Submissions to the Standing Committee on Finance and Economic Affairs Re Bill 127 (Amendments to *Workplace Safety and Insurance Act, 1997*)

May 15, 2017

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I. Background

We are a coalition of injured workers, community legal clinics, private bar lawyers, and doctors with many years of direct experience in the workers' compensation system in Ontario. Our members and clients, many of whom are low-income, precariously employed, non-unionized, racialized, or living in rural areas, are among those likely to be most negatively affected by the proposed changes to the *Workplace Safety and Insurance Act, 1997* embedded in *Bill 127, Stronger, Healthier Ontario Act (Budget Measures), 2017*.

We write to you in alarm. The s 159 amendments to the *Workplace Safety and Insurance Act* set the stage for the dissolution of more than 30 years of settled law designed by this legislature to fairly compensate injured workers.

The s 159 amendments will neutralize the Workplace Safety and Insurance Appeals Tribunal (WSIAT) and give the management of the Workplace Safety and Insurance Board (WSIB) absolute power to decide what benefits they will allow injured workers to have, regardless of the intention of this legislature as expressed in the Act. These amendments will allow the WSIB to legalize all of the unauthorized cost cutting practices it has developed to reduce benefit payments.

For the past seven years, injured workers have borne the brunt of austerity measures implemented by the WSIB in a bid to get its financial house in order. The WSIB has been singularly focused on reducing its costs, and has adjudicated claims accordingly. These benefit payment cuts have resulted in

the retention of billions of dollars.[1] Our clients and members have suffered the direct consequences of these cuts. They have been denied needed health care. They have been denied counselling. They have been denied the minimum financial supports needed to survive after workplace injury.

The decision to grant the WSIB an unprecedented and unfettered new discretion to change the law is unconscionable. Changes of the type contemplated by this policy-making power are fundamental to the workers' compensation scheme; they belong in the legislature to be made through the proper democratic process. Worker stakeholders will not abide this change.

This unfettered discretion undermines the admirable progress that would otherwise be made by Bill 127 in the adjudication of chronic stress claims. The WSIB can reintroduce by binding policy the same or similar limits on chronic stress claims that the WSIAT concluded violate the *Charter.*

Although improvements to allow entitlement for chronic mental stress are welcome, Bill 127 does not do enough to remedy the discrimination embedded in the law against workers with mental stress injuries. While it would remove one barrier to entitlement, it does not go far enough. Those who suffer mental health injuries because of their employers' decisions remain excluded from workers' compensation. Bill 127 also denies justice to the workers who have been excluded from workers' compensation for 20 years because of discriminatory law.

II. Board power amendments

[1] 2015 WSIB Economic Statement, online: file:///Users/ibook/Downloads/WSIB%202015%20Economic%20Statement.pdf, p. 8.

i. Overview

By granting the WSIB free reign to change the law by policy, the s 159 amendments threaten the foundations of workers' compensation law.

With these broad policy powers, a century of workers' compensation jurisprudence will be tossed aside and the WSIAT will become a rubber stamp for the WSIB.

ii. The amendments allow the Board to change the law

The s 159 amendments to the *Workplace Safety and Insurance Act, 1997* would give the WSIB unilateral power to alter the legal principles that form the core of workers' compensation law and undermine the purposes and express statutory language of the Act. The s 159 amendments grant the WSIB power to set specific "evidentiary requirements" and "adjudicative principles". The s 159 amendments also allow the Board to introduce "different evidentiary requirements or adjudicative principles [for] different types of entitlements."[2]

These unprecedented powers would allow the Board to fundamentally alter the legal principles that form the core of workers' compensation law to the detriment of injured workers. By policy, the Board could decide to:

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[2] 8 (1) Subsection 159 (2) of the Act is amended by adding the following clauses:
(a.1) to establish policies concerning the interpretation and application of this Act;
(a.2) to establish policies concerning evidentiary requirements for establishing entitlement to benefits under the insurance plan;
(a.3) to establish policies concerning the adjudicative principles to be applied for the purpose of determining entitlement to benefits under the insurance plan
[2] (2) Section 159 of the Act is amended by adding the following subsection:
(2.1) A policy established under clause (2) (a.2) or (a.3) may provide that different evidentiary requirements or adjudicative principles apply to different types of entitlements, where it is appropriate, having regard to the different basis for and the characteristics of each entitlement.

- Change the legal test for entitlement under the *Act*. The Board could require workers to prove that their workplace exposure or accident was the main cause of their disabilities. This would violate the long-standing adjudicative principle that workers only have to prove that the workplace exposure or accident was one significant cause of their disability.[3]

- Require workers to provide confirmatory expert evidence of work-relatedness in every case, and require the Appeals Tribunal to deny entitlement if such evidence was not provided, contrary to long-standing law and the recent direction of the Supreme Court of Canada.[4]

- Require the Appeals Tribunal to reduce loss of earnings and permanent impairment benefits if the worker had any pre-existing degenerative changes, even if the worker experienced no impairment affecting their ability to work before the workplace accident.

The Board will also be licensed to create policies that discriminate against groups of workers – like those with psychological injuries, occupational diseases like cancer, or chronic pain – by requiring them to meet higher thresholds for entitlement. The Board will be able to exclude groups of workers from the workers' compensation scheme by writing policies that:

[3] IAVGO Benefit Policy Consultations, http://iavgo.org/research-and-resources/, pp. 5-8.
[4] *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority,* [2016] 1 SCR 587.

- Create a higher legal test for entitlement based on the type of disability in question. The Board could require workers with cancer or depression to prove that the workplace exposure or accident was the only cause of their disabilities.[5]

- Require excessive or unusual workplace exposures for certain types of disabilities, and require the Appeals Tribunal to deny entitlement unless such exceptional and excessive exposures are proven.

- Require specific types of evidence (e.g. around occupational exposures or certain types of medical evidence) for certain disabilities, and require the Appeals Tribunal to deny entitlement if the worker cannot produce such evidence.

These are not the kind of changes that should be made by policy. No other Canadian workers' compensation board has a power like that which the s 159 amendments would give the WSIB.[6]

[5] IAVGO Benefit Policy Consultations, http://iavgo.org/research-and-resources/ pp. 5-8.
[6] Association of Workers' Compensation Boards of Canada, "WCBs - Standard Powers, Duties and Jurisdiction and Exclusive Jurisdiction", online: http://awcbc.org/?page_id=79. The Board's power to make policies is already implicitly recognized in the Act by virtue of section 126(1) which states, "If there is an applicable Board policy with respect to the subject-matter of an appeal, the Appeals Tribunal shall apply it when making its decision." Of note, in *Martin v. Workers' Compensation Board*, the Supreme Court of Canada interpreted sections 126 and 161 of the WSIA as indicating that the Ontario legislature, like all other provincial legislatures in Canada, "contemplate[d] the consistent adjudication of claims through the application of policies"; *Martin v. Workers' Compensation Board*, 2014 SCC 25 at para. 47.

We are terrified that the WSIB, an organization that is focused on reducing its own costs rather than on fair compensation, will have the power to change established workers' compensation principles by policy.

iii. The amendments will neutralize the WSIAT

Since its inception, the WSIAT has been the independent final adjudicator of workers' compensation appeals. Because the WSIAT is required to apply Board policies, the s 159 amendments threaten to neutralize the WSIAT.[7] The s 159 amendments would eliminate the WSIAT's ability to rule independently on critical adjudicative and entitlement questions, throwing the credibility of the entire workers' compensation system into doubt.

With these amendments, the WSIAT will be bound by policies that will require it to deny claims that should be allowed based on settled law and the overarching purpose of the Act. This is an unacceptable outcome for workers. It will cause an inevitable loss of confidence in the WSIAT and an increase in litigation challenging its decisions.

iv. These amendments will allow the Board to legalize its austerity agenda

Workers, doctors and representatives have expressed serious concerns about the WSIB's failure to act in good faith towards injured workers in recent years.[8] These same stakeholders are alarmed to learn that the WSIB

7 Section 126 of the WSIA states, "If there is an applicable Board policy with respect to the subject-matter of an appeal, the Appeals Tribunal shall apply it when making its decision."

[8] http://www.cbc.ca/news/canada/ottawa/wsib-injured-worker-benefits-1.3803300; https://www.thestar.com/news/gta/2017/02/14/class-action-against-wsib-claiming-unfair-benefit-cuts-given-go-ahead.html; https://www.thestar.com/news/gta/2017/01/09/doctors-frustrated-workers-compensation-boards-seem-to-ignore-medical-opinions-report-says.html; https://www.thestar.com/news/gta/2014/05/07/proposed_wsib_changes_will_hurt_workers_advocates_say.html; http://startouch.thestar.com/screens/5ad53e98-7eed-4c2b-989b-

will now have *carte blanche* to make binding policies to prevent many of the most vulnerable injured workers from getting fair access to workers' compensation.

In particular, stakeholders have been distressed to see the WSIB targeting workers with "pre existing conditions" and psychological injuries for unauthorized and unjustified benefit cuts. The WSIB has been regularly:

- Blaming disabilities on health conditions that had no effect on the injured worker before the workplace injury,

- Rejecting the well-established principle that workers are entitled to compensation for the full measure of their losses, even if they were more vulnerable to injury (the "thin-skull" rule) and compensating only for textbook usual healing times, and

- Reducing compensation by apportioning benefits to other possible causes outside the workplace.

Through these changes, the WSIB has cut compensation radically: for example, cutting the percentage of workers on long-term full loss of earnings by *65%* and cutting all permanent impairment awards by more than *a third*. [9]

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ae56e8cb3e28%7C_0.html; https://www.thestar.com/news/gta/2016/06/10/inadequate-health-care-devastating-injured-workers-critics-say.html; http://www.cbc.ca/news/canada/sudbury/pending-wsib-changes-to-pre-existing-injury-policies-worries-workers-1.2803774; http://www.cbc.ca/news/canada/toronto/family-of-six-lives-on-36000-a-year-1.4035415; IAVGO Benefit Policy Consultations, http://iavgo.org/research-and-resources/, pp. 11-21.

[9] Source: WSIB, 2012-2016 Strategic Plan: Measuring Results, Q4 2012, Q4 2013, Q4 2014, Q4 2015; IAVGO Freedom of Information request, November 26, 2014.

We expect that the WSIB will use its new power to legalize and validate the unauthorized benefit cuts it has been making. The WSIB will be able to entrench its policies in law and bind the WSIAT to apply them even though they are contrary to the Act.

v. These amendments condone discrimination

Allowing the Board to restrict entitlement to workers with certain kinds of disabilities violates the direction of the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*.[10] In *Martin*, the Supreme Court said that laws and policies that limit workers' compensation benefits to people with certain types of disabilities (in that case, chronic pain disability) are discriminatory and invalid.

Any WSIB policy that limits entitlement to workers with specific types of disabilities would similarly be subject to repeated *Charter* challenges as discriminatory.

vi. These amendments will hurt our members and clients

Our clients and members are among those most likely to be denied access to the protection of workers' compensation benefits when the WSIB changes the law through policy. Overly rigid adjudicative principles and higher evidentiary requirements will disproportionately affect our clients and members because:

[10] [2003] 2 SCR 504 [Martin].

- They live in rural and remote areas of the province with limited access to medical services, or they are migrant workers with no access to public health care. They won't be able to get adequate medical care and assessment to generate the evidence the Board will require before the Appeals Tribunal can allow their case.
- They are non-unionized, often precariously employed workers and so have poor or no access to proof regarding the workplace exposures that put them at risk of accident or disease. A precariously employed temporary factory worker who develops cancer won't be able to provide the concrete evidence the Board could require about the level of exposure at work.
- They are racialized workers who often speak English as a second language and are unrepresented. They already struggle and often fail to even meet the many deadlines that constantly threaten to limit their rights. They will not be able to meet the Board's new higher tests for entitlement.

Many of our clients and members want to give up on their workers' compensation cases because they have had terrible and alienating experiences in dealing with the WSIB. Often, we can only convince injured workers to pursue them claims by assuring them that they will have a fair shot at the WSIAT. If the WSIAT is neutralized by these amendments, these workers won't pursue their appeals at all. This will allow the WSIB to further reduce its costs, but it undermines the legislature's clear stated intentions in the Act to provide a meaningful appeals process and fair compensation to injured workers.

III. Mental Stress Amendments, s 13

i. Amending the unconstitutional provision is a good start

We are pleased to see that the government is finally seeking to correct this section of the Act, a section the WSIAT found to be unconstitutional. The Bill would amend subsection (4) and (5) to expand workers' compensation entitlement to chronic mental stress injuries. The current Act only covers mental injuries that result from an acute reaction to a sudden and unexpected traumatic event. Three decisions of the WSIAT, the final arbiter for workers' compensation appeals, have found this section unconstitutional.[11] That is, the Tribunal found the bar on entitlement to chronic mental stress to be discriminatory. The section was found to perpetuate stereotypes about mental illness (that mental illness is not a real disability), and therefore to be in violation of the *Charter of Rights and Freedoms*. Certainly, removing the bar on chronic stress entitlement is a step in the right direction.

ii. Transitional Provisions needed to address workers affected by invalid law

Unfortunately, the proposed s13 amendments do nothing to remedy the injustice faced by workers previously and currently affected by the illegal bar on mental stress injuries. Workers with chronic or unexpected mental stress injuries have been denied compensation for their injuries by the operation of unconstitutional legislation since the section came into force in 1998. The provision was declared invalid in 2014, but it has been invalid since

[11] WSIAT *Decision Nos. 2157/09, 1945/10, 665/10*

its inception.[12] As it is currently drafted, the amended s.13(4) and (5) will only apply to workers injured after the Bill is enacted in 2018. This will leave out an entire class of workers – 20 years worth – who will still be subject to the discriminatory prior version of the provision.

We recommend that the Bill be amended to include transitional provisions to address those workers who fall into the gap. The amended s13(4) and (5) should apply to all workers who incurred mental stress injuries since the section came into force. Additionally, first any worker who made a claim for a mental stress injury and was denied because the injury was not traumatic or unexpected, and second any worker who incurred such an injury but was deterred from making a claim for benefits under the Act because of the operation of subsection (4) and (5) should be permitted to file or request to reopen a claim.

iii. Amended subsection 13(5) is overly broad and therefore still discriminatory

The amended subsection 13(5) retains the restriction on entitlement to mental stress injuries arising out of employment decisions, such as employer discipline or changes to working conditions. This 'employment decision' provision has not yet been successfully challenged as discriminatory, but that challenge is coming.

Similar to the sudden and unexpected requirements that have been struck down, the employment decision restriction creates a distinction for mental

[12] *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, [2003] 2 SCR 504, 2003 SCC 54 (CanLII) at para.28

health injuries that does not exist for physical injuries. There is no bar on physical injuries that occur as a result of employment decisions, such as changes to work conditions. This section, as it is drafted would bar entitlement for a worker who developed a mental health disability following subtle bullying by her employer. Decisions of the employer that were instituted in bad faith, such as abruptly changing the worker`s schedule, giving her the worst tasks and hours, constituting harassment, would be captured under this section. A worker who was similarly treated, but developed a physical injury as a result of employment decisions (for instance a worker who injures his back following the employer's decision to give him the heaviest tasks and busiest shifts) would not face barriers to entitlement.
In light of the probable discriminatory effect of this section, it too must be removed. This would allow the WSIB to consider each claim, whether for mental or physical injury, to be assessed on its own individualized evidence, without discrimination.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF MAY 2017.

Members of Coalition

Individuals

Antony Singleton is a lawyer in private practice who represents injured workers in their WSIB claims and appeals. He has been practicing workers' compensation law for over a decade.

Ellen Lipes is a lawyer who has been representing injured workers in all facets of their cases for over 30 years. She was a staff lawyer at IAVGO for over 10 years where she participated in public legal education activities including the IAVGO Reporting Service, ÏAVGO Reporting Service Newsletter and the practice manual Workers' Compensation: A Manual for Workers' Advocates, both as a writer and editor. She has been in private practice since 1998.

Gary Newhouse is a lawyer in private practice since 1981 and is a very experienced practitioner of workers' compensation law for the worker side. He is the co-author of "Butterworths Workers' Compensation In Ontario Service" and the LexisNexis "Ontario Workplace Safety and Insurance Act & Commentary". He is well known as a speaker and educator in the workers' compensation field.

Michael S. Green has represented injured workers with their claims and appeals for over 30 years. He represented the Union of Injured Workers in the Appeals Tribunal's Pension Leading Case. He has spoken and written widely on the topic and made submissions to legislative committees and law reform studies throughout his career. He sat on the Board of Directors of the Industrial Accident Victims Group of Ontario and was a member of the Law Society of Upper Canada's Specialty Committee on Workers' Compensation.

Peter Bird has been representing injured workers since 1979, originally as a law student at the Union of Injured Workers Legal Clinic, and since 1984 as a lawyer in private practice. He is also the long time Chair of the Board of Injured Workers' Consultants Community Legal Clinic.

Organizations

ARCH Disability Law Centre (ARCH) is a specialty legal clinic, funded primarily by Legal Aid Ontario, dedicated to defending and advancing the equality rights of persons with disabilities across Ontario. For over 35 years, ARCH has provided legal services to help Ontarians with disabilities live with dignity and participate fully in our communities. ARCH provides summary legal advice and referrals to Ontarians with disabilities; represents persons with disabilities and disability organizations in test case litigation; conducts law reform and policy work; provides public legal education to disability communities and continuing legal education to the legal community; and supports community development initiatives. ARCH has a longstanding history of representing parties and interveners before courts and tribunals in matters that raise systemic human rights and disability rights issues. ARCH lawyers have appeared before the Canadian Human Rights Commission, the Canadian Human Rights Tribunal, the Human Rights Tribunal of Ontario, and all levels of court including the Supreme

Court of Canada. More information about our work is available on our website: www.archdisabilitylaw.ca.

Health Care Professionals for Injured Workers (HPIW) is a group of dedicated health professionals from across the province who work with injured workers. They are joining together to speak out about their concerns with the workers' compensation system and the negative impact on their injured worker patients. HPIW is advocating for positive change and reform.

IAVGO Community Legal Clinic is a non-profit community legal aid clinic funded by Legal Aid Ontario. We have provided legal advice, advocacy and representation to injured workers for over 30 years.

Injured Workers Action for Justice is a group of injured workers and their supporters who have fought for fair compensation from the WSIB since 2010. Many of our members are loosing their families, livelihoods and physical and emotional health as a result of WSIB's failure to protect us. We envision a workers' compensation system where the WSIB provides fair compensation to all injured workers in a manner that is respectful and reflective of our dignity and shared humanity.

Injured Workers Consultants is a non-profit community legal clinic providing free legal advice and representation to injured workers since 1969. We work with injured worker and community organizations seeking improvements to the workers' compensation system.

Ontario Network of Injured Workers Groups, founded in 1991, is the provincial voice for workers who have been injured or made sick on the job. We have first-hand experience of the WCB/WSIB system, know it needs improvements and take United action to see that this happens.

Renfrew County Legal Clinic is an independent non-profit corporation run by a Board of Directors made up of people who work or live in Renfrew County. Our mission is to promote access to justice for low income people of Renfrew County with the aim of promoting a just society. Much of our practice is in workers' compensation law. We serve many injured workers whose experience with the WSIB has been poor and who are face additional marginalization due to their rural and remote locations.

The Legal Clinic serves low-income residents of the counties of Lanark, Leeds & Grenville, Northern Frontenac, and Northern Lennox & Addington. We are a no-fee legal service. Our lawyers advise eligible residents of their legal rights and represent them primarily before government boards and tribunals.

Toronto Injured Workers' Advocacy Group (TIWAG) is a coalition of community legal clinics in Toronto specializing in workers' compensation law. Since 1986, TIWAG has been

advocating for just compensation laws on all legislative initiatives that have been brought forwards in Ontario. TIWAG advocates for all injured workers, particularly those with permanent impairments who suffer poverty after injury.

West Toronto Community Legal Services (WTCLS) is a non-profit community legal clinic and housing help service for low income people in Toronto's west end. WTCLS has been providing legal and other support services to low-income people in West Toronto since 1997.

WSIB's 'devastating' compensation policy all about board's bottom line, lawyers charge

Some injured workers have had benefits cut by half since pre-existing conditions policy came into effect

By Ashley Burke, CBC News Posted: Oct 27, 2016 5:00 AM ET | Last Updated: Oct 27, 2016 10:16 AM ET

Lanark County paramedic Dan O'Connor was injured on the job in 2013. The Workplace Safety and Insurance Board recently cut his benefits by half, citing pre-existing medical conditions. (Ashley Burke/CBC)

Lawyers who represent people injured on the job in Ontario say a new policy introduced by the province's Workplace Safety and Insurance Board is having a "devastating" effect on their clients, and accuse the board of unfairly cutting injured workers' benefits in order to meet its own financial demands.

As CBC News reported Tuesday, **injured Lanark County paramedic Dan O'Connor** says he fears losing his home after the board slashed his benefits by half. O'Connor was ordered to resume a transitional training course despite debilitating back pain that makes it difficult for him to commute or sit in a classroom.

O'Connor's case has shed light on what many of those who deal with the board are characterizing as a larger, systemic issue: they claim the WSIB routinely blames pre-existing medical conditions for exacerbating workers' injuries, using that as an excuse to slash their compensation.

"It's ridiculous," said retired lawyer Ron Ellis, who served for 12 years as chair of the board's appeals tribunal.

"It's a very large reduction in benefit entitlement with no change in the legislation," Ellis said. "I think we should all be ashamed of the system. You have some of the most vulnerable people in our society being victimized by a corporate structure."

> 'I think we should be ashamed of the system. You have some of the most vulnerable people in our society being victimized by a corporate structure.'
>
> - Ron Ellis, former chair of the WSIB's appeals tribunal

Ashley Burke

Ashley Burke is a video journalist for CBC News Ottawa. Have a story

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Following a report by Ontario's auditor general showing the WSIB was short billions of dollars, the province ordered the board to clean up its financial mess before it jeopardized workers' benefits

In 2011 the WSIB's unfunded liability — the amount by which its future payment obligations exceeded its bank balance — hit an unsustainable $14 billion. Getting out of that financial hole required "radical and rapid steps," according to an independent report commissioned by the province.

Since then, the board has managed to reduce its liability to $5.6 billion, setting it six years ahead of schedule in its mandate to get in the black by 2027.

Board hired American consultant

How did the WSIB pull off such a dramatic recovery?

In 2012, the board hired Hawaii-based consultant Dr. Christopher Brigham, paying his firm nearly $100,000 to review its policy on permanent impairment and create a tool to help staff rate cases.

The WSIB hired American consultant Dr. Christopher Brigham in 2012 to review its policy on permanent impairment. (LinkedIn)

According to the report submitted by Brigham and Associates, best practices within the industry "clearly identify that impairment due to an injury must be differentiated from impairment due to other health issues, including degenerative processes associated with aging or other pre-existing conditions."

Around the same time — and perhaps even earlier — lawyers who represent injured workers say they started noticing a dramatic shift away from a long-accepted principle known as the "thin skull rule."

Thin skull rule

The rule dictates that workers with thin skulls should be treated no differently than workers with normal skulls when bricks fall on their heads. The thin-skulled worker will suffer worse injury, but shouldn't be denied compensation just because their fragile cranium is a pre-existing condition.

Maryth Yachnin, a lawyer with the Industrial Accident Victims Group of Ontario, said the shift away from the thin skull rule began well before **the board updated its official policy in 2014**.

> 'It undermines the very core of the workers' compensation system. The results have been really devastating.'
>
> - Maryth Yachnin, lawyer

"They started cutting permanent impairment awards by half," said Yachnin. "[Workers are told], 'If you're still injured it's because you're older, you have pre-existing degenerative conditions, so we don't have to pay you anymore.'"

But the policy doesn't make sense, Yachnin insists, because in most cases the workers were able to perform their jobs without any problems — until they were injured.

"It undermines the very core of the workers' compensation system," said Yachnin. "The results have been really devastating."

Lawyer Maryth Yachnin wants WSIB to toss out policy on pre-existing conditions 0:27

'There's no malice here'

The WSIB said its pre-existing condition policy went into effect in November 2014, and followed extensive consultations led by the province's former deputy labour minister Jim Thomas. Prior to its adoption, the WSIB was the only compensation board in Canada without a policy dealing with pre-existing conditions, the board said.

"There's no malice

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here. What we're trying to do is be fair, follow our policies and make the best decision possible," said John Genise, the board's director of service delivery in Ottawa. "The policy provided us with a little more guidance and rigour around how to approach those cases."

John Genise is the WSIB's director of service delivery in Ottawa. (Ashley Burke/CBC)

The board rejects the accusation that the policy was really about saving money. Nor is the WSIB's improved financial outlook the result of any one policy change, Genise said.

"There's a multitude of factors, from what I understand, that have put us in a better financial situation," he said, including a drop in the number of claims across Ontario, an early intervention approach that gets workers back on the job sooner and financial gains earned by the board's investments.

Class-action lawsuit

Nevertheless, Toronto lawyer Richard Fink launched a multimillion-dollar class-action lawsuit in 2014 against WSIB on behalf of injured workers who had their benefits cut due to pre-existing conditions.

An Ontario judge dismissed the case in July 2015, but Fink appealed. The case was heard Sept. 16 and he and his clients await the decision.

Retired lawyer Ron Ellis said the public often doesn't care about WSIB cases because there's a widespread perception that workers are abusing the system. He said in his experience, they form a small minority.

"I think it's true that the public has had very little sympathy with injured workers ... until it becomes their father, wife or daughter," said Ellis. "It's a system that we totally depend on and it's been totally undermined, and it's upsetting."

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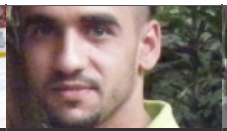

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Ontario psychologist 'alarmed by what's happening to WSIB claimants'

Group says WSIB unfairly denying patient claims, ignoring recommendations from health care providers

CBC News Posted: Nov 05, 2015 10:01 PM ET | Last Updated: Nov 05, 2015 10:01 PM ET

Sudbury psychologist Dr. Keith Klaasen says WSIB claimants "are told that they don't really read our reports and that our opinion isn't really important."

The Workplace Safety and Insurance Board of Ontario (WSIB) has "become a service whose prime objective is simply to not serve," a Sudbury psychologist says.

Dr. Keith Klaasen, who has been working with people who have suffered brain injuries and post-traumatic stress disorder for the last 22 years, is part of a group of Ontario psychologists who claim their patients are being unfairly denied compensation.

In a report, *Prescription Over-Ruled*, unveiled at Queen's Park Thursday, the group decried what it calls "the primitive practice of deeming injured workers eligible to resume work when physicians have clearly stated the opposite."

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At the news conference, Nancy Hutchison, secretary-treasurer of the Ontario Federation of Labour (OFL), said the report confirms "that the WSIB is more interested in clearing the caseload than supporting workers who have been seriously injured on the job and who require the benefits they are entitled to."

Hutchison alleged injured workers are being ordered back to work against the advice of their treating physicians, "receiving insufficient treatment because of being cut off too early, and their injuries are being blamed on pre-existing conditions in order to deny their claims."

"WSIB impossible to work with,' doctor claims

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Klaasen said that over the last five years "the WSIB has been impossible to work with."

"We send out treatment plans and we do not hear back, we call and we're told things are in process and we do not hear back," he said.

"After many months, we simply give up. When it is our opinion that someone cannot work we write detailed reports outlining why. Despite this, our clients get telephone calls stating they're going to be developing a return-to-work plan and they need to show up in a few weeks."

Klaasen claimed that when injured workers inform the WSIB their doctors "don't think they can work, they're often told that the WSIB worker hasn't looked at those reports and that they don't really matter."

In a statement issued Thursday, the WSIB denied the OFL's allegations.

It said it registers over 200,000 claims each year and takes its responsibility to injured workers very seriously.

"When an injury occurs or an illness is diagnosed, the WSIB acts quickly to ensure workers receive timely, specialized medical care," the statement said. "A worker injured on the job receives medical care that is significantly beyond what Ontario Health Insurance Plan (OHIP) would cover for someone not injured at work."

The WSIB said "92 per cent of injured workers are back at work within one year of their injury at full wages. Fewer than two per cent of claims are appealed, and in 2015, we have received the fewest number of appeals since 1989."

Klaasen said "silence is not an ethical option" for him.

"Just as with any other abuse of process, we are asking that WSIB be formally investigated by a body other than itself," he said.

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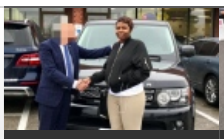
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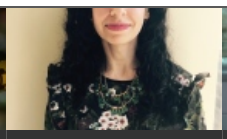
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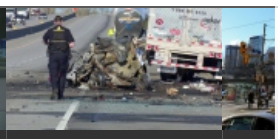
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AUDIO | Pending WSIB changes to pre-existing injury policies worries workers

Changes will make it harder for workers to make WSIB claims, retired Sudbury police officer says

CBC News Posted: Oct 17, 2014 3:14 PM ET | Last Updated: Oct 17, 2014 4:54 PM ET

The rain didn't stop injured worker advocates from demonstrating outside Sudbury's Workplace Safety and Insurance Board Thursday. They were raising awareness about four benefit updates that are taking effect Nov. 1. (Olivia Stefanovich/CBC)

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Advocates for injured workers are raising awareness about changes to their benefit policies, when the Workplace Safety and Insurance Board **rolls out changes next month.**

There's concern the revisions could affect a worker's eligibility to file claims.

Demonstrators rallied in the rain in downtown Sudbury on Thursday, arming themselves with colourful signs to protest workers' compensation changes.

"To me, it's a war. Nothing clean about it," said Herne Steelegrave, who came from Manitoulin Island to show his support.

He's worried about a new policy that considers **pre-existing injuries**.

"They've got every knee scrape and concussion that you got when you were a crazy kid on a bike. And suddenly all these things are held against you."

Kate Lamb with Workplace Safety and Insurance Board said that won't be the case.

"The existence of a pre-existing condition would not prevent a worker from receiving benefits," she said.

But the demonstrators say they don't interpret the policy that way.

Colin Pick, a retired Sudbury police officer who was injured on the job 26 years ago, said the changes will make it harder for workers to make claims.

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Friday	Saturday	Sunday	Monday	Tuesday
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- WSIB Ontario Policy updates/clarifications

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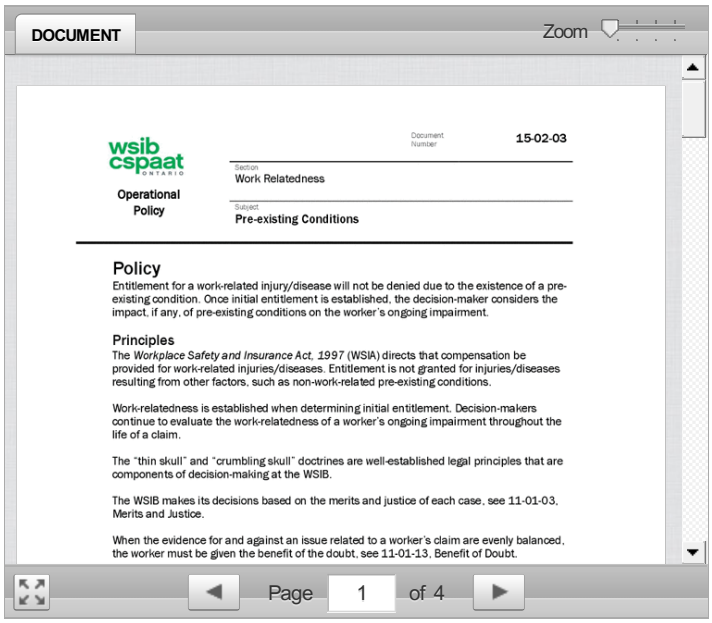
"Once these polices are imposed in total … it's taking away from what was there and leaving nothing in its place."

More changes are on the way for worker's compensation, as the WSIB says it intends to update all of its policies.



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Why a family of 6 in Oakville is living on $36K a year

The WSIB refused to compensate Steve Rescan, 40, after back issues forced him to stop working

By Lisa Xing, CBC News Posted: Mar 22, 2017 5:00 AM ET | Last Updated: Mar 22, 2017 8:36 PM ET

The Rescan family lives on $36,000 a year. (Lisa Xing/CBC)

As he's packing lunches and serving up waffles for his young daughters, Steve Rescan stops to rest every few minutes. He's hunched over, with his hands on the counter to steady himself.

"I've got to lean on something or my hips start to give," said the 40-year-old. "It's a sharp constant pain."

Four years ago, at the age of 36, Rescan was diagnosed with degenerative disc disease, mild scoliosis and osteoarthritis shortly after he stopped working his construction job. He spent 17 years installing aluminum siding for new subdivisions.

Danielle Rescan is now the sole earner for a family of six after her husband stopped working because of back issues. (Lisa Xing/CBC)

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- Injured paramedic feeling 'bullied' into returning to work despite debilitating pain

"I was having trouble bending down, standing, doing anything," he told CBC Toronto. "I stopped [working] at Christmas, hoping my back would get better. Never did."

Workers' compensation

Rescan applied for workers' compensation through the Workplace Safety and Insurance Board (WSIB), but was denied, and the family has spent the last few years trying to fight that decision.

His doctors said his conditions were exacerbated by his construction work.

At his worst, Steve Rescan was crawling up the stairs. He still needs both hands to steady himself. (Lisa Xing/CBC)

The WSIB appeals tribunal said "there is no significant dispute ... the worker has a disabling low back condition" and it accepted that "the worker's duties were reasonably physically demanding."

But the tribunal said it was not "persuaded on a balance of probabilities that the worker's back condition is the result of his work duties."

Rescan says he can't believe that 18 years of construction work didn't worsen his condition.

"You have to lug ladders around, unload equipment, materials, a couple hundred pounds a box," Rescan told CBC Toronto. "There's 30 pounds on your hips, your tool belt. You're at awkward angles, leaning. They shot me down saying it wasn't work related...."

In a statement to CBC Toronto, Christine Arnott, spokesperson for the WSIB wrote, "A claim for a work-related injury will not be denied because of a pre-existing condition, but the WSIB has an obligation to assess the ongoing work-relatedness of claims."

Family of 6

Because he stopped working and did not qualify for workers' compensation, Rescan's wife, who was a stay-at-home mom, went to school and got a job as a personal support worker, making $36,000 a year.

The family of six currently lives with Rescan's mother to make ends meet.

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Steve Rescan walks his two young children to school each day, but says it's a challenge. (Lisa Xing/CBC)

"[Steve and I] haven't been to the dentist in two years. We make sure our kids go, because we want to make sure they're taken care of, said Rescan's wife, Danielle.

"To be young and physically fit for so long to being 40 years old and run down, it's not something he chose to do," she said. "Having the two older children, 19 and 16, you see a big difference in his level of activity with them. He would go out and play soccer in the fields with the older ones. With our eight and five year old, he couldn't pick [our daughter] up."

WSIB policy change

The WSIB confirmed to CBC Toronto Tuesday it changed its practices around workers' claims in 2010. From then on, it became harder for workers with pre-existing conditions to get compensation.

That became official policy in November 2014. WSIB figures show the percentage of claims in which it has recognized a permanent impairment has decreased from 9.3 per cent in 2010 to 5.9 per cent in 2015.

Lawyer Maryth Yachnin says many of the WSIB decisions are 'completely unfair.'

Maryth Yachnin, a lawyer with the Industrial Accident Victims Group (IAVGO) in Toronto, calls many of the WSIB decisions "unjustified and completely unfair" to workers.

"They don't want to be forced out of work because of disability, but that's their reality. And compounded on that reality, which is bad enough, but now they're forced into poverty. We see tons of it," she said.

"This system, which is supposed to support workers. is actually doing the opposite."

Danielle Rescan agrees.

"For a system you've been putting money into for 20 years, for them to turn around and say, 'Sorry we can't help you,' none of it makes

sense," she said.

"We want help. We want answers that make sense."

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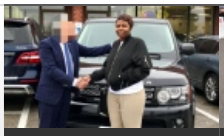
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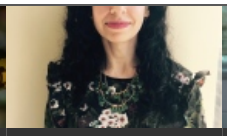
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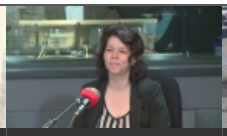
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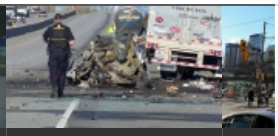
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Class action against WSIB claiming unfair benefit cuts given go-ahead

Lawsuit could potentially impact hundreds of workers allegedly denied "full extent of benefits to which they were entitled.

Former Brampton sewer worker Pietro Castrillo, 64, permanently injured his shoulder on the job in 2011, is the representative plaintiff in a class action lawsuit against the Workplace Safety and Insurance Board. (STEVE RUSSELL / TORONTO STAR) | ORDER THIS PHOTO

By **SARA MOJTEHEDZADEH** Work and Wealth reporter
Tues., Feb. 14, 2017

A class action lawsuit alleging Ontario injured workers had their benefits wrongfully slashed has been granted permission to proceed, after the province's compensation board sought unsuccessfully to block the case.

The suit filed by Toronto lawyer Richard Fink against the Workplace Safety and Insurance Board could impact hundreds of workers. It argues accident victims between 2012 and 2014 were "denied the full extent of benefits to which they were entitled" as a result of "misfeasance in public office" and "negligence" at the board.

The class action was originally quashed two years ago by a Superior Court judge, who said WSIB compensation decisions were "beyond court challenge." But in a reversal issued Monday, the Court of Appeal ruled it could go ahead.

"This case is about law. As in, the rule of law," Fink said. "If you accept what we've argued in our claim, the board may well be violating the law and should be subject to penalty. And that is a large step forward because it begins to hold the board accountable."

In a statement to the Star, board spokesperson Christine Arnott said the decision needed to be discussed with the WSIB's legal counsel "before determining how we will respond."

"It is important to note that the decision concerns a procedural matter, and makes no determinations about the merits of (the plaintiff's) case," she added. "We continue to deny the allegations made in the lawsuit."

Those allegations include that the WSIB sought to unfairly cut costs through a "secret policy" to "aggressively reduce" the lump sums awarded to workers with permanent injuries sustained in workplace accidents.

The policy suggested benefits could be slashed by blaming at least some of a worker's injury on a pre-existing condition — even if that condition had never shown any symptoms before the workplace accident, according to the lawsuit.

It represented a significant and some say illegal departure from the founding principles of the worker's compensation system in Canada: the so-called thin-skull principle, which says workers cannot be discriminated against because of a pre-existing condition that had no physical impact on them before an accident.

The board argued there were no grounds for the allegations, and said it is obliged by law to act in a "financially responsible and accountable manner" — which includes reducing payments to injured workers where appropriate. It also sought to characterize the suit's allegations as "those of a disgruntled claimant." Justice Peter D. Lauwers rejected the board's arguments in Monday's decision.

The representative plaintiff is former Brampton sewer worker Pietro Castrillo, who permanently damaged his shoulder at work in 2011. He was awarded a lump sum of around $3,000 — but the WSIB subsequently cut the amount in half because it claimed he suffered from osteoarthritis in the injured shoulder.

But Castrillo, now 64, had never previously experienced any symptoms of osteoarthritis. He appealed the board's decision and won. But he decided to pursue a class action suit after learning about "a number of injured workers" who were similarly impacted by the alleged "secret policy" in operation at the board.

"It's not just for me, it's for all these poor people out there who don't know where to go or what to do," he said. "They get in accidents and it ruins their lives."

As previously reported by the Star, the overwhelming majority of appeals from workers who had benefits slashed because of so-called pre-existing conditions have been overturned by the WSIB's own independent appeals tribunal since 2012. But because of backlogs, it often takes workers' years to win the entitlements they were owed in the first place.

The board's alleged "secret policy" was operational roughly between 2012 and 2014, Fink said. In November 2015, it was replaced by a new policy that the board says is compatible with the thin-skull principle and "provides consistency in decision making and alignment with other jurisdictions." Decisions made under the new policy have yet to reach the board's appeals tribunal because of long wait times.

Between 2012 and 2014, the portion of claimants deemed to have a permanent injury dropped by 37 per cent, according to the WSIB's own stakeholder reports.

A Star investigation revealed last year that the WSIB hired U.S.-based doctor Christopher Brigham in 2012 to review its policy on awarding benefits to workers with permanent injuries. The same doctor is currently embroiled in a legal battle in Hawaii for allegedly conspiring with a private auto insurance company to unfairly cut car accident victims' medical benefits. Brigham, who says he is a "strong advocate for those who are recovering from injury or illness," was not a named defendant and the case was later dismissed.

Fink's class action against the board alleges that the WSIB's approach to pre-existing conditions was "motivated by a desire to reduce costs," and "the defendant knew it was acting illegally and that its actions would harm the plaintiff and class."

The suit must now wait to be certified as a class action, although the WSIB could also seek an appeal at the Supreme Court of Canada.

Fink noted that under the compensation system, workers' give up their right to sue their employers in exchange for a fair shot at compensation if they are hurt on the job.

"This is not an insurance company. This is a workers' compensation system. They are to take care of injured workers because they've knocked you out of litigation," he said.

"Their mandate should be, try and do the best you can for the injured worker within reason."

Correction – February 17, 2017: *This article was edited from a previous version that mistakenly said allegations against Christopher Brigham had not been proven in court. In fact, the case was dismissed.*

Doctors frustrated workers' compensation boards seem to ignore medical opinions, report says

A new report by the Toronto-based Institute for Work and Health offers valuable findings "with respect to improving engagement with health care providers," a WSIB spokeswoman said.

Karl Crevar hurt his back on the job in 1987 and has since been an advocate for injured workers. A new report suggests widespread frustration amongst doctors with workers' compensation boards, including the WSIB, for ignoring medical opinions. (PETER POWER / FOR THE TORONTO STAR)

By **SARA MOJTEHEDZADEH** Work and Wealth reporter

Mon., Jan. 9, 2017

They are the first port of call for workers hurt on the job. But when decisions are made about accident victims with complex injuries, a new study suggests doctors feel sidelined by workers' compensation boards.

The report, conducted by the independent, Toronto-based Institute for Work and Health, examined the role of doctors and other health care professionals in workers' compensation across four provinces, including Ontario. It found doctors treating workers with complicated or prolonged conditions were frustrated by an "opaque and confusing" system where their views on a safe return to work after an accident appeared to sometimes be ignored by case managers with no medical training.

"It quickly became clear that there was a significant amount of disagreement and confusion about what the role of health-care providers should be in the return-to-work process and in the workers' compensation system more generally," the report concluded.

Agnieszka Kosny, a scientist with the IWH who led the study, said doctors rarely reported encountering significant problems when their patients had visible, acute physical injuries. But that changed when workers had multiple injuries, chronic pain and mental health conditions.

In those cases, health care professionals expressed concern that compensation boards' return-to-work programs "might not be appropriate and could do more harm than good" and were sometimes motivated by "cost-containment" rather than the best interests of patients.

"Sometimes where things go off the rail is when a decision is made, and the health care provider feels like they have been excluded from that process. I think that further alienates them from the process," Kosny said.

In a statement to the Star, Workplace Safety and Insurance Board spokeswoman Christine Arnott said the board "values its relationships with heath care providers" and said the study "confirms the importance" of its return-to-work programs.

"There are valuable findings in the report with respect to improving engagement with health care providers," Arnott said, adding board staff will meet with the report authors to discuss the study later this month.

Critics say the findings bolster a formal complaint made to Ontario's ombudsman a year ago by labour groups, doctors, and injured worker advocates asking the provincial watchdog to investigate the Workplace Safety Insurance Board for ignoring medical opinions provided by physicians treating workers, resulting in accident victims being unfairly cut off benefits or pushed back to work too early.

"This is not something that's new. Its something that we have brought to the attention of the government as well as the compensation board," said Karl Crevar, who has been an activist in Ontario for more than two decades, ever since he hurt his back on the job in 1987.

"This is another piece of evidence to say there is a systemic problem," added Aidan Macdonald of the Toronto-based legal clinic Injured Worker Consultants. "Somebody needs to take it seriously, and somebody needs to do something about it."

The ombudsman has yet to make a decision on whether it will launch a probe.

In a statement to the Star, the ombudsman said its assessment of the issue was "ongoing" and that it was "monitoring ongoing dialogue" between the WSIB and complainants.

The latest IWH study is based on interviews with close to a hundred doctors in British Columbia, Manitoba, Ontario and Newfoundland and Labrador. Researchers also interviewed 34 compensation case managers, although the WSIB declined to participate in the study because it was "in midst of changes to its service delivery model," according to the board. Researchers spoke to case managers employed by private companies to deal with WSIB claims instead.

Doctors in the study expressed dissatisfaction with dealing with case managers with "limited medical knowledge." One Ontario health-care provider described treating an injured worker with a neck, or cervical spine, injury whose benefits were almost denied because of confusion over basic anatomy.

"For some reason, (the WSIB) had requested records, and there was something in the patient's chart about cervical dysplasia, like of your cervix, the female genital organ. They said she wasn't covered because she had a pre-existing condition, which is completely ridiculous," the doctor said.

Compensation case managers told researchers they often had difficulty getting information from health care providers treating injured workers, resulting in a "heavy reliance" on the advice of so-called independent medical consultants who review workers' medical files, but often never meet the patient.

The report found a number of doctors treating injured workers were concerned such consultants "were not independent" and that their medical opinions were "problematic."

"Some health care providers believed that case managers may cherry pick opinions offered by internal consultants, choosing those that were favourable to the workers' compensation board (for example, ones that reduced costs)," the study said.

Kosny said she saw a role for independent medical consultants in the compensation system, especially if injured workers did not have a regular doctor or were seen by emergency room staff. But she said provinces such as Ontario could consider adopting a system like Manitoba's, where such consultants actually examine patients in person.

She said family doctors offered valuable assessments of accident victims because they had better overall knowledge of their health, adding that treating physicians needed more support from compensation boards to play an active role in decisions about benefits and return-to-work programs.

"There just doesn't seem to be a lot of resources that are specifically directed at health care providers," she said.

In the meantime, Crevar said, workers are falling through the cracks.

"We have injured workers in dire straights, on the verge of family break down or even committing suicide because they don't know what to do," he said. "And we are seeing more and more of that throughout the province."

Proposed WSIB changes will hurt workers, advocates say

Observers claim workers' comp is already using pre-existing condition findings to unfairly cut payouts to injured workers.

William Harris was injured on the job as a Great Lakes shipper in 2010. (LAURIE MONSEBRAATEN / TORONTO STAR) | ORDER THIS PHOTO

By Staff Reporter
Wed., May 7, 2014

William Harris never missed a day of work until his accident on Nov. 23, 2010.

The burly Great Lakes shipper was opening an 18-tonne hatch to load gravel destined for St. Mary's Cement in Detroit when a faulty hinge sprung open unexpectedly.

"I was propelled into the air like a lawn dart. I felt every vertebra in my back go pop, pop, pop, pop," he recalls. "I haven't been the same since."

Under Ontario's 100-year-old no-fault workplace insurance program administered by the Workplace Safety and Insurance Board (WSIB), the cost of Harris's physiotherapy, prescription drugs and other medical treatment was covered. He also received income support for his lost wages.

But every time he tried to return to work, he hurt his back again. And after his last injury, in October 2012, WSIB stopped paying. The insurance board said x-rays of Harris's back showed evidence of degenerative discs, a pre-existing condition that disqualifies him from further payments.

Workers' advocates charge that hundreds of injured workers have, like Harris, been denied benefits for pre-existing medical conditions since 2010, when the former Dalton McGuinty government appointed David Marshall as WSIB president.

They blame Marshall's marching orders "to reduce and ultimately retire" the board's $12 billion unfunded liability, the difference between current funding levels and long-term payouts to injured workers. They say this financial imperative is behind a proposed new WSIB policy on pre-existing conditions that would "fundamentally change" the system and throw thousands of injured workers into poverty.

Instead of putting the squeeze on injured workers, advocates say the board should restore cuts to employer contributions made by Mike Harris's Progressive Conservative government that are the root of the WSIB's current financial woes.

The WSIB counters that Ontario is the only jurisdiction in Canada without a policy on pre-existing conditions, and that workers' advocates themselves requested the clarification. The board flatly denies that money has anything to do with the change.

The proposed policy "is under consideration given the need for consistency in decision making, not for financial reasons," board spokeswoman Christine Arnott wrote in an email.

Harris, 40, is fighting the board's decision. His lawyer says he will most likely win because the Workplace Safety and Insurance Appeal Tribunal follows the so-called "thin skull doctrine," a common-law principle enshrined in the Workplace Safety and Insurance Act.

The legal principle, well-tested in personal-injuries litigation, states that "you take your victim as you find him/her." In the workplace, this means that compensation for a injury is not discounted due to any pre-existing condition the worker may have.

The WSIB appeals tribunal has typically interpreted this to mean that if a pre-existing condition wasn't interfering with the employee's work before the injury, then it doesn't negatively affect the amount or duration of compensation an employee is entitled to after an injury.

But the proposed WSIB policy revision would instruct the appeals tribunal to take a much narrower view, say workers' advocates who are urging against the change.

Advocates acknowledge they raised the issue during an earlier consultation, but not because they saw a policy gap. They raised it because they noticed the board was denying more people like Harris, and they wanted to know what was going on. They argue the WSIB already has a policy on pre-existing conditions spelled out in a document known as the "Second Injury and Enhancement Fund," and that nothing should be changed.

"This is a seismic shift in the approach to compensation," says Marion Endicott, of Injured Workers Consultants, a Toronto legal aid clinic that advises the government on policy and helps injured workers with WSIB claims and appeals.

"The draft policies are evidence of the WSIB's institutional bias in favour of reducing costs, and they are inconsistent with the law," the clinic says in its response to the proposed changes.

If they are adopted, injured workers will qualify for short-term claims, but long-term compensation will disappear, Endicott predicts.

As people age, degenerative changes in knees, necks and backs are common, Endicott notes. Under the proposed policy, the WSIB will be able to point to those changes in injured workers — that often show up on x-rays but don't cause pain or limit ability to work — and deny any long-term claim, arguing the worker had a pre-existing condition, she says.

Based on the appeals her office is seeing, the WSIB is already applying the policy "illegally," she adds.

In an open letter to Premier Kathleen Wynne last month before the election call, the Ontario Network of Injured Workers Groups urged the government to intervene.

"This is a direct contravention of your government concern about poverty reduction and the historic compromise, in which workers gave up their right to sue in return for fair and just compensation (funded by employers) for as long as the disability lasts," the letter says.

The WSIB stresses that recent cost improvements in the system are not being made on the backs of injured workers, but "due to improved safety in workplaces resulting in fewer injury claims" and "better medical care and assistance for injured workers returning to work," Arnott writes in the email.

This is no comfort to injured Burlington worker Richard Renzella, 50, who used to earn as much as $60,000 a year repairing electrical transformers for industrial clients such as Ontario Hydro. He is literally a living example of how the WSIB is ignoring the "thin skull doctrine," advocates say.

Renzella was injured in 2002 when he fell about five metres inside a transformer tank and struck his head, leaving him permanently injured and unable to work.

The WSIB awarded him a non-economic loss award for cognitive impairment, which it discounted by 25 per cent for a pre-existing condition because Renzella's medical file showed he was hit in the eye by a tennis ball when he was a child.

But as his lawyer, Laura Lunansky, notes, Renzella did not have a pre-existing impairment or even a pre-existing condition before the fall. "He was perfectly fine before the accident," she says.

Since the impact of head injuries can be cumulative, Renzella's work injury may have been more severe as a result of his childhood accident, Lunansky acknowledges. The key, however, is that if he hadn't been injured on the job, Renzella would not have any cognitive impairment today.

Instead, Renzella, who suffers memory loss as well as permanent physical injuries from the accident, is barely surviving on WSIB payments of less than minimum wage. He uses food banks to make ends meet and worries about losing his condo as fees and property taxes rise.

"I tell everyone I meet to be careful at work," he says. "Because if you get injured, WSIB won't pay you."

WHO IS CHRISTOPHER BRIGHAM?

According to his resumé, Christopher R. Brigham is an "internationally recognized expert in impairment and disability assessment" who focuses on workers' compensation and car accidents. He graduated from the Washington University School of Medicine in St. Louis, Missouri in 1976 and has since held numerous positions as a medical consultant.

From 2009 to 2012, he was the chairman of Impairment Resources LLC, which reviewed medical records workers' compensation board claims and auto casualty claims for around 600 insurance companies.

He has made numerous presentations in the United States and Canada on work-related injuries and medical evaluations, including for Manitoba's worker compensation board and the Alberta provincial government. Brigham is also on the board of directors for an organization called the Faith Based Claims Association, which works "to promote the use of biblical principles in the handling of claims."

In an email to the Star, Brigham wrote that he also worked with Wounded Warriors, a veterans' service organization, and Stephen Ministries, a Christian educational organization.

"I have strived to have an impeccable reputation, this being reflected in my professional and personal life," he said.

LABOUR

DOCTOR HIRED BY THE WSIB IS IN A LEGAL BATTLE OVER SLASHED MEDICAL BENEFITS

Man accused of helping board reduce compensation for people like Fernando Paul faces suit alleging he wrote reports to kill benefits for car accident victims

SARA MOJTEHEDZADEH
STAR TOUCH

A doctor commissioned to write a report on "fair compensation" for Ontario's injured workers is embroiled in a legal battle alleging he "conspired" with a private auto insurance company to unfairly cut car accident victims' medical benefits, the Star has learned.

The allegations come as the Workplace Safety and Insurance Board also faces sustained criticism for slashing injured workers' entitlements.

Christopher Brigham, who was paid almost $100,000 to complete a 2012 report for the WSIB, is not a named defendant in the Hawaii-based lawsuit against Farmers Insurance Inc. But a statement of claim obtained by the Star alleges Brigham was "paid a substantial fee" by the company to write medical reports that were "used as a pretext for terminating (plaintiffs') insurance benefits in direct contravention of the professional recommendations of the treating physicians."

The accusations have not been proven in court. When reached by the Star by phone, Brigham called the allegations against him inaccurate.

"From my perspective, I performed reviews of records to ensure whether care was consistent with evidence-based medicine," he said of his work with Farmers Insurance Hawaii. "In many circumstances, it was not supportable by current science."

The complaint by eight Hawaii plaintiffs was filed in 2015, three years after Brigham was contracted by the WSIB. Christine Arnott, a spokesperson for the WSIB, said Brigham had not worked with them since. But the court documents shed new light on the man hired to provide a comprehensive review of the board's policy on evaluating workers with permanent injuries in the province.

The suit, expected to go to trial in September, describes Brigham as a "medical doctor who has a reputation in the community and nationally for being biased and predisposed in favour of the insurance companies that hire him."

Brigham wrote medical reports for the company about each of the plaintiffs' injuries, according to the complaint, but did so "without interviewing the patient, without conducting any tests on the patient and without communicating with the patients' treating physicians." The eight plaintiffs subsequently had their benefits terminated.

"Farmers and Dr. Brigham therefore conspired together to defraud each and all plaintiffs by handling and deciding plaintiffs' insurance claims unfairly and in extreme bad faith," the lawsuit alleges.

A spokesperson for Farmers Insurance declined to comment on "matters of ongoing litigation." Its statement of defence did not contest that Brigham provided medical reports to the company without ever examining accident victims, but rejected the notion that claimants were unfairly denied benefits.

Brigham told the Star he was a "strong advocate for those who are recovering from injury or illness, assuring that they receive appropriate care that permits them to live full, joyful and productive lives."

"Unfortunately, sometimes people are involved in minor automobile accidents and see health care providers who reinforce the experience of pain and provide unnecessary treatments and narcotics," he said, adding that plaintiff attorneys profited financially from attacking his work.

In 2012, Brigham authored a report for the WSIB to help staff "accurately rate" the severity of permanent injuries and to maximize the "efficiency" of the process. The report made several recommendations, including that the board should consider any degenerative and pre-existing conditions workers might have when ruling on compensation.

A WSIB orientation guide obtained by the Star, which was revised two months after the Brigham report, characterized the board's current approach to determining permanent injuries as "more aggressive" and says claims managers should reduce compensation if workers had pre-existing conditions.

Maryth Yachnin, a lawyer with the Industrial Accident Victims Group of Ontario, says she believes the board's change in permanent impairment policy is a cost-cutting measure — legitimized at least in part by Brigham's 2012 report. She says the result is that workers are being unjustly denied compensation.

Between 2012 and 2014, permanent injury awards dropped by 37 per cent, according to WSIB's own stakeholder reports.

Michel Lacerte is a doctor based in London, Ont., who specializes in physical rehabilitation and worked with Brigham on his 2012 report. He describes his colleague as "very much a technocrat." But he voiced deep concerns about how the WSIB has moved to "systematically" identify pre-existing conditions, in what he believes is a pretext to reduce injured workers' entitlements.

"Degenerative disease is an example," he said. "Everybody after the age of 40 has degeneration in the neck and back."

Lacerte says that if the injured worker hadn't experienced any symptoms from a degenerative disease before a workplace injury, the board should not use the condition as a reason to cut benefits. That, he says, violates its own "thin-skull principle," which states that the WSIB cannot consider any prior conditions unless they were already debilitating before the workplace injury happened. Lacerte said that principle "no longer exists" at the board.

Undermining the thin-skull principle, critics argue, leaves workers vulnerable. In 2010, a workplace accident damaged tractor-trailer driver Fernando Paul's lower spine, leaving him almost completely unable to walk. Paul uses a wheelchair, has lost control over his bodily functions and is struggling with mental health issues, according to his WSIB file.

But in 2012, after an MRI found that he might have a mild degenerative disc disease in a completely different part of his spine, the board halved Paul's permanent impairment rating — a key figure in determining how much compensation workers receive from the WSIB.

Paul, now 65, currently receives next to no compensation for his workplace accident. He was on the cusp of qualifying for the board's serious injury program, which would have made him eligible for additional support, until the board reduced his impairment rating.

"The money is so tight that at the end of the month, every penny counts. We don't spend money. We don't have any extras," the Toronto resident said.

In a statement to the Star, the WSIB's Arnott said she could not comment on Paul's case for privacy reasons.

Arnott added that the WSIB had undertaken a benefits policy review following the Brigham report, which recommended addressing pre-existing conditions to ensure "benefits appropriately compensate for work-related injuries/illnesses." Arnott said the board only considers pre-existing conditions "when (they are) shown to contribute to the degree of (a worker's) permanent impairment."

The WSIB has faced intense scrutiny in recent years over what critics call backroom efforts to reduce benefit payments to workers.

As first reported by the Star, a group of lawyers, doctors and labour groups have now formally requested an ombudsman

investigation of the board, alleging that it has "systematically" ignored the medical opinions of workers' own physicians and blamed pre-existing conditions for their illnesses in a bid to cut payouts.

Brigham said he was not aware of how his recommendations to the WSIB were implemented. He said he was not interested in slashing injured workers' benefits — only in accurately rating their injuries.

"It may appear to make a better story to portray me as a biased physician; however, nothing could be further from the truth," he told the Star.

Brigham was the subject of congressional hearings in the United States two years before he was contracted by the WSIB. In the hearings, critics claimed that a medical guide written by Brigham, which is used to evaluate workers' injuries by numerous compensation boards in the U.S., was developed in "near secrecy" and that it "dramatically reduced impairment ratings for many types of conditions without apparent medical evidence and transparency."

In the hearings, lawyer Frederick Uehlein spoke in Brigham's defence, and said his guides were "evidence-based" and afforded "consistency and ease of use." Uehlein and Brigham were formerly business partners at a "workers' compensation cost containment" company called Impairment Resources, which went bankrupt in 2012 after a massive data breach.

Brigham has made no secret of his broader views on workers' compensation schemes. In his 2015 book *Living Abled and Healthy*, he says the system is based on workers repeatedly showing how workplace activities led to their injuries, which "requires us to maintain a negative focus on our problem."

"Yet we know we are more likely to have a better health outcome when we maintain a positive focus," the book counsels. "We know that accepting responsibility for our health is healthier for us than blaming others or relying on others to 'make us well.'"

Lawyer Maryth Yachnin calls that attitude "pernicious."

"We do see that kind of moral judgment about our clients, that they are not accepting responsibility, that they're not really trying or even that they're faking."

"The whole idea that our clients choose this experience of disability and pain is so ridiculous," she added.

Fernando Paul agrees.

"I miss working. But in my condition it's impossible," he said. "I lost a life."

WSIB critics say spending cuts are 'devastating' injured workers

Letter signed by more than 140 doctors, legal clinics, and labour groups, expresses deep concern about injured workers who are increasingly unable to get the treatment their doctors recommend,

Indira Rupchand fights back tears as she recalls details of injuring her back in a workplace accident in 2013. (VINCE TALOTTA / TORONTO STAR) | ORDER THIS PHOTO

By **SARA MOJTEHEDZADEH** Work and Wealth reporter
Fri., June 10, 2016

Dramatic changes to health-care services for injured workers, including a 40 per cent funding drop in rehabilitative treatment and a 30 per cent drop in drug benefit spending, is having a

"devastating" impact on some of the province's most vulnerable citizens, according to a letter obtained by the Star.

The letter, to be delivered Friday to senior Ontario government figures and signed by more than 140 doctors, legal clinics and labour groups, expresses deep concern about injured workers who are increasingly unable to get the treatment their doctors recommend because of significant health-care changes at the Workplace Safety and Insurance Board. The letter claims that shift is designed by the board to cut costs at the expense of injured workers.

"We only have one body," said Indira Rupchand, 56, who hurt her back three years ago on a manufacturing production line. "If we are hurt at work, I think we deserve to be treated with dignity and get the treatment that is recommended. Many times we are railroaded."

The board has moved away from relying on the medical advice of injured workers' own doctors in favour of opinions provided by physicians in specialty clinics contracted by the WSIB, according to the letter. The board has doubled its spending on such clinics over the past 10 years.

WSIB has responded to criticisms of its health services, including a formal complaint to Ontario's ombudsman by injured worker advocates, by saying that it has "confidence in the integrity of Ontario's health-care professionals" and that it "acts quickly to ensure workers receive timely, specialized medical care."

But critics say specialty clinics' treatment programs often push injured workers back on the job before they are ready and set unrealistic recovery dates. Workers' benefits are frequently cut off according to those recovery timelines, without the board ever following up with the worker or their doctor about their health.

"It turns the focus away from health care and toward a date," said Maryth Yachnin, a lawyer with the Industrial Accident Victims Group of Ontario (IAVGO).

Meanwhile, the board has cut its spending on drug benefits by close to 30 per cent since 2009, according to the letter. Funding for services like physiotherapy and psychological treatment provided by doctors not affiliated with the board also plummeted by 40 per cent between 2005 and 2014. That statistic was obtained by IAVGO through a freedom of information request.

Such rehabilitative services are often vital for real, long-term recovery, Yachnin says, and are frequently recommended by injured workers' own doctors — only to be ignored by the board.

"(Workers) feel like they are coming up against a wall when they're trying to get services that will actually help them recover," she told the Star. "They don't listen to workers' doctors and specialists."

When it comes to the WSIB's own specialty clinics, the board is "setting the terms and conditions of what the (clinics) reports are providing," she added. "They set out the specific way they want doctors to frame their answers . . . the answers are generally not as candid as you might see from the workers' (own) doctors in our experience."

Questions about the WSIB's health-care provision have already been raised: as reported by the Star, a Hamilton-area doctor is currently suing the board and one of its private health-services contractors, claiming she was terminated after delivering a medical opinion that did not suit the WSIB.

After injuring her back in 2013, Rupchand says she received just a couple of physiotherapy sessions through one of the WSIB's specialty clinics before being told to start working again. The stress of working while still injured was the start of a downward spiral, according to the Toronto-area resident who says she has since contemplated suicide as a result of her ordeal, and is currently separated from her kids.

"All this is a systematic thing with injured workers," said Rupchand, who is helping to organize a day of action on Friday to raise awareness about the issue. "I've heard people going through this so many times."

"It's causing a lot of stress. I'm a single mother and it's hard. That's why I'm still feeling pain and that's why it's so important that the WSIB listens to treating doctors," she added.

"As injured workers, they don't believe us. I was never believed."

With files from Jacques Gallant

WORKPLACE SAFETY AND INSURANCE BOARD

2012-2013 Benefits Policy Review

Submissions of the Industrial Accident Victims Group of Ontario

November 28, 2012

Industrial Accident Victims
Group of Ontario
203-489 College Street
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The merits and justice provision is the foundation for the investigative or inquisitorial model of workers' compensation. This model is deliberately different from tort litigation where plaintiffs bear a burden of proof. Instead, the Board must gather the evidence necessary to decide each case. Where the Board fails to do so, it breaches its obligation to decide each case on its merits and justice.[11] The Board recognizes this obligation through its "Merits and Justice" policy[12] and its "Weighing of Medical Evidence" and "Escalation Protocol for Obtaining Outstanding Medical Information" adjudicative advice documents.[13]

2.2.3 The significant contributing factor standard

Workers' compensation decision makers use the common law "significant contributing factor" standard to determine causation. This standard recognizes that injuries often have multiple causes: the workplace accident only needs to be one of those causes. A worker's injury is a significant contributing factor to their condition when it was necessary for it to have happened. But there is entitlement even if the accident isn't the only cause, or even the main cause of the worker's condition. In the words of then Vice-Chair Strachan, a significant contributing factor is "a factor of considerable effect or importance or one which added to the worker's pre-existing condition in a material way to establish a causal connection with the ultimate [injury]."[14]

The significant contributing factor test dates back at least to the early stages of the Tribunal's existence and is rooted in the *Act*. The two leading cases on the significant contributing factor standard are *Decision No. 72* and *Decision No. 915*. In *Decision No. 72*, a panel chaired by Tribunal Chair Ellis found that the statutory requirement that an injury "arise out of employment" is met when

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[11] Brock Smith, Final Report of the Chair of the Occupational Disease Advisory Panel, February 2005, p. 10.

[12] Operational Policy Manual Document No. 11-01-03.

[13] Online at:
ahttp://www.wsib.on.ca/files/Content/AdjudicativeAdviceWeighingMedicalEvidence/WOME.pdf;
http://www.wsib.on.ca/files/Content/AdjudicativeAdviceEscalationforMedicalInfo/Advice_escalation.pdf

[14] Decision No. 280, 1987 CanLII 1996 (ON WSIAT).

the "evidence show[s] that the worker's employment made … a significant contribution to the occurrence of the injury."[15]

The significant contributing factor test also applies to other questions of causation in workers' compensation. The legal foundation for this approach is set out in *Decision No. 915*, where the Panel looked at the standard of causation necessary to establish that a consequence "resulted from" the work-related injury.[16] The Panel concluded that, given the historic trade-off, workers' compensation legislation should be interpreted so as to provide workers with at least as broad coverage for the disabling effects of injuries as provided under the common law.[17] It confirmed that the common law-standard for causation, the significant contributing factor test, applies in workers' compensation.[18]

The provisions of the current Act dealing with causation questions remain essentially the same as that considered in *Decisions No. 915* and *Decision 72*:

- The "arises out of employment" test for whether an accident caused an injury remains the same as it was in *Decision No. 72*. It is in section 13(1) of the current *Act*.
- A worker who has a loss of earnings was "as a result of" the injury is entitled to LOE benefits. The "as a result of" standard in section 43(1) of the *Act* is essentially identical to the "results from" standard considered in *Decision No. 915.*
- A worker is entitled to a non-economic loss award if the injury "results in" permanent impairment. Again, this language is essentially the same as the "results from" standard considered in *Decision No. 915.*

[15] Decision No. 72, 1986 CanLII 621 (ON WSIAT).
[16] Decision No. 915, 1987 7 W.C.A.T.R. 1, p. 98.
[17] Decision No. 915, 1987 7 W.C.A.T.R. 1, p. 100.
[18] Decision No. 915, 1987 7 W.C.A.T.R. 1, p. 100.

The Tribunal continues to use the significant contributing factor standard for cases involving recurrences,[19] aggravation basis,[20] permanent impairment,[21] and work disruptions.[22] Indeed, it has used the significant contributing factor standard to decide causation questions in over 10,000 cases.[23]

The Tribunal's approach to causation has been affirmed by the courts. In *Dunham v Workmen's Compensation Board*, a fireman's spouse received survivors' benefits after he died of a heart attack that occurred while responding to a fire.[24] In concluding that the worker's death arose "out of and in the course of employment",[25] the chief justice of the New Brunswick Court of Appeal reviewed English jurisprudence, which confirms that

> … a physiological injury or change occurring in the course of a man's employment by reason of the work in which he is engaged at or about that moment is an injury by accident arising out of his employment, **and this is so even though the injury or change be occasioned partly, or even mainly, by the progress or development of an existing disease if the work he is doing at or about the moment of the occurrence of the physiological injury or change contributes in any material degree to its occurrence**. Moreover, this is none the less true though there may be no evidence of any strain or similar cause other than that arising out of the man's ordinary work.[26]

The test of causation adopted by the Court of Appeal allows an injury caused partly or mainly by the progression of an existing non-work-related disease to be compensable if the employment made a material contribution to the injury.

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[19] See, for example, Decision No. 2252/11, 2011 ONWSIAT 2726 (CanLII), para. 64.
[20] See, for example, Decision No. 142/12, 2012 ONWSIAT 980 (CanLII) paras. 49-50 and Decision No. 328/12, 2012 ONWSIAT 406 (CanLII), para. 36.
[21] See for example Decision No. 142/12, 2012 ONWSIAT 980 (CanLII) and Decision No. 936/12, 2012 ONWSIAT 1614 (CanLII), para. 16.
[22] See, for example, Decision No. 1589/11, 2011 ONWSIAT 2782 (CanLII), para. 44 and Decision No. 2480/10, 2012 ONWSIAT 973 (CanLII), para. 37.
[23] On November 26, 2012, a search of the term "significant contribution" on Can Lii's Tribunal database yielded 10,348 results.
[24] *Dunham v Workmen's Compensation Board* , (1967), 67 D.L.R (2d) 726 (NBCA).
[25] The relevant statutory (*Workmen's Compensation Act*, R.S.N.B. 1952, c. 255) provisions used the language of "arising out of and in the course of employment".
[26] *Dunham v Workmen's Compensation Board*, citing Oates v. Earl Fitzwilliam's Collieries Co., [1939] 2 All E.R. 498 (emphasis added).

Although the nomenclature has changed, Courts still essentially apply the same standard in tort law cases.[27] Most recently, the Supreme Court of Canada has confirmed that the "but for" test should be used except in unusual circumstances, when a material contribution to risk test applies.[28] Again, this test recognizes that there may be a myriad of causal factors, as long as the tortuous conduct was a cause outside of the "de minimis" range.[29]

2.2.4 Applying the significant contributing factor test

The test for causation should be applied pragmatically, without unnecessary rigidity.[30] There is no requirement for medical or scientific certainty.[31] Circumstantial evidence may be enough to establish causation.[32] Common sense plays an important role, especially when the medical evidence is unclear.[33]

This approach again has its roots in tort law jurisprudence. The Supreme Court of Canada requires that decision makers take a "robust and common sense approach" to causation.[34] There is no requirement for scientific proof of causation, nor for a firm opinion by medical experts.[35]

2.2.5 The thin skull principle

Workers' compensation decision makers also use the "thin skull" principle. This principle derives from the significant contributing factor test. Put simply, the think skull principle requires that the Board takes its workers as it finds them: a worker is entitled to benefits for the full extent of their injury, even if the injury is unexpectedly severe because they are unusually vulnerable to injury. The injury is still a significant contributing factor.

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[27] Decision No. 2144/10R, 2012 ONWSIAT 1197 (CanLII), para. 15.
[28] *Clements v. Clements*, 2012 SCC 32 (CanLII), para. 46.
[29] *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 SCR 458, para. 44.
[30] Decision No. 2035/06, 2008 ONWSIAT 2315 (CanLII), paras. 24-25.
[31] Decision No. 93/12, 2012 ONWSIAT 502 (CanLII) at paras. 51-52;
[32] Brock Smith, Final Report of the Chair of the Occupational Disease Advisory Panel, February 2005, p. 10.
[33] Decision No. 32, 1986 CanLII 395 (ON WSIAT); Decision No. 93/12, 2012 ONWSIAT 502 (CanLII), paras. 51-52.
[34] *Clements v. Clements*, 2012 SCC 32 (CanLII), para. 46.
[35] *Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2 SCR 311.

The thin skull principle has been described by the Board's former Vice-President and General Counsel, and accepted by the Tribunal, as "a cornerstone" of the workers' compensation system."[36] Indeed, this principle is widely-referenced and applied in Tribunal jurisprudence.

The "thin skulled" worker is often contrasted with a worker with a "crumbling skull." A crumbling skull is where the injury is caused only through the natural development a pre-existing condition. For a worker to be disentitled because of a crumbling skull, the pre-existing condition must be so large a factor in causing the disability that it overwhelms the significance of the accident.[37]

The "crumbling skull" concept does not apply when the work-related accident aggravates or accelerates the injury.[38] In those situations, the worker has entitlement for the period during which the injury was aggravated or accelerated. This again flows from the significant contributing factor test: if not for the accident, the worker would not have suffered from the same degree of symptoms.

Often absent from these discussions the "strong skulled" worker. This is the worker who has an accident at work but because of exceptional resistance to injury or healing powers, is not injured and thereby saves the workers' compensation system money. Over the years, the Board and employers have benefitted from countless such workers and the amount of money they have saved the workers' compensation system.

The thin-skull principle is based in fairness and good policy. Then-Chair Ellis articulated these reasons in *Decision No. 915*:

1. Workers with pre-existing vulnerabilities would should have the same level of protection they would have had had under tort law. To exclude workers with pre-existing conditions leaves them with "substantially less protection."[39] This "would not be understandable" under either the history of workers' compensation or the legislation.[40]

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[36] Decision No. 63/98R, 1998 CanLII 15949 (ON WSIAT), para. 10.
[37] Decision No. 881/99, 1999 CanLII 15941 (ON WSIAT), para. 36.
[38] Decision No. 886/12, 2012 ONWSIAT 1398 (CanLII), paras. 31-36; Decision No. 587/10, 2011 ONWSIAT 2567 (CanLII), para. 27; Decision No. 32, 1986 CanLII 395 (ON WSIAT)
[39] Decision No. 915, 1987 7 W.C.A.T.R. 1, p. 101.
[40] Decision No. 915, 1987 7 W.C.A.T.R. 1, p. 101.

2. It is unfair to deny workers' compensation for pre-existing conditions which did not affect them before they were injured on the job: "injured persons become entitled to compensation because they have been engaged as workers" and were then injured.[41]

2.2.6 Intervening causes

Like pre-existing conditions, intervening factors disentitle workers only when they are so important that they render the compensable injury insignificant.[42] This follows logically from the significant contributing factor standard: if the work-related injury is still a contributing factor, there should be entitlement even if an intervening cause has contributing to the worsening of the workers' condition.

The Supreme Court of Newfoundland has stated that the test of causation in several jurisdictions requires an examination of whether the workplace accident made a material contribution, or if in fact its effect on the injury was negligible compared to other circumstances so as to render the chain of causation broken between the workplace and the worker's condition.[43]

2.3 The broader context

Mr. Peter Tabuns: So if, in fact, it's found that there are financial problems with the WSIB, the government will ensure that the changes that are needed are not going to be done on the backs of workers. Is that correct?

Ms. Leeanna Pendergast: That's correct, Mr. Tabuns. Full funding will not be achieved on the backs of injured workers.[44]

There is a crisis at the Board. Not a financial crisis; a crisis of confidence and trust. Despite the Government's promise to the contrary, the Board has been trying to address its financial problems at the expense of injured workers.

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[41] Decision No. 915, 1987 7 W.C.A.T.R. 1, p. 101.

[42] Decision No. 513/12, 2012 ONWSIAT 927 (CanLII) at para. 48; Decision No. 1870/07, 2008 ONWSIAT 260 (CanLII), para. 38.

[43] *Saunders v Newfoundland (Workers' Compensation Commission)* (1998), 166 Nfld & PEIR 227 (NL SCTD), para 28.

[44] Hansard, Standing Committee on Finance and Economic Affairs, Dec. 6, 2010, page 261.

Although we will make constructive recommendations, we feel obligated to comment on the context of this review. Unfortunately, we, along with many other worker stakeholders, believe that the Board intends to change the policies to justify its already-implemented retrenchments to benefits.

2.3.1 The Funding Review

In early 2012, the Board released Professor Harry Arthurs' comprehensive review of its financial situation. Professor Arthurs recommended that the Board put its financial house in order while fulfilling its statutory obligations to injured workers. He urged the Board to restore its reputation for sound financial management without neglecting "its obligation to respect workers' rights and dignity."[45]

Despite Professor Arthurs' advice, the Board has slashed benefits. Using the language of "right-sizing costs" and "modernization", the Board has reduced its benefit costs the expense of injured workers. Older workers have been hit the hardest: the Board tells these workers that their injuries should have healed and blames any ongoing symptoms on age-related degeneration.

In recent reports, the Board boasts about how reductions to loss of earnings and permanent impairment awards are proof of "better return to work and recovery".[46] There is no evidence to support the Board's spin that benefit cuts reflect better outcomes. In fact, based on the evidence set out below, the only logical conclusion is that the Board has cut benefits by "tightening" its internal practices and policies and, in some cases, flouting the policies and the law.

2.3.2 A brief recent history: the KPMG report and its fall out

The KPMG Value for Money Audit on the Board's Adjudication and Claims Administration Program set the stage for "modernization" at the Board.[47] KPMG was hired by the Board to conduct a value for money audit of the efficiency and effectiveness of its claims administration and adjudication

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[45] Prof. Harry Arthurs, Funding Fairness: A Report on Ontario's Workplace Safety and Insurance System (2012), p. 32. Online at http://www.wsib.on.ca/files/Content/FundingReviewFundingFairnessReport/FundingFairnessReport.pdf (Funding Fairness)

[46] 2012-2016 Strategic Plan: Measuring Results, http://www.wsib.on.ca/files/Content/MeasuresReportsQ22012MeasuresReport/Corporate%20MeasuresQ22012.pdf, p. 3.

[47] KPMG, WSIB Adjudication and Claims Administration Program Value for Money Audit Report 2010. (KPMG Report).

processes. In its report, KPMG exceeded its mandate by making specific policy recommendations, and even recommendations for statutory reform. Among KPMG's comments:

- The current adjudication of permanent impairment (NEL) awards is generous compared to other provinces. The Board should consider adopting its own rating schedule instead of the AMA Guides.[48]
- The Work Disruptions policies should be revised because injured workers who are laid off from their jobs - and whose ability to get another job is negatively affected by their workplace disability - have an unfair advantage over workers who are not injured.[49]
- The Aggravation Basis and Recurrences policies have led to the expansion of entitlement and benefits beyond what was envisioned, especially for workers with pre-existing age-related conditions. KPMG suggests these policies be revised to prevent this alleged overcompensation. KPMG recommends a time limit for recurrences to re-enter the system.[50]
- The Board should consider recommending that the government eliminate the six-year final review of benefits.[51]
- Workers who are claiming to be unemployable should be required to apply for CPP-D.[52]

[48] KPMG Report, p. 37.
[49] KPMG Report, p. 28.
[50] KPMG Report, pp. 23, 28.
[51] KPMG Report, p. 51.
[52] KPMG Report, p. 41.

- The Board should adopt a guideline created by the American College of Occupational and Environmental Medicine (ACOEM), a controversial body that has come under significant criticism in academic journals as a "legitimizing professional association for [American] company doctors [and a] vehicle to advance the agendas of their corporate sponsors."[53] This guideline suggests that injured workers should rarely take time off work to heal.[54]

In releasing the KPMG Report, Board management indicated its support for all of KPMG's recommendations. And, indeed, it has already moved forward with most, if not all, of KPMG's recommendations.

The reaction to the KPMG Report in the worker community was swift and overwhelming. Workers were outraged. A few examples of the reaction:

- Large worker protests were held against the Board's adoption of the KPMG Report in Toronto, Thunder Bay and London.
- Paper and online petitions against the KPMG report were signed by over a thousand outraged Ontarians.
- Hundreds of faxes demanding that the Board trash the KPMG Report were sent to David Marshall, WSIB President & CEO.
- A unanimous resolution was passed by over 1500 delegates at the Ontario Federation of Labour convention in December 2011, stating:

> Whereas the recently released KPMG report clearly takes us down the road to a private insurance model, with limited or no rights for the injured workers; and
>
> Whereas the WSIB is supporting this report and has already implemented many of its proposals; therefore
>
> Be it resolved that the OFL call on the government of Ontario and the WSIB to throw out the KPMG report and any current policy and practice that follows its philosophy; and

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[53] KPMG Report at p. 15; "American College of Occupational and Environmental Medicine (ACOEM): A Professional Association in Service to Industry", *Int J. Occup Environ Health 2007; 13: 404-426,* see also, "A critique of the ACOEM statement on mold: undisclosed conflicts of interest in the creation of an "evidence-based" statement," *Int J Occup Environ Health, 2008 Oct-Dec;14(4):283-98.*

[54] *ACOEM Guideline on Preventing Needless Work Disability by Helping People Stay Employed,* p. 5.

Be it further resolved that the OFL initiate a campaign to end the policies and practices called for in the KPMG report . . .

- In a press release dated November 16, 2011, the Ontario Network of Injured Worker Groups criticized the Audit for advocating benefit reductions and called on the Board to end its relationship with KPMG.
- In a letter dated November 16, 2011, two of the most experienced private bar workers' compensation lawyers, Gary Newhouse and Michael Green, called on the Minister of Labour to stop the Board's policy review based on the Audit.
- In a letter dated October 28, 2011, we called on the Board to publicly reject the Audit.
- The Ontario Legal Clinics Workers' Compensation Network made comprehensive submissions to the Premier in January 2012 critiquing the KPMG report.
- The CAW Council unanimously a resolution condemning the KPMG report. CAW Local 112 Financial Secretary and Chair of the CAW Council Workers' Compensation Committee Scott McIlmoyle said that these recommendations signal an all-out-attack on Ontario's injured workers. "At a time when Ontario's injured workers need greater support, KPMG is proposing reforms that would effectively end the workers' compensation system as we know it," McIlmoyle said.[55]
- CUPE Ontario's Report to the Ontario Standing Committee on Government Agencies review of the WSIB detailed KPMG's comments and the Board's benefit cuts.

2.3.3 The Board implements KPMG's recommendations

Soon after the report was released, the Board intended to review its policies to implement some of KPMG's recommendations. It appears the Board did not proceed with these changes in light of stakeholder outrage.

In particular, we are aware that the Board intended to revise its policies to include:

[55] Online: http://www.caw.ca/en/10788.htm

- A limitation on recurrence entitlement to deteriorations that happen within two years of the injury
- A limitation on entitlement for work disruptions, unless the work disruption happened within two years of the workers' return to work or the worker had a permanent impairment
- Restrictions limiting compensation for permanent work disruptions except in exceptional circumstances
- An expansion of the Aggravation Basis policy to limit entitlement for workers with pre-existing conditions
- A statement that in most cases, it is unlikely that the progression of the "natural aging process" is either altered or accelerated by a single injury/illness, unless it is very severe (i.e., a fall from a height as opposed to a lifting strain or repetitive movement)
- A direction to decision makers to begin their analysis of recurrence cases by asking whether there has been a new intervening cause that would disentitle the worker

Many of these same suggestions, in somewhat more veiled language (of "clarity", "consistency" and a dislike of "complexity"), appear in the Board's comments reflected in the Consultation Discussion Paper and the case scenarios. The Board opines that there are insufficient "parameters" in light of "time lapses" and the "natural progression of … age-related changes."[56]

2.3.4 The Board is cutting benefits

Since 2010, workers and worker advocates have seen the Board cut benefits. We have a significant amount of evidence – statistical, experience-based, internal Board documents – showing these cuts. A few examples:

- The numbers :
    - Permanent impairment awards were down 31.3% in the first six months of 2011 compared to the same period in 2010.[57]
    - Denials of initial entitlement claims from 2009 to 2010 increased from 7.9% to 11.3% – an increase of almost 50%.[58]

[56] Consultation Discussion Paper, pp. 14-15.
[57] WSIB's Second Quarter 2011 Report to Stakeholders, p. 3

- A reduction in the amount of LOE benefits for workers who are locked in. In 2011, workers who continued to receive loss of earnings benefits at the six year post-injury lock-in received an average of $15,106 annually in 2011 as opposed to $21,144 in 2009.[59] This is a 28.6% reduction in benefits for the workers with long-term disabilities.
- The percentage of workers receiving full LOE benefits as a total percentage of workers on LOE benefits was cut from 71.9% in 2010 to 58% in 2012.[60]
- The average time for a work transition plan in 2011 was reduced to five months, reduced down from nineteen months in 2009.[61]
- Loss of earnings benefits have decreased by 9.3% reflecting 5619 or 11.2% fewer non-locked-in claims as at June 30, 2012 compared to the same period ending in 2011.[62] In its report to stakeholders, the Board commented that this decrease "is a lagging indicator of improved performance as reductions in volumes of non-locked-in claims are muted by the fact that more than 40% of the payments in the loss of earnings category relate to locked-in claims, over which we have little influence."[63]
- In its 2012-2016 Strategic Plan: Measuring Results, the Board highlights its efforts to "right-size costs" by getting workers off of benefits earlier.[64]

- The Board has changed how it adjudicates asymptomatic pre-existing conditions. In the past few years, the Board has regularly denied ongoing entitlement where workers have not recovered from a strain or musculoskeletal injury within the "expected" recovery time and test results show the presence of any pre-existing degenerative findings.

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[58] KPMG report, p. 22
[59] WSIB's Second Quarter 2011 Report to Stakeholders, p. 3
[60] 2012-2016 Strategic Plan: Measuring Results, p. 16.
[61] WSIB's Third Quarter 2011 Report to Stakeholders, p. 3.
[62] WSIB Second Quarter 2012 Report to Stakeholders, p. 4.
[63] WSIB Second Quarter 2012 Report to Stakeholders, p. 10.
[64] 2012-2016 Strategic Plan: Measuring Results, p. 14.

- To support this new approach, the Board created an adjudicative advice document titled "Determining a Permanent Impairment when there is a Pre-existing Factor: Permanent Impairments for Work-Related Injuries". This document says that regardless of whether the worker has a pre-existing condition or a pre-existing disability, in assessing entitlement to a permanent impairment award, the case manager should "determine which diagnoses and symptoms are related to the work injury and which ones are non-occupational." In our experience, this type of guidance is leading more case managers to deny permanent impairments awards to injured workers because they find that any ongoing injury relates to age-related degenerative changes.

- An example. One of IAVGO's clients suffered a back injury in his job as a roofer. His doctors linked his ongoing symptoms to the workplace accident, and an occupational specialist physician said that his work related disc injury had not recovered. Nonetheless, the Board terminated benefits because he "should have" recovered. When the worker went into the Board offices to try to understand its decision, the Board manager recorded their conversation as follows: "*I explained to the worker that DDD is a non-work related condition and that pain is a symptom and not a diagnosis. I further explained that pain, in and of itself, persisting after an injury is not sufficient to award benefits." He also said that "I explained to the worker that a PI is based solely on the objective physical findings." And, "I explained to the worker that a muscle strain should resolve within a couple of weeks, unless there is an underlying non-compensable condition, in which case it needs to be determined if a compensable injury even occurred."*

- In 2011, the WSIB retained Deloitte & Touche LLP to identify how to "reduce its claims burden whilst complying with legislated benefits requirements to injured workers".[65] In its agreement with Deloitte, the Board provided the following as "background":

[65] SOW #2, July 18, 2011, p. 1, Attachment No 2, Document 6.

> WSIB's largest area of risk lies with its ability to reduce its claim burden whilst complying with legislated benefits requirements to injured workers. The current $12 billion funding deficit is connected to 71% of its claims burden being legislatively locked in. Whilst these claims cannot be touched, the risk associated with new claims coming into the system, and those which are reaching the legislated lock-in duration, must be mitigated.[66]

In other words, the Board is looking for every way to limit benefits to workers whose benefits are not locked-in. Stakeholders only learned of this review when the Board was required to disclose documents to the Standing Committee of Government Agencies in the summer and fall of 2012.

- The Board hired consultants in 2012 to conduct a review of its non-economic loss system and devise recommendations for a different way to rate these awards (despite the legal requirement that the Board use the AMA Guides 3rd ed).[67] The report recommends that the Board stop compensating for fibromyalgia because rating such impairments "reinforces dysfunctional behaviour".[68] And, it said that the Board should not include any permanent impairment assessment for "degenerative processes associated with aging and genetics."[69]

- It appears the Board has followed the consultants' advice and, without any change in policy, decided to start apportioning permanent impairment benefits to workers with pre-existing conditions, even where those conditions were asymptomatic. Whenever workers' diagnostic tests show degenerative changes, the Board's Permanent Impairment Branch has been directed to apportion benefits, without regard to whether the worker had any symptoms.[70] This cut to benefits

[66] SOW #2, July 18, 2011, p. 1, Attachment No 2, Document 6.
[67] O/Reg. 175/98, s. 18(1).
[68] Permanent Impairment Advisory Service: Executive Summary, Brigham & Associates, April 4, 2012, Attachment No 2, Document 4, p. 6.
[69] Permanent Impairment Advisory Service: Executive Summary, Brigham & Associates, April 4, 2012, Attachment No 2, Document 4, p. 7.
[70] WSIB Permanent Impairment Branch guideline documents (2012), Attachment No. 2, Document 5.

is discussed in greater detail below in our recommendations regarding the permanent impairment policies. It violates the plain language of OPM Document No. 18-05-05.

- The Board has adopted a new approach to cases involving employability and psychological injury. The cases we have seen demonstrate a pattern of changed decision making, in some cases rising to the level of bad faith. A few specific examples:
    - The Board's new specialist psychotraumatic disability and chronic pain disability team is using a test that reflects neither the policy nor the Board's long established analysis. For example, in one of IAVGO's cases, a client with a very significant organic injury (43% NEL) asked for psychotraumatic entitlement. The case manager denied the request stating:

      > Psychological reports indicate the workplace injury was a partial contributor to his depression. Co-existing contributors include lay-offs, loss of accommodated work, conflict with WSIB, difficulties with LMR/WT and feelings of mistreatment from his employers. These are conditions not related to the workplace injury. … He is lacking in English skills and there are reports of social isolation which pre-existing his injury. … Based on my review, there is no clear and convincing evidence that the workplace injury significantly contributed to the extended disablement.

      The Board's analysis in the case is at odds with the policy, which states that entitlement is awarded for the socio-economic consequences of injury.[71] The idea that the loss of accommodated work and conflict with Board are not socio-economic consequences of injury is preposterous.

    - In or around 2010, the Board began revisiting employability decisions in claims where benefits had not already been locked-in. This included a number of cases where the Board told workers that they would receive full loss of earnings benefits until age 65. Although it is not possible to ascertain how many such decisions the WSIB reversed, the statistics show a trend in the level of LOE benefits workers are getting at the 72-month

[71] Psychotraumatic Disability, Operational Policy Document No. 15-04-02.

lock-in. For example, from 2009 to 2010, there was a 27.6% reduction in the number of workers locked in at full LOE benefits.[72]

The Fair Practices Commission received a number of complaints from workers whose employability had been reassessed by the Board. Its 2010 Annual Report provides the following background:

> The complaints came from workers who had been on full benefits for many years because the WSIB found them to be competitively unemployable due to their work injuries. The WSIB had earlier advised many of them, often in writing, that their benefits would be locked in at 100 per cent and that benefits would continue at that rate to age 65. The workers contacted the Commission after the WSIB told them, just before the 72 month lock-in, that their benefits were under review and in some cases would be reduced. The workers thought this was unfair.[73]

These reversals continue. We see workers almost every week who come to us for help because the Board has reneged on its commitment to pay them full benefits until age 65.

- The Board appears to be applying a different test for employability which does not ask whether the workplace accident is a significant cause of the worker's inability to work. Instead, it asks only whether the workplace injury prevents the worker from working. The worker's other characteristics, like age, literacy, education and so on, are ignored.

  For example, in one of IAVGO's cases, a worker was deemed unemployable in 2008 and told he would receive full LOE to age 65. The case manager determined that the worker had been able to work in heavy labour until his back injury, despite barriers limiting his employability. Then, in 2011 the same manager reviewed and reversed her 2008 decision, stating that

[72] KPMG Report, p. 40.
[73] Fair Practices Commission Annual Report (2010), p. 3.

she was reconsidering "from a strictly compensable 15% NEL point of view".

- We have recently obtained a copy of a internal Board document entitled "Appeals Services Division Support Documents – Determining Employability: Factors to consider when addressing a worker's level of employability for the purposes of paying loss of earnings (LOE) benefits" (September 2010). The document appears to be an internal guideline given to Appeals Resolution Officers to guide them in determining whether a worker is employable. A copy of the document is attached. It represents a new analysis of employability with a clear message that AROs are to take a more restrictive approach to cases where workers are claiming to be unable to work.

- The Board is in the midst of "modernizing" its appeals system. Its proposed modernization includes limiting in-person hearings, strictly enforcing time limits against injured workers, and advising Appeals Resolution Officers to freely review and reverse unappealed decisions in any claim. At the same time the number of appeals increased by 22.5% in 2012.[74]

2.3.5 What are the implications for this Review?

In light of the above context, we believe that the Board wants to change its policies to "catch up" with its adjudication and justify its new restrictive approach to entitlement under the four policy areas. The fictional case scenarios the WSIB provided laid plain its agenda. All of the challenges identified in the case scenarios suggest that these policies have led to overcompensation or improper compensation. The Board wants to amend these policies to restrict entitlement. None of this is a surprise to worker representatives: the Board has already changed its adjudication of recurrence, aggravation basis, non-economic loss and work disruption cases to curtail entitlement.

[74] 2012-2016 Strategic Plan: Measuring Results, http://www.wsib.on.ca/files/Content/MeasuresReportsQ22012MeasuresReport/Corporate%20MeasuresQ22012.pdf, p. 20.

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VIA REGULAR MAIL

November 26, 2014

Industrial Accident Victims Group of Ontario
489 College Street, Suite 203
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M6G 1A5

Attention: Maryth Yachnin

Workplace Safety & Insurance Board

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Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Dear Ms. Yachnin:

RE: FIPPA Access Request #14-011
IPC Appeal #PA14-214

Further to my letter of September 15, 2014 wherein we provided you with lock-in benefit data for 2010 to present, you have requested for the same data going back to 2006. You also requested the number and percentage of cases locked in at 100%.

Please find below the data as requested:

Lock in Year	100% LOE	1 – 99% LOE
2006	1774	2076
2007	1788	1979
2008	1858	2133
2009	1960	2420
*2010	1395	2806
*2011	1126	2771
*2012	977	3549
*2013	693	3447
*2014	387	2562

*Changing trends in lock-in awards are directly related to improved outcomes from the New Work Transition Program which was phased in between 2010 and 2011. Return to work rates improved from 34.4% in 2009 to 81.3% in 2014 (October 2014).

I trust that this will satisfactorily close this appeal.

Yours truly

Ashleigh Burnet
c.c. Andrea Schwartz, Office of the Information and Privacy Commissioner/Ontario