



Practice Direction #22

Downside Risk

1.0 This Practice Direction

- explains what a “downside risk” is
- explains that the WSIAT will notify parties if it identifies a potential downside risk
- describes the process for notifying parties of a downside risk

2.0 What is a Downside Risk?

2.1 A downside risk means that there is a reasonable chance that an appellant (worker or employer) may be worse off than if they had not appealed. So, a downside risk is a situation where deciding an issue may result in a party losing rights or entitlements. For example, the appeal may result in lower benefits for a worker or higher claim costs for an employer.

2.2 Examples of downside risk

- a. A worker may appeal for a higher non-economic loss (NEL) award. But, there is the possibility that the appeal will result in a lower NEL award than they received before. Or, they could get no NEL award at all.
- b. An employer appeals its level of Second Injury and Enhancement Fund (SIEF) cost relief. But, the Vice-Chair or Panel may find that the evidence shows that they should get a lower level of SIEF cost relief. Or, they could get none at all.

3.0 Notice of Downside Risk

3.1 To have a fair, consistent and transparent process, the Vice-Chair or Panel will take steps to notify parties of the potential downside risk.

4.0 How Parties are notified of a Downside Risk

4.1 How parties are notified depends if it is an oral hearing or a hearing in writing.

4.2 Before or during an oral hearing (by videoconference, in-person, or by teleconference), the Vice-Chair or Panel will

1. notify the parties at the hearing of the potential downside risk
2. ask the parties for submissions on the downside risk issue and how the appellant wants to proceed – they can
 - a. continue with their appeal of all issues or
 - b. withdraw their appeal of the issue where a downside risk has been identified

If the appellant wants to continue with their appeal, they accept the risk that the Vice-Chair or Panel may change a decision that was previously made in their favour.

4.3 Before a written hearing or after an oral hearing

1. The Vice-Chair or Panel will send a memo or interim decision to notify the parties of the potential downside risk – this will be sent as a post-hearing request.
2. The WSIAT will carry out the post-hearing request. The WSIAT will ask the parties for written submissions about the downside risk issue and how the appellant wants to proceed – they can
 - a. continue with their appeal of all issues
 - b. withdraw their appeal of the issue where a downside risk has been identified

If the appellant wants to continue with their appeal, they accept the risk that the Vice-Chair or Panel may change a decision that was previously made in their favour.

5.0 References and Resources

5.1 Legislative Authority

Workplace Safety and Insurance Act, 1997, section 131 (the WSIAT can determine its own practice and procedure)

5.2 Related Practice Directions

#23 – Adjournments and Withdrawals

#25 – Post-Hearing Procedure