Lawyers looking to instil culture of co-operation in WSIB disputes

BY JUDY VAN RHIJN
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The move towards collaboration and alternative dispute resolution has passed the representatives of workforce participants by, according to submissions by the Ontario Bar Association on the modernization of the Workplace Safety & Insurance Board appeals process. However, a change of attitude may not be enough in a system that has many legislative and practical obstacles to early dispute resolution.

Stephen Roberts of McTague Law Firm LLP in Windsor, Ont., confirms that there's little alternative dispute resolution in the WSIB appeals system. "Currently in appeals it is not an option. You are not even asked the question and there are no mediators." Roberts recalls that there used to be return-to-work mediators but notes return-to-work specialists have replaced them. "They hold interventions which are very different from mediations. They are not voluntary or confidential."

Carissa Tanzola, a labour and employment lawyer with Sherrard Kuzz LLP in Toronto, notes the world of WSIB is different from every other part of labour and employment law. "In labour law, there is a long and continuing relationship, so people aim to be conciliatory with settlement the focus of both parties. Communications regarding WSIB matters are entirely different in all aspects."

William LeMay, a partner at Hicks Morley Hamilton Stewart Storie LLP who contributed to the OBA submission, believes legislative provisions are at the root of the problem. "The WSIB is an inquisitorial system, so decision-makers have more control. It is also charged with protecting the integrity of the insurance system. A worker and employer may agree on an outcome that's not in the best interests of the insurance system. It really is a very complicated process to resolve."

LeMay believes opportunities for early resolution do exist but says they're harder and require more creativity than in other areas of labour law. "They require more support from other lawyers and adjudicators," he notes.

The reality is that the WSIB doesn't encourage early settlement at present. "The relationship between claims adjudicators and managers and employees and the relationship between them and employers is not productive that way," says Tanzola.

"Communicating openly, frankly, and in a timely manner is very, very difficult." According to Tanzola, this grassroots problem has ongoing repercussions. "Think how that plays out. Where there is no communication, the claims manager may not call the employer about modified employment for weeks on end."

At the same time, the parties' representatives don't bother calling each other because the system doesn't allow settlements except in very specific circumstances. "That's straight from the legislation," says Tanzola.

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"When the employee claims they can't return to work and the employer claims they can, they can't say, 'Let's end the relationship and pay appropriately.' They still have the WSIB claim in play, which can be very expensive for the employer. The agreement generally has to be approved and has to put the worker in a better position than they would otherwise have been. Representatives say, 'If we can't settle this, then why would I call Carissa for issue confirmation?'"

Roberts also points to the nature of the disputes as being problematic. "A lot of the issues being appealed have no middle ground. If it's relating to a work injury and the issue is initial entitlement, no compromise is possible. It's either allowed or denied. Sometimes it is allowed with cost relief if there is a pre-existing injury, but usually it's black and white and the parties are firm in their position."

He also believes it's relevant that there are no cost consequences to the person pursuing the appeal in workers' compensation cases. "They get free advice from the union or the Office of the Worker Adviser or other legal clinics. Often that's a motivator for early resolution or resolution without a trial in other areas."

LeMay believes it would be enormously beneficial if the WSIB stated a position that it encourages early settlements and then supported that by training the appeal resolution officers in alternative dispute resolution. "Adjudicators need to understand that there are more than just workers' compensation issues on the table. If there is an employer-worker relationship, there are generally larger issues in play. A broader approach, thinking about the interests of the parties, can produce a more holistic solution."

The changes to the appeals system due to take effect on Feb. 1 include some measures that many hope will prompt representatives to take a more proactive approach. The new forms include an appeal readiness form on which parties must define the issues and list witnesses and additional documents filed. At present, Tanzola says people are often unclear as to what the appeal is about until they're actually at the branch to dispute it. "The objection form may be very general and worker representatives often add issues up to the night before. They can bring a new case or introduce new angles that change everything and the adjudicators allow it. The new documents proposed may address that by making the parties set out the issues at the get-go and be bound to those issues."

Tanzola is hopeful that what the WSIB is doing will reflect what the Workplace Safety and Insurance Appeals Tribunal has in place. "When you appeal, you have to set out the issues specifically. If you have new information, you have to add it then and there. Also, if you implement new issues, you get the initial adjudicator to look at it. You change the issue then, not eight months down the track." LT