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:

[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.