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VIA FACSIMILE

October 28, 2011

David Marshall
President & CEO, WSIB
200 Front Street West
Toronto, ON
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Dear Mr. Marshall:

Re: KPMG Report

IAVGO Community Legal Clinic has represented low-income injured workers in Ontario for 35 years.

We are writing in reply to your October 21, 2011 letter attaching the 2010 Value for Money Audit on the Adjudication and Claims Administration (ACA) Program conducted by Consultants at KPMG (the "KPMG Report").

We are appalled by the KPMG Report. It goes far beyond the terms of reference for the Value for Money Audit. As a result, rather than provide an objective opinion about the Board's effectiveness and efficiency in adjudication, the KPMG Report provides KPMG's vision for significant re-working of the legal and policy framework that animates workers' compensation.

The KPMG audit was led by Peter Heimler, a risk management expert with no meaningful experience with workers' compensation or disability and employment policy or law. Mr. Heimler, whose previous experience focused on IT risk management and whose curriculum vitae includes an "economy in government" award from the Fraser Institute, appears to have approached the Value for Money Audit from his belief that compensating injured workers creates disability and dependency. The result is an ideologically-driven document that suggests that workers suffer from too much compensation and advocacy for their rights, and would be better served by the tough love of being either cut off or denied benefits.

Over our 35 years, we have seen the workers' compensation system experience many revisions and some major reworking. But, in every case where a major reworking of the system was contemplated, the consultation and evaluation process was transparent, engaged stakeholders, and was guided by people who understood workers' compensation and its goals and objectives. This did not happen here.

A non-profit community legal clinic funded by Legal Aid Ontario

We now face a private consultant report that proposes substantial reworking of workers' compensation law and policy in Ontario. In our view, the KPMG Report should be disregarded. If the WSIB intends to be guided by the legal and policy recommendations in the KPMG Report, it should issue a public explanation for its decision to take its policy direction from private consultants at KPMG.

KPMG strayed outside of both its mandate and its expertise.

The KPMG Report strays far outside of its stated mandate, which was to provide an opinion on whether the WSIB's adjudicative services are being delivered in an operationally efficient and effective manner.

A Value for Money Audit is supposed to assess how well – in terms of economy, effectiveness and efficiency – a public organization is accomplishing its statutory mandate. In announcing the 2010 Value for Money Audit, the WSIB outlined its terms of reference as follows:

The audit will evaluate the WSIB's Claims Administration and Adjudication process. This VFMA will provide an opinion on whether the WSIB's current practices are being delivered in an operationally efficient and effective manner. The assessment will include:

- the effectiveness of WSIB operational policies and guidelines, and if they provide enough guidance to help ensure consistent and timely decisions,
- administrative efficiencies of the adjudication and claims processes,
- are there adequate resources, information and systems to support cost-effective and efficient decisions.

Given the terms of reference, stakeholders reasonably believed that the audit would assess how well the WSIB's claims adjudication practices are fulfilling the Board's statutory objectives. This would include issues such as decision-quality, timeliness, adequacy of resources for adjudication, etc. Stakeholders understood this was the scope of the audit, and met with the KPMG auditor on this understanding.

Instead of fulfilling its mandate, the KPMG auditors decided to substitute their own vision of how to re-write WSIB law and policy. The WSIB never provided notice to stakeholders that the terms of reference of the Value for Money Audit were being expanded to include issues such as the scope of compensation where workers have pre-existing asymptomatic conditions, the appropriateness of compensating injured workers who are laid off, the fact that workers have entitlement for recurrences or worsening of work-related conditions, and the legislative decision to have a lock-in of benefits at 72 months.

We are taken aback by the WSIB's decision to allow KPMG to expand its mandate so significantly without notice to stakeholders.

KPMG has no expertise in workers' compensation law or policy. Therefore, not surprisingly, its analysis is wanting and weak. Unfortunately, it appears the WSIB is ready to act on KPMG's legal and policy analysis. We urge the WSIB to take a step back and reconsider its reliance on KPMG's opinions.

KPMG demonstrates ignorance about workers' compensation, leading to faulty analysis.

The KPMG Report makes a number of statements and recommendations that reflect the auditors' ignorance about workers' compensation law. Because of its ignorance, KPMG wrongly concludes that the WSIB's mandate is being "broadened beyond what the legislation intended".

In particular, KPMG targets older injured workers who, in their eyes, are being "over-compensated" for workplace injuries that are more serious because aging makes their bodies more vulnerable. In KPMG's view, these workers should not receive benefits because age plays a role in the seriousness of their injuries. KPMG recommends that the WSIB amend its Aggravation Basis and Recurrences policies accordingly. But, KPMG misses – because it lacks expertise – that pre-existing age-related changes are subject to the well-established "thin-skull" principle.

The thin skull rule means that victims are entitled to compensation even if they are more vulnerable to injury than the average worker. The related principle is that a pre-existing condition does not limit entitlement unless it caused a reduction in employability and therefore was an "impairment" before the accident. The classic example of the thin skull doctrine is an older worker with pre-existing asymptomatic or non-impairing degenerative disc disease (DDD) who suffers a workplace back injury. The DDD may then worsen due to the injury or complicate recovery from the injury. But, this worker is entitled to WSIB benefits because, but for the workplace injury, they would likely have been able to keep working.

There are two primary reasons for the thin skull rule, that have been clearly and repeatedly articulated by the Workplace Safety and Insurance Appeals Tribunal. First, as stated in the seminal *Decision 915*, "permitting compensation to be denied or adjusted because of preexisting pre-disposing personal deficiencies would very substantially reduce the nature of the protection afforded by the compensation system as compared to the Court system for reasons that would not be understandable in terms either of the historic bargain or of the wording of legislation." Second, workers receive compensation because they have been engaged

as workers, functioning with any pre-existing condition they may have had. It is wrong in principle that conditions which did not affect their employment as workers should be relied upon to deny them compensation as injured workers; *Decision No. 915 (1987)*, 7 W.C.A.T.R. 1 at 136.

KPMG also targets workers who are able to return to modified work with a permanent injury and then subsequently are laid off or suffer a recurrence. It recommends that the WSIB revisit its Recurrences and Work Disruption policies. In KPMG's view, disabled workers shouldn't have the "unfair advantage" of workers' compensation when they become unemployed or more disabled. Injured workers whose conditions deteriorate are entitled to increased benefits to compensate for any increased level of impairment or income loss. This arises directly from the statute. And, it is well-accepted in workers' compensation that deterioration of a compensable injury is compensable unless there is an intervening cause so serious it breaks the chain of causation between the original accident and its ultimate consequences. KPMG's musing that workers are "over-compensated" by being given benefits when their conditions recur or deteriorate overlooks this settled law.

In short, KPMG mistakes fundamental tenets of workers' compensation law as evidence that the WSIB's mandate is being "broadened beyond what the legislation intended" and is over-compensating workers. As a result of its inadequate understanding, KPMG's policy advice is unreliable and should be disregarded. Such matters were outside of KPMG's mandate and its expertise.

In matters arguably within its mandate, KPMG's analysis was shoddy.

Beyond its faulty understanding of workers' compensation, the KPMG Report engages in sloppy analysis and does not consider what information is needed to properly assess efficiency and effectiveness.

The KPMG Report ignores the Board's statutory mandate to compensate injured workers for the damage of workplace injury. It conducts no analysis of how effectively or efficiently the WSIB is accomplishing this goal. At every turn, the KPMG Report concludes that less compensation means a more successful system. For example, it cites the fact that many more workers are being denied initial entitlement (11.3% in 2010 versus 7.9% in 2009) as proof of "greater consistency and quality in eligibility adjudication" (p. 22). On this logic, the WSIB should strive to deny all claims, thus achieving perfect consistency.

And, KPMG uses disingenuous reasoning to argue that reduced benefits equal better return to work and recovery outcomes. KPMG concludes that return to work is improving because workers are being cut off benefits much more quickly post-

injury. None of the numbers they cite, though, demonstrate that more workers are actually returning to work earlier – instead the numbers show that workers are receiving fewer benefits from WSIB, whether they return to work or not. If workers are unable to return to work and are not receiving WSIB benefits – as is happening to many workers IAVGO meets – the WSIB is failing its statutory mandate to compensate injured workers.

Similarly, KPMG claims that the reason for the drastic reduction (from 42% to 30%) from 2009 to 2010 in workers with 100% locked-in LOE is better work reintegration and recovery efforts. This is unfounded. The workers locked-in in 2010 generally went through the work reintegration (then LMR) program a number of years ago, well before recent amendments to the program. The only explanation for the drastic change from 2009 to 2010 is that the WSIB has changed its decision-making around unemployability. Indeed, we have seen that over the past two years, the WSIB has systemically re-adjudicated pre-lock-in cases where workers had already been deemed unemployable. In these cases, return to work had already failed. But, the WSIB saw an opportunity to reverse previous decisions about unemployability and tell people who have not worked in years they can work as a greeter, or customer service representative, or other random job, allowing for reduction of their benefits. This might be a financial success for the WSIB, but to claim that these cases show better return to work and recovery outcomes is disingenuous.

What should KPMG have done? It should have asked the WSIB to start generating meaningful statistics. Instead of asking how many people remained on benefits at 30, 60, 90 days, etc., the WSIB should find out how many workers *returned to work* at no wage loss at each of these benchmarks. This would allow the auditors to actually measure real return to work outcomes.


The WSIB should publicly reject KPMG's recommendations.

KPMG's recommendations should be rejected. If the WSIB wants to consider foundational reworking of workers' compensation in Ontario, it must do so in a transparent way that 1) engages and provides notice to stakeholders and 2) gathers the necessary experience and expertise to properly advise the WSIB and about its policy direction.

We would welcome a meeting with you to discuss our concerns.

Yours truly,

IAVGO Community Legal Clinic



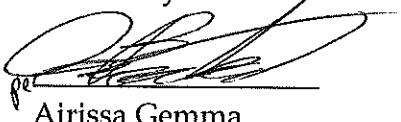
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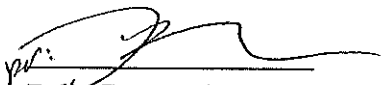
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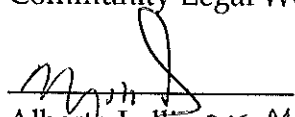
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- cc. Steve Mahoney, Chair, WSIB
- Linda Jeffrey, Minister of Labour
- Laura Bradbury, Fair Practices Commissioner