The Liversidge *e*-Letter

An *Executive Briefing* on Emerging Workplace Safety and Insurance Issues

January 28, 2005 An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B. 11 pages

WSIB Changes Appeal Time-Limit Rules

These changes will impact the appeal rights of all stakeholders.
WSIB did not consult prior to revising appeal time-limit "guidelines"

WSIB time limits have been in place since 1998

As readers of **The Liversidge *e*-Letter** are well aware, one of the significant changes which took place when the *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Sch. A., [the "WSIA"] became effective in 1998 was the introduction of appeal time-limits, which applied to appeals to both the Workplace Safety & Insurance Board ["the WSIB" or "Board"] and the Workplace Safety & Insurance Appeals Tribunal [the "WSIAT" or "Appeals Tribunal"]. Refer to the **July 14, 2004 issue of The Liversidge *e*-Letter (at page 5)** where I introduce the problems associated with the six month appeal time-limits. In this issue of **The Liversidge *e*-Letter**, I continue that discussion and comment upon recent changes to WSIB "guidelines".

Time limits to appeal WSIB decisions within the Board

For the WSIB, there are two distinct time limits. One deals with objections to WSIB decisions pertaining to return to work or a labour market re-entry plan and requires that notice of the objection be filed within 30 days of the decision or within such longer period as the Board may permit **[WSIA, s. 120(1)(a)]** (these will not be commented upon). The other deals with objecting to any other WSIB decision and requires that a notice of the objection be filed within six (6) months after the decision is made or within such longer period as the Board may permit **[WSIA, s. 120(1)(b)]**. In all cases the notice must be in writing and indicate why the decision is incorrect or why it should be changed **[WSIA, s. 120(2)]**.

Time limits to appeal WSIB decisions to the Appeals Tribunal

There are similar time limits for appealing WSIB decisions to the WSIAT, the final decision-making level in the Ontario workplace safety and insurance ["WSI"] system. The Appeals Tribunal, of course, is separate and independent of the WSIB. ***(continued on page 2)***

WSIB Changes Appeal Time-Limit Rules

Executive Summary

Time-limits have been in place since 1998

Workplace safety and insurance ["WSI"] six month appeal time-limits have been in place since 1998. Employers have generally favoured them and labour has generally opposed them.

Experience has shown that a six month time-limit is too short

Based on direct experience over the last seven years, I am of the opinion that while the concept of time-limits remains supportable, the period should be two years, not six months. However, since the time-limits are clearly set out in the *Workplace Safety and Insurance Act* any change must be legislative.

The WSIB has effectively over-written the law and extended appeal time-limits to twelve months

The WSIB however, has recently revised internal Appeal System "guidelines" which has the effect of extending appeal time-limits *generally* from six months to twelve months. In my opinion, this is wrong on several fronts.

If the law is the problem, the law must be changed

Firstly, the Board has effectively over-ruled the legislation. The six months time-limit is a statutory directive, not a suggestion. The Board has the discretion, case-by-case, *to extend the time-limit*, but it does not have the power *to set the time-limit*.

The Board should consult before changing policy

Secondly, any proposed change to time-limits should be subject to some level of public consultation. Before being enacted, time-limits (among other reforms), received the highest level of public consultation – debate within a legislative committee. Without consultation, policy change is less credible, and less legitimate.

The Board's approach is clumsy as it will allow different treatment between the Board and the Appeals Tribunal

Thirdly, the Board's "guideline" change almost guarantees that the Board and the Appeals Tribunal will treat similar time-limit appeals quite differently. Ironically, other changes to the Act implemented when time-limits were introduced, were designed to ensure the Board and the Appeals Tribunal remained in lock-step.

LAL recommendations – consult and legislative change

I strongly recommend that the WSIB take steps to ensure that rights and obligations of stakeholders are not altered in the future without consultation. I further recommend that the WSIB fulfill its obligations under the Act and recommend appropriate legislative change to the Government.

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Other Recent Developments

Funding Strategy Consultation

As readers of **The Liversidge *e*-Letter** are aware, for 2004 and now 2005, the WSIB has not increased the average employer premium rates. In July 2003, after consultation with employer stakeholders, the WSIB CEO informed employers that rates would not rise, and while that decision may slow down its rate of decline, the unfunded liability will still bottom out to zero by the year 2014. In other words, while a rate-hike would eliminate the unfunded liability at a faster rate, holding rates level would not upset the long-term funding strategy (i.e., zero unfunded liability by the year 2014).

Last Summer, senior WSIB officials advised that premium hikes were likely required for 2005. See the **August 25, 2004 issue of The Liversidge *e*-Letter**, **"*WSIB Premium Rate Consultation: Average Rate Could Rise Between 4.5% and 8.2%*"**. Last summer, I suggested deferring any thoughts of premium hikes until a broad based discussion on the long-term funding strategy was convened. Last Fall, the Board agreed. After a preliminary meeting last November, the Board has scheduled a series of discussions:

Funding Framework:	**February 3, 2005**
Experience Rating Off Balance:	**February 11, 2005**
Return to Work/Labour Market Re-entry:	**February 16, 2005**
Health Care:	**March 2, 2005**
Prevention:	**March 30, 2005**
Occupational Disease:	**May 4, 2005**

While some senior WSIB officials have been referring to these meetings as "information sessions", employer participants are optimistically viewing them as "consultation sessions". The distinction is more than semantics. If a true consultation process is underway, employers should be able to participate in funding strategy design in a true partnership with the WSIB. One of the issues that require attention is whether or not there are alternatives to premium hikes. Various employer groups have asked the Board to investigate the impacts of extending the 2014 date, and/or moving off a 100% funding target, and experimenting with a 85% or 90% funding target.

In upcoming issues of **The Liversidge *e*-Letter**, I will keep readers abreast of these developments. What transpires over the next several months will dramatically shape the future of the Ontario WSI system.

(CONTINUED FROM PAGE 1) A notice of appeal must be filed to the Appeals Tribunal within six (6) months after the decision or within such longer period as the Tribunal may permit **[WSIA, s. 125(2)]**.

The imposition of time limits has been controversial – employers have generally supported them, and unions have generally opposed them

With the introduction of the *Workers' Compensation Reform Act, 1996* [Bill 99] business and labour expressed differing viewpoints on time limits. Business generally supported them as written (six months) **[see for example, the submissions of the Employers' Advocacy Council as recorded in Hansard August 12, 1997]** and labour opposed any time limits **[see for example the submissions of the Ontario Liquor Board Employees' Union as recorded in Hansard June 23, 1997]**. Notwithstanding initial positions on time limits, the system is now the beneficiary of many years of experience in administering these limits, and it is a prudent time to review and reassess the law pertaining to time limits.

Administrative "tinkering" rather than legislative review normally follows a period of WSI statutory reform

Unfortunately, history suggests that with respect to WSI reform, no matter how massive a legislative restructuring, there is little future "fine tuning" planned or considered. I have always considered this to be a mistake, being of the view that the more significant the reforms, the more likely the case that some design errors, discoverable only upon application, would be made. I have long held the viewpoint that legislative "fine tuning" was a critical component absent to the massive reforms of the 1980s and 1990s. Typically, rather than a return to legislative adjustments after experience has been gained with new approaches, the system responds administratively in the short term, to correct those design errors. While not directly intended, this supplants the principle of parliamentary supremacy. No matter how well intentioned, those administrative interventions have the capacity to undermine the statute itself. It is my respectful view that this has occurred with respect to recent changes to Board's approach to appeal time-limits.

One example: The administration of the legal relationship between the Board and the Appeals Tribunal from 1985 to the early 1990s

The most profound example of this "tinkering" was the administration of the legal relationship between the Board and the Appeals Tribunal in the early 1990s. The Appeals Tribunal, which was created in the 1985 reforms, at first had a very broad jurisdiction and mandate, one that, with respect to individual cases, was not all that distinctive of the Board's. Both institutions acquired their jurisdiction from the same source – the Act. At the end of the day, if there was an interpretive disagreement on the application of that Act, an elaborate process was put in place whereby the Board could call up an Appeals Tribunal decision for "review". This process ensured a "legal harmony" within

the system, and was a means to protect against the Board and the Appeals Tribunal creating different interpretative frameworks in the long term.

This process, though, was within the total control of the Board. At first, the Board responded to interpretative disagreement by calling up a few Appeals Tribunal decisions for review (chronic pain, accident definition, retroactivity) but quite quickly, the Board's appetite for this process waned, and soon, no matter what the issue, the Board did not review decisions of the Appeals Tribunal, even those which applied a different interpretation of the law (such as stress entitlement and reemployment cases). The underlying expectation in the statutory design, of course, was that if the Board did not call up an Appeals Tribunal decision for review, it would be assumed that the Board agreed with the Tribunal's interpretation, and would refine its policies accordingly. This of course, is not what transpired.

By the early 1990s, the Board chose to ignore the Appeals Tribunal

By the early 1990s, it was clear that the Board chose to simply ignore interpretive disagreements of the Appeals Tribunal. Rather than expend the required effort to review a Tribunal decision, it was more expedient to continue on with Board business as usual. The very unsatisfactory and untenable result was that, over time, on many issues, distinct interpretations applied depending on where the case was decided – the Board or the Appeals Tribunal.

Over time, the interpretive distinctions between the Board and the Appeals Tribunal became a political issue. However, rather than insist that the Board exercise the responsibilities expected under the law and call up Appeals Tribunal decisions for review as circumstances required, the Appeals Tribunal was labelled as the culprit by disagreeing with the Board's interpretation. With the 1998 reforms, among other things, the lawful jurisdiction of the WSIAT was significantly adjusted requiring the Appeals Tribunal to apply Board policy. For the most part, this solved the "problem" of differing interpretations. However, where there is no policy, the Appeals Tribunal is free (and arguably legally required), to present its own interpretation and analysis, if circumstances so warrant.

Recent WSIB actions may result in different approaches between the WSIB and the WSIB on time-limits in the long-term

This brings us back to time limits. Recent actions on the part of the WSIB have ensured that systemic differences with respect to the administration of a fundamental process – the time allowed to appeal a decision – will be allowed between the WSIB and the WSIAT administration of essentially identical matters.

Time limits have attracted much appeal activity

As if WSI issues are not litigious enough on their own, the imposition of time limits has given rise to a huge body of time limit appeals, adding to an already busy appeal schedule. Since their inception, over 1,800 time limit appeals have been considered by the Appeals Tribunal alone (based on a recent electronic search). Last year, the current Minister of Labour, the Hon. Christopher Bentley, advised a Canadian Bar Association forum that he is sympathetic that time limits should be addressed **[*Briefly* speaking, Ontario Bar Association's News and Events Forum, Vol. 30 No. 2, June, 2004]**.

My position on time limits

I support a review of the limitation periods in the WSIA. In my opinion, six months is quite unworkable. For the informed and represented litigant, they do not usually pose a problem. Most "potential" appeals are filed in time because the provisions of the WSIA are technically adhered to simply by filing a form letter providing notice of intent to appeal. This means that many appeals never proceed, and those that are unlikely to ever proceed, are initiated simply to preserve appeal rights. Once an appeal is filed, of course, the party responding to the appeal must begin to prepare, which needlessly wastes resources if the appeal never sees the light of day.

A six month time limit is out of sinc with WSI administration – the system is not that efficient

Of course, before any party can advance an *informed* appeal, it is usually necessary to first obtain a copy of the WSIB file. That process alone may consume many months. Therefore, the informed appellant will usually simply automatically file an appeal when file disclosure is requested, and in so doing, preserve appeal rights without actually filing an appeal, or even knowing if an appeal is warranted. The WSI system simply is not sufficiently efficient for a six month appeal time-limit.

The person who does not appeal in time is usually the unsophisticated appellant

This also means that the person who runs afoul of the limitation period is usually the uninformed, un-represented or unsophisticated appellant (or respondent because limitation periods apply for cross appeals as well), which is the very class of individual for which, one would think, the system has the most interest in preserving legitimate appeal rights. It must be noted however, that the limitation periods at the Board and at the Tribunal are open to extension at the discretion of the Board and/or Tribunal **[ss. 120(1)(b) and 125(2) respectively]** and therefore are not true time limits at any rate.

I am not opposed to limitation periods *per se*, however, it is my view that the six month limitation period has, with experience, now been proven to be unworkable.

The best case to advance, in my respectful view, is to extend limitation periods to two years. A two year limitation period also conforms with the ***Limitations Act*, *2002*, S.O. 2002, C. 24**, which became operable in 2004, and which provides for a basic limitation period of two years. Since a WSI appeal is less appeal and more of an application for a *de novo* determination, in my view, this approach is consistent with the expectations and obligations of the Ontario WSI

system. I am convinced that a two year limitation period achieves the policy goals desired. For more on the ***Limitations Act, 2002***, readers may wish to review the following issues of ***The Lawyers Weekly*****: Vol. 23, No. 26. November 7, 2003; Vol. 23, No. 28 November 21, 2003; Vol. 23, No. 34 January 16, 2004**.

Any changes to time limits though must be consulted upon and directed at changing the WSIA

Since time limits are enshrined in the WSIA, and as they received the highest level of public commentary during public legislative committee hearings (prior to being enacted), any changes to time limits should be open to an equally broad public consultation before change is considered, let alone implemented.

The WSIB and the WSIAT have published "guidelines" to assist in the administration of time limits

While WSIB policy on time limits is rather scant, the WSIB Appeals Branch has published "guidelines" in the document **"Appeals System: Practice and Procedure" ["ASPP"]**. Up until very recently, the ASPP set out these criteria to be considered in applying WSIB discretion to extend the time limit to appeal:

- Serious health problems;
- Whether there was actual notice of the time limit;
- 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.

Similarly, the WSIAT, has set out the following general, albeit more elaborate, criteria to be considered in time limit cases **[WSIAT Practice Direction: Time Extension Applications]**:

- The lapse of time between the expiry of the six months and the date the notice of appeal was filed and any explanation for the delay;
- Whether there is evidence to show an intention to appeal prior to the expiry of the six months (e.g., notice of appeal is mistakenly sent to the WSIB rather than the Tribunal);
- Whether the applicant ought to have known of the time-limit (e.g., notice appears in the cover letter to the Board decision);
- Whether the applicant acted diligently (note that the Tribunal may apply a higher standard of diligence if the applicant is represented since representatives are expected to be knowledgeable about workplace safety and insurance law);
- Whether there is prejudice to a respondent (e.g., a witness is no longer available to testify);
- Whether the case is so stale that it cannot be reasonably adjudicated;
- Whether the issue is so connected to another appeal that the Tribunal cannot reasonably adjudicate the other appeal without considering it (e.g., the "whole person" concept applies);
- Whether a refusal to hear the appeal could result in a substantial miscarriage of justice due to defects in prior process or clear and manifest errors; and
- Whether there are exceptional circumstances (e.g., very serious illness or family considerations).

Recent decisions of the WSIAT suggest that the Appeals Tribunal is applying a very limited discretion to time limit appeals

Based on a recent decision of the Appeals Tribunal **[W.S.I.A.T. *Decision No. 1743/04E* (October 29, 2004), Vice-Chair Keil]**, which seems to present a very hard-line with respect to the application of discretion pertaining to time limit appeals, the WSIAT is of the view that unless there are very exceptional circumstances associated with a failure to appeal within the time limits, an appellant will be denied a right of appeal. Interestingly, the WSIAT takes the view that as time limits have been in place for several years now, there should *little leniency* associated with time limit considerations. The ***Decision No. 1743/04E*** Vice-Chair wrote:

> *While a certain leniency was applied in the early transition days when the time limits came into effect and people were not as knowledgeable as they currently are, it is now generally presumed that practitioners in the area of compensation are familiar with both the time limits and the consequences of not meeting them. Accordingly, the presumption at this point should be that compelling reasons must exist not to enforce the time limits* **[W.S.I.A.T. *Decision No. 1743/04E* (October 29, 2004), Vice Chair Keil, at para. 14]**.

Notwithstanding that I strongly disagree with the Appeal Tribunal's determination in ***Decision No. 1743/04E***, the principles set out in that decision are quite at odds with very recent developments at the WSIB.

I am familiar with the facts behind ***Decision No. 1743/04E*** as we represented the employer in that case. My client was found not to have adhered to the time limits for a cross-appeal, even though the worker appellant significantly delayed in advancing the main appeal (although it was filed "in time", the appeal readiness form was not filed until almost two years later). Those familiar with the WSIAT appeal filing process are aware that until the appeal readiness form is filed, the party responding to the appeal is not fully aware that the appeal is even proceeding.

The WSIAT appeal notices, which were mailed to the company, were mailed to a branch of the firm, and due to internal error (which was readily admitted), were not referred to the managing minds within the company. While this was clearly an internal mistake on the part of the company, as soon as the company retained counsel, the notice to appeal was immediately filed. In fact, the cross appeal notice was launched even before the company received the case materials from the Appeals Tribunal.

Even though the **WSIAT Practice Direction** suggests there should be a different standard for representatives and clients (which I agree with), the ***Decision No. 1743/04E*** Vice-Chair applied the same standard to the employer directly, apparently on the rationale that since this was a large "sophisticated" company, it must be sophisticated in WSI matters. The Tribunal held (incorrectly in my opinion) that:

The employer is a large, sophisticated organization. It is not compelling to advance "administrative deficiencies" as sufficient grounds for allowing a time extension at this stage **[*Decision No. 1743/04E*, at para. 20, emphasis added]**.

The reference to "*at this stage*" obviously refers to the length of time that time limits have been a part of the WSI system. Yet, the **WSIAT Practice Direction** clearly advises that a different standard would be applied against representatives in comparison to appellants directly. While large employers may indeed be "sophisticated organizations", with but a few exceptions, many are not all that sophisticated with respect to WSI matters, and certainly, not with respect to time limit matters. In ***Decision No. 1743/04E***, the WSIAT held firm to a very strict interpretation of the statutory time limits holding that "*there is a strong presumption that a statutory time limit will have effect, unless exceptional circumstances exist*" **[*Decision No. 1743/04E*, at para. 21]**.

The WSIB has recently revised internal "guidelines" that open up WSIB discretion on time limit appeals – the WSIB is going in the opposite direction of the WSIAT

The approach of the Appeals Tribunal is all the more interesting in light of very recent changes to the Board's "guidelines" pertaining to time limit disputes. In September, 2004, the Board published revised Appeals Systems procedures (ASPP), which in part, disclosed previously unannounced changes to the instructions to WSIB decision-makers with respect to time-limit disputes. Senior officials at the WSIB have insisted that these "guidelines" do not represent a change in WSIB policy *per se*, but that they are to be applied by Board adjudicators, at all levels, nonetheless. The "guidelines" were approved at the WSIB Executive Committee level (not by the WSIB Board of Directors). While the ASPP is publicly available on the WSIB website, the memorandum to senior WSIB management was obtained through a request under the ***Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31, as amended [the "FOIPPA"]**.

The memorandum provides the following explanation for the changes:

For several years, the injured worker community has expressed concerns with the length of time they have to appeal a WSIB decision and the potential harsh consequences that can result when appeal time limits are not applied in a flexible manner.

To address these concerns, Executive Committee has approved a revision to the administrative guidelines for extending the time period for filing an appeal. We believe the change will improve accessibility to the system while maintaining the legislative principles of the Workplace Safety and Insurance Act.

The WSIB Executive Committee change amounts to the insertion of this policy directive: "***Broad discretion to extend will be applied where appeals are brought within one year of the date of the decision***. *Additional criteria to be considered for longer delays include" . . .* (the prior list of criteria set out earlier).

I will address several issues arising from these changes: i) whether or not the "administrative guideline" is a change in "policy"; ii) the process adopted to change the "guideline"; and, iii) whether or not the changes are consistent with the WSIA.

A summary of concerns

I disagree that the "guideline" is not a policy change. While the guideline may not be a policy in the context of s. 126 (the significance of which will be explained later), and while it has only internal WSIB applicability, as it is designed to influence WSIB decision making, and ensure consistent application, it rises to the level of policy in the context of any pragmatic definition, notwithstanding the Board's labelling.

I question the manner in which the Board has chosen to develop and implement the guideline change. Consultation not only provides enhanced legitimacy to rule changes, it is a process through which public awareness and acceptance is acquired. Moreover, and more significantly, it is clear that it is the six (6) month deadline in the legislation that is being addressed. As such, it is more appropriate for the Board to exercise its discretion to suggest statutory change to the Government, rather than take a "band aid" approach.

I disagree that the guideline is consistent with the WSIA, although I recognize that the issue is unlikely to be judicially tested. By advising that "*broad discretion to extend will be applied where appeals are brought within one year*" the guideline is doing two things: it is effectively over-riding the legislative direction of a six month limit, and while so doing, is distinguishing or limiting the discretion that is to be applied for cases where the appeal is brought within eleven (11) months versus one where the appeal is brought within thirteen (13) or more months, improperly fettering the discretion of decision makers (in both instances). It is the reference to "within a year" that is problematic. Had the policy simply required that WSIB decision-makers apply a broad discretion, then, in my respectful view, the policy would be legally sound. The six months stipulated in the statute must be considered to have effect and meaning. The Board's revised "guideline" has rendered the six months meaningless, and has instead, simply effectively replaced "six months" with "twelve months".

I also question the decision not to codify the change as an official policy so that the new guideline is applicable to the WSIAT review of WSIB time limit decisions. By choosing not to establish an actual "policy" that meets the test of policy for the purposes of s. 126, the Board will allow similar situations to be treated differently by the WSIAT and the WSIB. This, I respectfully suggest, is contrary to the policy purposes of s. 126, and is an unwise discretionary decision.

I will now expand upon the positions just introduced.

Is the change an "administrative guideline" change or a "policy" change?

The WSIB position – it is not a policy unless so officially categorized

It seems to be the case that the Board is of the view that the "guideline" change is not a policy change as the Board has chosen not to label it as a policy change. In one context, which I will introduce and address in a moment, this would be an appropriate and valid institutional approach of the WSIB.

For the purposes of s. 126 of the WSIA, a "policy" is what the Board defines as a policy

Without commenting on whether or not the Board has exercised an appropriate choice in this instance, there are instances where the labelling of the document as a policy or not will be determinative as to the scope of applicability of that document.

Of course, the question as to what constitutes a Board policy acquired increased legal significance with the proclamation of the WSIA, and was a question which captured the joint interests of the WSIAT, the WSIB, and the stakeholder community a few years ago. The WSIAT is now required to apply a Board policy if an applicable Board policy exists with respect to the subject matter of the appeal **[WSIA, s. 126(1)]**. Since (at least) July, 2001 it has been clear that, for the purposes of s.126, a policy must be published in either the WSIB Operational Policy Manual ["OPM"] or the Employer Classification Manual and must be "minuted" **[see July 13, 2001 widely distributed letter from WSIB Vice-President, Policy and Research]**.

Therefore, if a particular document does not rise to this standard, regardless of whether it was widely applied throughout the Board, it would not be a policy that the Appeals Tribunal is required to apply. The need for a clear and unequivocal statement as to what a policy is (and what a policy is not), is established by the legislative requirement of the Appeals Tribunal to apply Board policy. Therefore, for the purposes of s. 126 of the WSIA, a policy is what the Board defines as a policy, by virtue of the exercise of certain prescribed protocols.

The "guideline" in question is not a policy for the purposes of s. 126

Therefore, applying the Board's s. 126 policy definition to the time limit issue, the document in question is not a policy for the purposes of s. 126, since it does not follow the prescribed approvals and formats. In other words, for the purposes of s. 126, the WSIB has full control over what is, and what is not, a policy in the context of the legal jurisdiction of the Appeals Tribunal.

In making a determination of course, the Board must assess whether or not it is in the interests of the effective administration of the WSI system for the Board to formally develop and adopt, or not adopt, a "policy".

Therefore, the Board and the Appeals Tribunal may legally apply different interpretations of the statutory time limits

One of the policy reasons behind the refinements to the WSIAT's jurisdiction as prescribed by s. 126 is to ensure greater consistency between the adjudicative actions of the Board and the Appeals Tribunal with respect to interpretative questions. Should the Board be content to have a certain matter defined in a "guideline" or other means that does not rise to the level of a "policy", in one context, it is within the legal prerogative of the Board to do so. However, by so doing, a risk is created that the Appeals Tribunal may offer an alternative interpretation, and may be free to do so, since a "Board policy" as defined for the purposes of s. 126 of the WSIA, does not exist.

Notwithstanding that this is likely not in the best interests of the WSI system, it is within the legal prerogative of the Board

I will return to this theme later, however, simply introduce at this juncture, that it is likely not in the better interests of the Board, or in the interests of effective administration of the WSIA, or in the interests of worker and employer stakeholders, for the WSIB not to elevate the "guideline" to the level of "policy".

A document that is not a "policy" for the purposes of s. 126, may well be a "policy" for the purposes of the WSIB's internal exercise of administrative discretion

However, even though a document may not rise to the level of "policy" for the purposes of s. 126 of the WSIA, it may well be a "policy" for other purposes pertaining to WSIB administration of the WSIA. By issuing the guideline, there is an expectation that individual WSIB decision-makers will be expected to follow the guideline. Guidelines have recently been described as "soft law" **[see for example "Hard Choices and Soft law", (2003) 40 Alta. L. Rev. 867 – 893 (Sossin, Smith)]**, and judicial treatment of soft law is evolving. Soft law however, as it is not subject to parliamentary accountability and the procedural formality of legislation and regulation, cannot give rise to enforceable rights.

However, by the act of advancing a "guideline" which is expected to be influential on decision-makers within the Board in the context of exercising discretion on time limit considerations, the Board has in effect, created an internal policy, that with respect to the exercise of internal discretion, achieves the status of *de facto* law, at least as applied by WSIB decision-makers. It is clear that there would be an expectation for WSIB decision-makers to adhere to the instructions set out on the guideline, and that while a decision-maker does have the latitude to make a "fair and just" decision in consideration of the individual circumstances of the case, every WSIB decision-maker would be required to adhere to the "guideline".

Of course, technically and legally, other than within the specific context of s. 126, all WSIB policy amounts to being

no more than a "guideline", in the sense that WSIB policy cannot define rights, unlike the statute itself, or regulations approved by the Lieutenant-Governor-in-Council **[for one, of many discussions, on the legal effect of WSIB policy vis-à-vis conferring rights, refer to W.C.A.T. *Decision No. 915* (1989), 7 W.C.A.T.R. 1, at 253, Technical Appendix B]**.

The inherent problem of "guidelines" and the absence of public consultation

The WSIB should significantly limit the development of internal "guidelines"

Of course, aside from the s. 126 reasons (which will be returned to later), there are other sound public policy reasons that should constrain the WSIB from issuing internal "guidelines". Board policy, of course, is readily available to the public, usually in the form of a policy manual. The Policy Manual (now published on the Board's web-site), has been publicly available now for over two decades. Not only is the existence of such a manual necessary to assist Board adjudicators in the consistent adjudication of claims, the manual is also the primary tool by which members of the public can inform themselves of the Board's position on various issues.

The publication of policy is essential to ensure fair and open adjudication

The publication of policy is an important component in the fair and open adjudication of claims in an administrative justice system **[see W.S.I.A.T. *Decision No. 25/98I* (1998), 46 W.S.I.A.T.R. 207]**. Of course, well in the past, the (then named) Workers' Compensation Board ["WCB"] did not publish its internal policies. The administrative and natural justice issues that surround such a past practice are clear and have long been remedied.

Board policy of course, aside from the rigor of the normal internal approval process, usually must undergo external consultation (which will be addressed in a moment) and is published. Publishing policy and making it readily available is an essential ingredient to administrative justice and fairness. Significant changes in policy though must be published both before and after the change. In other words, legitimate policy change must be preceded by public consultation, and the invited opportunity for public comment.

The Board's time-limit memorandum, and the rationale behind it, is available to the public only when someone becomes aware of its existence and makes a request under the FOIPPA. It is though, arguable that the inclusion of the essence of this guideline in one sentence in the **WSIB Appeals System Practice and Procedures document (at Appendix A, page ii)** meets a test of public availability. If it does meet this test, I respectfully suggest that it does so quite minimally. ***There is no specific reference to this policy change otherwise on the Board's website, nor is there a specific reference to the change under "time limits", yet this change has the capacity to impact every single WSIB appellant, which number, on a yearly basis, in the many tens of thousands***.

So, while I am of the viewpoint that the scope of publication and announcement surrounding this change is insufficient and minimal, there is *some* public disclosure, although the reasons behind this change are, for the most part, not generally known.

The WSIB reliance on "guidelines" over "policy" is inappropriate

The issuance of guidelines of this type is, in my view, very problematic. This practice represents the antithesis of the entire thrust of contemporary WSI reform as practiced over the last twenty (20) years, and in my opinion, is an unfortunate departure from a clear and unequivocal commitment to openness.

While it is appropriate for the Board to issue administrative guidelines, the scope of those guidelines must be limited. Legitimate "guidelines" must be limited to circumstances of process not substance. Any matter dealing with the rights or obligations conferred upon a person, in my considered opinion, must be addressed as a policy. Policy has been described as a "*guideline developed under the law, to create consistency and fairness in the application of legislation*" **[see W.S.I.A.T. *Decision No. 652/93R* (December 15, 2000), at para. 29]**. Using this very simple definition, the "time limit guidelines" rise to the level of policy.

The struggle to change the WCB from an institution that relied upon internal guidelines, many of which were unpublished, to one where policy was developed in an open and consultative manner, was a long and arduous one. This struggle though was successful and the Board was forced to change its methods. The mindset which followed this change became manifest in every facet of WSI administration, within and outside of the Board itself. This change (which in past writings I have referred to as a true *Renaissance*), was an extraordinary metamorphosis, and culminated in what I can describe, without exaggeration, with the Ontario WSI system becoming the archetypical example of Canadian administrative justice. While the system has not reacquired all of its past characteristics, the zenith of that change is clearly now well behind us.

"Guidelines" that confer or define rights or obligations must be treated as policy. While the Board has the lawful discretion to define policy for the purposes of the Tribunal's jurisdiction, it cannot change the substantive effect of a document through a feint of labelling.

Problems associated with the process used

Introduction

I have four issues to address with respect to the process adopted: i) the absence of broad based consultation on a matter of significance; ii) a related concern that which includes concerns that the WSIB responded to a single constituency without requesting the comment or

participation of another affected community; iii) the decision not to formally adopt a policy and thus risk the likelihood of differing interpretations between the WSIB and the WSIAT; and, iv) the decision not to exercise WSIB Board of Director discretion and bring the substantive matter to the attention of the government.

The absence of broad based consultation on a matter of significance debases the legitimacy of the new policy

A requirement to consult is an essential ingredient to the appropriate discharge of administrative discretion. However, consultation is able to take on many various forms, from "notice and opportunity to participate"[1] at one end of the spectrum (what I will describe as the minimum content consultation) to actually involving those affected by a rule or policy in the formation of the rule.[2] To effectively consult, an agency must ascertain the array of various interests within the agency's sphere of authority.[3]

The WSIB itself has a long-established history of consulting on policy changes, which has been rather tumultuous and varied. From a standing (non-existing) start in the mid-1980s, by the late-1980s and early 1990s, the Board earnestly consulted on every major issue, ensuring public participation and mutual accountability. By the mid-1990s this commitment had clearly waned, to the point where the Board felt the need to publish, for discussion purposes, **"Strategic Consultation Principles" [March 17, 1999]**, suggesting that it wishes to "renew" a relationship with its stakeholders, and re-establish a consultation strategy.

In the Board's 2001 Annual Report, the Board announced that "*WSIB policies are constantly reviewed and revised in consultation with Ontario workers and employers*" **[2001 WSIB Annual Report, p. 14]**, and more recently unequivocally stated that the Board "*is committed to keeping representatives of workers, employers, health care providers and all partners involved and informed*" **[WSIB 2003 Annual Report, p. 12]**.

The "guideline" changes were in direct response to political considerations

It appears that the "guideline" changes were in direct response to concerns expressed by the injured worker community, although it is not clear how those concerns have been advanced to the Board, or how they were considered by the Board. I am personally unaware of these matters being addressed in a broad public forum. It is my view that such an approach to policy design does not adhere to the reasonable expectations of stakeholders. This is problematic from several fronts.

The Board's approach to policy development in this instance opens the door to future unfairness

Firstly, an impression is left that WSIB policy development which effects all constituencies is reactionary to the concerns of a single constituency. The capacity for unfairness under such an approach is readily apparent. In the immediate instance, the opportunity for a full and robust public dialogue is denied. As a signal, it suggests a waning of the (recently recharged) WSIB commitment to consult, although I doubt that WSIB officials considered that their views undermined either the Board's commitment or practice to consult.

Secondly, and more importantly, by not involving the WSIB stakeholder community in a matter that clearly and directly affects their rights, the policy change acquires a lesser legitimacy. A policy that has been shaped by the opinion, commentary and perspective of *all* of the impacted constituencies acquires greater legitimacy.

The WSIB responded to a single constituency without requesting the comment or participation of another affected community

A related alarm surrounds a process that responded to the concerns of a single constituency without requesting the comment or participation of another affected constituency. It is my view that this is not an appropriate exercise of WSIB discretion and is fraught with fairness considerations.

A core component of the ability for stakeholders to effect change within the Ontario WSI system, at a minimum, involves the practice of petitioning the Board, formally and informally, for a policy change. In fact, most significant long-standing policy change of importance has been externally initiated. Rarely has the WSIB demonstrated a capacity for internally initiated far-reaching reform initiatives. This is not a criticism of the Board – it is simple recognition of the realities of change, especially change in the public policy arena. Most, if not all, WSIB policy reform finds some external root.

However, by deciding to immediately implement significant change advanced by one group or constituency, without involving other *affected* communities, several problems are created. The most obvious is that the Board may (unintentionally) subvert the legitimate interests of other constituencies or groups. This is not to suggest of course, that the WSIB is hamstrung by a duty to consult on all matters. Such an expectation would serve to grind WSI executive administration to a halt. However, as already discussed, policy decisions which alter substantive rights, must first be subject to some form of consultation.

Another is that the scope of change is limited by the absence of an appropriate process. Very often, and particularly in the field of public policy development, consultation allows for a growth of ideas that otherwise would remain unrequited. A robust public dialogue, if

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[1] Hudson N. Janisch, "The Choice of Decision Making Method: Adjudication, Policies and Rulemaking", Administrative Law, at 327.

[2] John Mark Keyes, "Power Tools: The Form and Function of Legal Instruments for Government Action", Canadian Journal of Administrative Law and Practice 10 C.J.A.L.P. 133 at 151.

[3] Law Reform Commission of Canada, "*Administrative Law - Independent Administrative Agencies*" (Minister of Supply and Services, Ottawa) at 98.

earnestly advanced in a model of true consultation, very often will bear fruit beyond original expectations.

The process (or absence of process) with respect to the matter at hand, is therefore self-limiting. This type of approach curtails innovative thinking. Idea development becomes staid and stalled. When one compares the ideas which were developed within the (broadly defined) WSI community from the mid-1980s to the early 1990s, and compares that to the state of contemporary idea development, the distinctions are stark. Yet, it is generally considered that the period from 1985 – 1990 represented the pinnacle of fairness and stakeholder participation. It certainly was a period of significant change that has been generally lauded.

In the matter at hand, had the issue been opened up for public dialogue, it is very likely that a larger consensus for change would have emerged, and that the momentum of that consultation could have very well lead to the more appropriate solution – legislative reform.

The WSIB decision not to adopt a formal policy risks the likelihood of differing interpretations between the WSIB and the WSIAT

As I have already set out, for the purposes of determining the lawful jurisdiction of the WSIAT, the WSIB maintains a broad discretion not to codify practice into policy. However, the effect of the exercise of that discretion must be carefully understood. In the absence of a Board policy, the Tribunal is free to present its own interpretation of the legislation. In the case of time limits, it is clear that a very different and distinct adjudicative treatment is evolving between both expert institutions.

The WSIB revised "guideline" suggests that a broad discretion should apply in instances where the appeal is advanced within twelve months of the decision. As noted earlier, the WSIAT takes a very different approach advancing the thesis that ". . . *there is a strong presumption that a statute time limit will have effect unless exceptional circumstances exist*" **[see W.S.I.A.T. *Decision No. 1743/04E* (October 29, 2004), Vice Chair Keil, paras. 20, 21, emphasis added]**.

This distinction will give rise to some interesting future jurisprudential developments. These developments will be rendered all the more interesting and significant in light of the fact that the WSIAT exercises adjudicative discretion over time limit considerations from two similar, but legally distinct sources; one where the Tribunal is exercising its jurisdiction pursuant to s. 123(1) of the WSIA and which is reviewing a time limit appeal decision of the WSIB, and one where the Tribunal is exercising an *original* jurisdiction pursuant to s. 125(2). I will address the significance of both set of circumstances.

Time limit appeals considered pursuant to s. 123(1):

Under s. 120(1)(b), a person appealing a WSIB decision must do so within six months, or within such longer period as the Board may permit. It is these appeals which fall within the Board's jurisdiction, and to which the revised "guideline" is applicable. WSIB time-limit decisions are appealable to the WSIAT pursuant to s. 123(1). Since the time-limit "guidelines" are not policy for the purposes of s. 126, the WSIAT is not required to apply them. In fact, as noted, the WSIAT has developed a contrary approach, holding that it will not apply a broad discretion in time limit matters **[see W.S.I.A.T. *Decision No. 1743/04E* (October 29, 2004), Vice Chair Keil, paras. 20, 21]**.

While the circumstances addressed in ***Decision No. 1743/04E*** relate to a matter for which the WSIAT had original jurisdiction, it is not conceivable that the Tribunal will develop an entirely different standard for WSIB time-limit decisions. Therefore, it is certainly possible, likely, and based on the ***Decision 1743/04E*** reasoning, quite probable, that the "broad discretion" for appeals made within a year will not be applied by the WSIAT.

Yet, the Board has the capacity to codify this change in policy, thereby ensuring that the WSIAT is required to apply the same adjudicative standard as the WSIB decision-maker. I should add that both parties will have standing with respect to a time limit dispute. If a time-extension is granted on the basis of the Board's "guidelines", the other party (worker or employer) may appeal that decision to the Appeals Tribunal.

Time limit appeals considered pursuant to s. 125(2):

A similar time limit is set out in the WSIA with respect to appealing WSIB decisions to the WSIAT. Under s. 125(2), an appellant must appeal to the WSIAT within six months after the WSIB decision or within such longer period as the Tribunal may permit. As set out earlier, the WSIAT has adopted an approach quite contrary to that of the WSIB. It is therefore likely that the WSI system will treat similar cases, within the same system, governed by identical legislative directives, quite differently, depending on which institution has jurisdiction – the WSIB or the WSIAT. This aberrant result is not supportable.

The true problem is with the law itself – the WSIB has failed to exercise a delegated responsibility

It is clear that the WSIB "guidelines" are attempting to address a perceived or actual deficiency in the law itself. As set out earlier, the "guideline" effectively re-writes the statute and changes the "six" months to "twelve" months. The reason behind this change is clear – the adherence to the six month limit is systemically unfair.

I agree that it is. I am in full agreement that the six month time-limit provisions in the WSIA, while in principle supportable, have now been proven to be unworkable. The system simply is not responsive enough that six months is a reasonable length of time within which to expect an exercise of an appellant's appeal rights. However, I doubt that twelve months is much of an improvement. As noted earlier, I believe that a two year time limit adequately achieves the policy expectations of a time-limit, while recognizing the realistic limits of the system itself. A two year time-limit is

also consistent with the principles of the ***Limitations Act, 2002,*** which would provide a more solid credibility.

The WSIB Board of Directors has a duty under the WSIA to advise the Government of the need for statutory reform

The WSIA places certain expectations on the WSIB. Since the WSIB is clearly the expert agency with respect to WSI issues, the legislators were sensitive to the special expertise of the Board and its unique position to recognize, over time, certain deficiencies in the WSIA. Consequently, the WSIA conferred upon the Board an important responsibility – to review the WSIA and recommend amendments **[WSIA, s. 159(2)(b)]**. If it is the case that in the considered view of the WSIB Board of Directors that the time-limit provisions of the WSIA are unfair, then the Board is under a legislatively mandated *obligation* to recommend amendments to the Government. It is my view that the Board is undermining that obligation by putting a policy "band-aid" on a gaping wound.

Is the "guideline" consistent with the WSIA?

Senior officials within the Board have advised me that the Board is confident that the "guideline" is consistent with the WSIA. I disagree. It is my respectful opinion that the Board's "guideline" is contrary to the tenets of statutory interpretation.

The statutory language is not particularly cumbersome. The WSIA stipulates that a person objecting to a WSIB decision shall file a notice of objection with the Board "*within six months after the decision is made or within such longer period as the Board may permit*".

The WSIA creates a clear and unequivocal requirement on an appellant to file a notice of objection. It is clear though that the WSIB "guideline" effectively serves to adjust the effect of the "six months" provision set out in the statute. The guideline is clearly designed to distinguish an appeal for which notice was provided to the Board *after six months but before twelve months*, with an appeal for which notice was provided *after twelve months*. In short, the "guideline" will ensure that an appeal filed eight months after a decision is made will be treated quite differently than an appeal filed thirteen months after a decision is made.

In other words, the "exceptional circumstances" test, or an equivalent WSIB test, as set out in **W.S.I.A.T. *Decision No. 1743/04E* (October 29, 2004)** may be applicable to WSIB appeals lodged after twelve months, but, would not be applicable to appeals lodged between six and twelve months.

The only discretionary aspects of s. 120(1)(b) relates to the six months provision. The WSIA stipulates that a notice must be filed within six months "or within such longer period as the Board may permit". Therefore, the discretion conferred upon WSIB decision-makers by the guideline must relate to the discretion to allow a longer notice period. The WSIB has accomplished this by providing a general appeal notice extension to twelve months. This is, in my respectful view, where the interpretive error has occurred.

Some general points on statutory interpretation

It is trite to point out the rules of paramountcy. Legislation is paramount over WSIB policy and certainly over WSIB guidelines. In fact, as addressed earlier, other than for the purposes of s. 126 and placing constraints on the lawful jurisdiction of the WSIAT, WSIB policies, in a legal sense, are simply guidelines, as policy cannot confer rights or create obligations beyond that directly empowered by the WSIA.

The WSIB is thus required to give effect to the instructions set out in the legislation. Moreover, the Board internal memorandum discloses that the guideline is being revised because "*the injured worker community has expressed concerns with the length of time they have to appeal a WSIB decision and the harsh consequences that can result when appeal time limits are not applied in a flexible manner*".

The WSIB does not have the power to legislate – it must follow the directives of the WSIA

This is clearly a political not an interpretive concern. The WSIB does not have the power to legislate and certainly does not have the power to effectively override legislative instructions, *no matter how disagreeable they may be*. As discussed earlier, the WSIB does have the power, and indeed the obligation, to recommend changes to legislation, but it cannot *de facto* write legislation.

It is presumed that legislation is written with a clear mind to the intent of the words chosen, and that the legislature is a careful user of language. Legislative words are analyzed in their immediate context, with the basic presumption that the drafters deliberately chose the particular sentence structure and punctuation etc. Words are also analyzed in the larger context of the entire Act. Based on the basic rules of statutory interpretation, it is my view that the Board has exceeded its jurisdiction and has effectively undermined the intent of the WSIA and overridden the express words of the statute.

The six months period must be afforded meaning

In the case of time-limits, the legislators chose six months as a significant demarcation point. An appeal may be filed as a matter of right within six months from the date of the decision. After six months, an appeal may be filed only if the Board allows for a longer period. Allowing a longer period is not automatic.

The six month point must have meaning, and must be interpreted and applied as reflecting the intent of the legislature. The WSIB revised "guideline", if it is to have any meaning or effect itself, will ensure a different treatment generally for cases appealed between six and twelve months with those appealed after twelve months.

By requiring WSIB decision-makers to apply a broad discretion for appeals filed between six and twelve months, the "guideline" is instructing decision-makers to effectively ignore the provisions of the WSIA, and to render the six

month provision effectively meaningless. The Board has, in effect, overridden the statute.

The WSIB does not have the discretion *to set* the time limit period

It is clear that the discretion described in the "guideline" must refer to the discretion of the Board to allow an appellant to file a notice "*within such longer period as the Board may permit*".

The Board though, has not been provided with the discretionary power *to set* the time limits "*as the Board may permit*", but only *to extend* them as the Board may permit. If it were the case that the legislature intended appeals filed between six and twelve months to be treated differently than those filed after twelve months, basic principles of statutory interpretation would expect that the statute would have clearly so stated. If the principles set out in the "guideline" were what the legislators intended, the WSIA would have reflected that intent. It did not.

The time-limit discretion is intended to be "case specific"

The time-limit discretionary power conferred upon the Board is clearly intended to be a case-specific power and not a general discretionary power to be codified in a universally applied policy or guideline, at the discretion of the Board, by WSIB management, by its Management Committee or by its Board of Directors. A textual and contextual reading of the WSIA clearly shows that the discretion was intended to be a case specific one.

Throughout the WSIA, the powers of the Board that relate to cases are described in both specific and general terms. This distinction must be conferred meaning and intent. For example, under s. 119(1), the Board is required to make a decision "*based upon the merits and justice of a case*", thus mandating a certain requirement and expectation on the Board generally for all cases.

However, the discretion conferred upon the Board with respect to time-limits relates to "*the decision*" **[WSIA, s. 120(1)(b)]**, clearly limiting the scope of the WSIB discretion to allow for the filing of an objection "*within such longer period as the Board may permit*". The intent of the WSIA is clear – the six month provisions are to be given significant weight and are to have meaning, but, in certain cases, for the reasons unique to that case, it may be just for the Board to extend the time-limits.

As already stated, if the approach set out in the "guideline" was the approach intended by the legislature, then the WSIA would have been drafted accordingly. The "six month" deadline was not *a suggestion* of the legislature, but, *a directive* of the legislature, one to be administered in a manner consistent with the merits and justice provisions of the WSIA. It is for that reason that some discretionary provisions were included.

The Board does not have the discretionary authority to, with the issuance of a guideline, to override legislative instructions.

Concluding comments

The preamble set out in the internal WSIB memorandum announcing the guideline change, by referring to concerns expressed by the injured worker community clearly establishes the political content of the guideline. By issuing this guideline in this fashion, the Board is legislating, not interpreting.

Beyond the immediate issue of time-limits, in the larger context of the exercise of the Board's discretionary authority and of the Board's commitment to consult, this approach is troubling. In any and all instances where a policy change of the WSIB will effect rights or obligations, it remains my firm view that the Board is obligated to consult. The Board is free to choose the most appropriate method of consultation – but – it must consult. This principle, long in coming, was once foreign to the Ontario WSI system. A managing mindset that was not open amendable to consultation or openness set in motion an unparalleled public demand for change. After an extensive and revitalizing period of extraordinary reform, this principle gained root, and not too long ago, was steadfastly adhered to with a brisk conviction.

By choosing not to consult in cases that effect the rights and obligations of persons governed by the WSIA, the system becomes less fair, and gradually, increment by increment, acquires long discarded attributes. Maintaining fairness requires an ongoing vigilance. To paraphrase a well known proverb, the road to injustice is paved with good intentions.

Two things must be done. On the specific issue of time limits, the WSIB Board of Directors should exercise its statutory obligations and recommend that the Government consider statutory reform. Secondly, the WSIB must take immediate steps to curtail any practices which allow for the rights and obligations of stakeholders to be altered without first hearing from those stakeholders. Otherwise, one small step may take us one large leap backwards.

2004 Experience Rating Changes

Readers may have noticed some very significant and unexpected changes to their experience rating (NEER) performance for **Accident Year 2004**. Last December, very preliminary projections were made for 2004, based on claim data as at September 30, 2004. The reserves for projected future costs and the "expected cost factors" were changed. As a result, a smaller portion of the premium was experience rated, and in most instances, future costs attributed to individual cases rose. ***For many employers, this will mean that rebates will be smaller and surcharges higher***. Stay tuned. I will be writing much more about experience rating in future issues of **The Liversidge *e*-Letter**.

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