongst others, medical doctors, psychologists and physiotherapists. It is generally sufficient for the above individuals to provide medical reports to the ARO, and they will only be approved to appear at an in-person hearing in unique circumstances where the evidence they intend to bring forward can only be effective if it is provided in person.

Witness Fee Schedule

Non-Professional witnesses **\$110.96 for a full day/ \$55.48 for a half day**

Professional Witnesses **\$600 for a full day/\$300 for a half day**
Attendance Fee

Payment for Medical Reports

Medical reports will be paid for at the approved WSIB fee schedule in the following circumstances:

- the ARO has requested the medical report for the purposes of the appeal,
- if the report has not been requested by the ARO but is provided by a party or representative on their own initiative, only if the report is deemed by the ARO to be significant in the decision-making process.

The approved fee schedule is set out in 17-02-03, *Payment of Clinical Assessments/Reports Requested for Adjudication*.

Use of Surveillance Material in the Appeals Branch

This document is meant to supplement WSIB policy 11-01-08, *Audio Visual Recordings* and 22-01-09, *Surveillance*.

When resolving an issue in dispute, the AB may accept video evidence from the WPPs or from the WSIB Regulatory Services Division (RSD) if the evidence is relevant and provides new or more complete information than is already on file.

Video evidence may be accepted in a variety of media formats. Parties submitting video evidence are responsible for ensuring the evidence is in a format that is accessible to all parties to the appeal.

SEE PRACTICE GUIDELINE on RULES OF DISCLOSURE/WITNESSES for guidance on the disclosure timelines for surveillance material.

In all cases the evidence must be authenticated. This is generally done by way of the author signing an affidavit confirming the date, time and location of the video, that it has not been altered, and that the video is a true representation of its subject.

If the BU decision is based in whole or in part on surveillance evidence but the identity of the subject of surveillance is contested, a detailed investigation by RSD can be undertaken at the request of the AB.

If the video evidence is to be used in an in-person hearing the ARO should view the evidence in advance of the hearing and seek agreement with the parties about what sections of the video are most relevant. Consensus should be sought as to whether actual viewing of the video during the hearing is necessary and if so what sections will be viewed. Often, an agreement can be reached that if the parties have all viewed the video in advance it would not be necessary to view it again in the in-person hearing.

When video evidence is to be used in an in-person hearing the Scheduler must be advised at the time of booking the hearing that audio visual equipment will be required.

Experience Rating Adjustments – Exceptional Circumstances

Retroactive experience rating adjustments may be presented as a stand alone issue in an appeal after SIEF relief has been granted.

As a result, it is important for decision-makers to have regard for the experience rating window when deciding if SIEF cost relief is to be applied.

However, there may be circumstances where retroactive adjustments to SIEF relief occur after the closure of the experience rating window.

WSIB policy outlines that adjustments outside of the experience rating window can occur if the WSIB has made an error. Errors are defined as:

- Clerical (typographical)
- Data Processing (computer generated)
- Omission (decision made but not acted upon)

It is important to distinguish the above circumstances from delays which result from the appeals process. The fact that an ARO grants SIEF relief on appeal outside of the experience rating window, does not in itself make it a WSIB “error” that would give rise to an experience rating adjustment.

The AB has developed the following assistive guideline when considering employer appeals where exceptional circumstances may exist.

Circumstances that may constitute “exceptional circumstances” include but are not limited to:

- whether the employer pursued SIEF relief within a reasonable period after the employer knew or ought to have known the worker’s recovery period was prolonged or enhanced by a pre-existing condition.
- Whether there was a delay in identifying a pre-existing condition.
- Whether undue delay in the decision-making process caused the decision to grant SIEF relief to fall outside the experience rating window.
- The length of time between the closure of the experience rating window and the SIEF decision. It would be expected that discretion be extended in cases where the period is relatively short (i.e., less than six months).

When an ARO is deciding on the experience rating adjustment as part of an SIEF appeal, the ARO must be aware of the appeal time limit for the experience rating adjustment, if a decision has been made by the BU relating to that issue.

In cases where the above rule of practice is applied, a copy of the ARO decision should be e-mailed or hard copied to the Manager of Experience Rating.

Compliance Reviews

In situations where workers and/or employers have been non-compliant with their statutory obligations under the WSIA, such non-compliance may result in a charge being laid under the *Provincial Offences Act* by the RSD of the WSIB. In such a circumstance, subsequent to the laying of a provincial offense charge and or a charge under the *Criminal Code of Canada*, the RSD will refer the file to the AB.

The laying of charges and evidence of non-compliance will give rise to a reconsideration of prior adjudicative decisions as the information relied on to make the entitlement decisions may have been submitted fraudulently, through misrepresentation, and/or the lack of credibility. This process is called a compliance review.

It is the role of the AB to conduct a comprehensive compliance review of the claim and to determine what impact (if any) the additional evidence obtained by RSD has on past adjudicative decisions made with regard to entitlement to WSIB benefits and services. The review will also consider entitlement to future WSIB wage loss benefits and services. The AB review is conducted independent of the Prosecution Branch of the RSD.

The process followed for a compliance review mirrors that of a regular appeal. In all compliance cases, the review event will include a letter to the parties that will explain the reasons for the compliance review, a brief summary of the RSD evidence submitted, identify the issues or entitlements to be reconsidered, and offer a choice of resolution methods, including the option to suspend the compliance review until the disposition of the charge(s).

As part of the initial review the assigned ARO is responsible for determining if prior ARO decisions impact the compliance review. If impacts are identified the file is brought to the attention of the Appeals Manager for possible re-assignment.

The subject of the compliance review, in order to preserve his/her right not to reveal his/her defence before the courts, has the option of suspending the compliance review until the disposition of charges. Once the charges are dispensed with, the ARO will then recommence the compliance review.

Decisions rendered as a result of a compliance review can be appealed to the WSIAT.

Publication of ARO Decisions

Some ARO decisions will be published on the website for the Canadian Legal Information Institute (CANLii). This is to enhance education as well as openness and transparency in the AB decision making process.

Published ARO decisions are anonymized and do not include any personal identifying details.

The AB will not publish decisions in circumstances where a risk of identification exists or where the issues are of such a sensitive nature that it would not be appropriate to do so.

Please see www.canlii.org for published decisions.