

WORKERS' COMP IS A RIGHT



WORKERS' COMP IS A RIGHT



Workers' Compensation Is A Right A publication of the Ontario Network of Injured Workers Groups

Published 11 September 2017

www.injuredworkersonline.org

twitter: @oniwg

facebook: [facebook.com/OntarioNetworkIWG](https://www.facebook.com/OntarioNetworkIWG)

The contents of this report are based on the
experiences of injured workers and their advocates

TABLE OF CONTENTS:

Introduction	1
History of compensation in Ontario	7
Demand 1: No cuts based on phantom jobs	11
Demand 2: Listen to injured workers' healthcare professionals	22
Demand 3: Stop cutting based on "pre-existing conditions"!	30
Conclusions, contact info, and online resources	40

Introduction:

Why We Are Launching This Campaign

Who we are

The Ontario Network of Injured Workers' Groups (ONIWG) is an umbrella organization of injured worker groups in communities throughout the province. We are a voice for workers who have been injured or made ill on the job. We are injured workers and their families, who have had first-hand experience with the Workers' Compensation Board/Workplace Safety & Insurance Board, and we see how the system fails all too many workers across the province. We refuse to accept the unfair system, and we take united action to demand justice for all injured workers.

The Workers' Compensation is a Right campaign

ONIWG is launching the province-wide Workers' Comp is a Right campaign because we need to stand up to the injustices that are being committed against us as injured workers. For too long, the Workplace Safety & Insurance Board (WSIB) has gotten away with violating our rights through cutbacks and austerity. The cuts have been fueled by a market-based approach that involves reducing employer costs and keeping compensation to a minimum. The system has been transformed from one that is supposed to support us, into one that is hostile to us.

We refuse to accept this. We are taking a stand across Ontario to reclaim our rights, and to call for a strong, public workers' compensation system that operates according to its founding principles.

With the Workers' Comp is a Right campaign, injured workers throughout the entire province are coming together and organizing around three key demands:

- 1. No cuts based on phantom jobs!**
- 2. Listen to injured workers' treating healthcare professionals!**
- 3. Stop cutting benefits based on "pre-existing conditions"!**

These demands address some of the WSIB's primary methods of cutting benefits and sending injured workers into poverty.

Together, we are powerful, and we have the collective strength to build our movement until we achieve these demands and see justice for injured workers.

The context of the workers' compensation system today

For years now, injured workers and frontline advocates have been sounding the alarm that the WSIB has been “getting its financial house in order” through austerity and cost-cutting measures. It is abundantly clear that the WSIB decided that the best way for it to save money is by cutting benefits to injured workers.

In implementing its austerity agenda,¹ the WSIB has adopted a private insurance mindset. Just as insurance companies look to deny and cut claims wherever they can, the WSIB has become rigid and aggressive in trying to find ways to deny or terminate injured worker claims. It has abandoned its founding principles, which were based on treating injured workers with dignity and respect, and it has ignored the fact that the compensation system was supposed to be a system of remedial legislation, designed to help people.

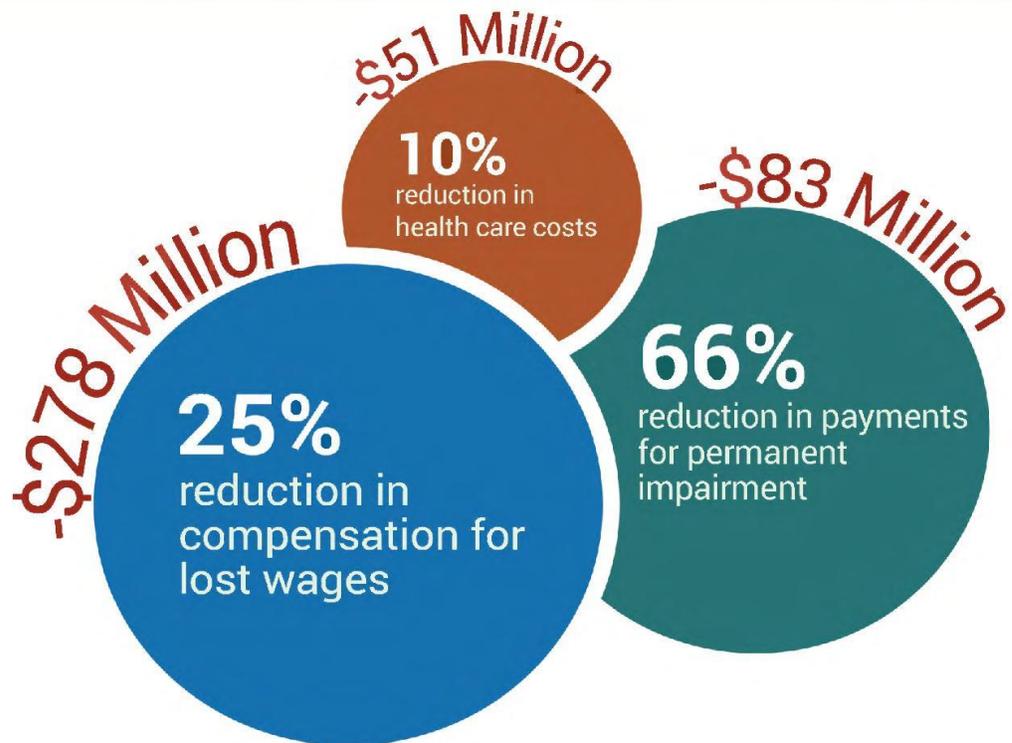
The WSIB's cost-cutting measures have been extreme. From 2009 to 2015, the WSIB cut total annual benefits to injured workers by nearly \$1.16 billion — a 33% reduction over the six-year period.² The figure on the next page breaks that number down by demonstrating the cuts specifically to loss of earnings (LOE) benefits, healthcare benefits, and benefits for permanent disabilities.

¹ The austerity agenda that has taken over the WSIB is in line with a broader political shift we see that concentrates on spending restraints, reducing expenditures, eliminating deficits and other so-called 'austerity' measures. Many critics of the austerity agenda have called for alternate

² Macdonald, Aidan. “Defending the Rights of Injured Workers.” in *Canadian Dimension*, Volume 51, Issue 2: Spring 2017.

Workers' Compensation Benefit Cutbacks

Follow the money: In recent years, Ontario workers injured or made ill on the job have been up against the cutting edge of an austerity agenda. These figures compare 2010 and 2015 WSIB data for three key benefits.



Data source: WSIB Corporate reports. Prepared by Injuredworkersonline.org , 2017

For injured workers, the WSIB's austerity agenda means thousands of people every year are forced into poverty. A comprehensive study published in 2015 found that 46% of injured workers with a permanent disability from their work injury were at or near the poverty line, with 9% living in deep poverty.³ 38% of them had been unable to return to employment since they were injured, and yet the WSIB cut their benefits.

³ Ballantyne, Peri et al. "Poverty status of worker compensation claimants with permanent impairments." *Critical Public Health*, 2015, p.15

In addition to high rates of poverty, injured workers also face high levels of mental health struggles following their injuries. A 2012 study found that nearly 50% of injured workers experienced symptoms of depression, while 37% had symptoms of anxiety.⁴ In many cases, dealing with the WSIB itself is what causes these mental health issues to develop. Many of our members report that they are unable to even open mail or answer phone calls from the WSIB because of the intense anxiety and panic-like symptoms that are provoked by any interaction with the system.

The consequences of the WSIB's practices are disproportionately felt by marginalized groups such as immigrant workers, women workers, and racialized workers. These demographics of people are often stuck in more precarious and unsafe employment conditions with a greater risk of workplace injuries. They are also more vulnerable to intimidation from employers and threats of losing even the precarious work they have.

In effect, as is well-expressed in a 2017 report from the IAVGO legal clinic, in order to cut costs, "the Board is disregarding the safety, health and dignity of workers who are injured on the job. It is abdicating its statutory duty to compensate workers and help them recover and return to work."⁵

Downloading costs onto public systems

Another important consequence of the WSIB's cuts is that the costs of work injuries are being offloaded onto public systems. There is a common misconception that the workers' compensation is funded by taxpayers. In fact, this is not true; the system is funded entirely by employer premiums and the WSIB's own investments.

However, every year, thousands of injured workers are forced onto publicly funded systems like Ontario Works (OW), the Ontario Disability Support Program (ODSP), and CPP-Disability, when they are cut off of WSIB benefits.

⁴ O'Hagan, Fergal et al. "Mental health status of Ontario injured workers with permanent impairments." *Canadian Journal of Public Health*, Vol. 103, No. 4, 2012, p.305

⁵ Yachnin, Maryth. *No Evidence: The Decisions of the Workplace Safety & Insurance Board*. IAVGO Community Legal Clinic, 2017, p.2

Similarly, when the WSIB refuses to pay for healthcare treatment for injured workers, those costs are shifted onto OHIP. As far back as 2007, the Canadian Medical Association has raised concerns about work injury-related costs being shifted to the public system.⁶

The reality, then, is that work injuries are becoming a public burden precisely *because* the WSIB is trying to find ways to skirt its responsibilities.

The WSIB narrative

According to the WSIB, the explanation for the reduction in benefits is that more injured workers are recovering faster and are getting back to work. This explanation, however, conflates better health outcomes with aggressive adjudication of claims. In other words, the WSIB is simply declaring people to be recovered and cutting their benefits – even when the reality is that they still need support.

The WSIB has also put structural biases in place that discourage comprehensive treatment for injured workers. For instance, its healthcare treatment fee structure pays healthcare professionals less for each treatment session they provide to a worker after 4 weeks. Similarly, the WSIB pays healthcare professionals up to 33% less if they advise that a worker cannot return to their pre-injury job.⁷

The systemic problems with the WSIB's decision-making practices are also demonstrated by a recent report on decisions from the Workplace Safety & Insurance Appeals Tribunal (WSIAT) – an independent body that is the highest level of appeal for WSIB decisions. The report found that in 2016 alone, there were 425 cases where the WSIAT addressed unfair decision-making practices that have consistently been identified by the worker community – issues such as disregarding medical evidence, forcing people back to work before it is safe to do so, wrongly cutting benefits based on “pre-existing conditions,” and targeting workers with mental health issues.⁸

⁶ Thompson, Aaron. “The Consequences of underreporting workers’ compensation claims.” *Canadian Medical Association Journal*. Volume 176, Issue 3, January 2007, p. 343

⁷ Singleton, Antony and IAVGO Community Legal Clinic. *Bad Medicine: A Report on the WSIB’s Transformation of its Healthcare Spending*. 2017, p.6

⁸ Yachnin, p.10

In effect, those with the most severe and complex injuries – including mental-health injuries – are the ones who are bearing the brunt of the WSIB’s cost-cutting measures. The reason is simple: their injuries are the more expensive ones. As such, the most severely injured are seen as costs and liabilities to the system rather than as human beings who have a right to the care they require.

This type of analysis has even made it into academic discourse, as a 2016 study on the role of healthcare providers in the workers’ compensation system recommends that compensation boards – including the WSIB – should consider how to fairly and quickly adjudicate complex cases “in a way that does not further injure and stigmatize workers.”⁹

Workers’ Compensation is a Right

Despite the grim context of the workers’ compensation system in Ontario, we will not allow ourselves to be pushed down or swept under the rug. We deserve dignity and respect, and we have a right to compensation benefits for our injuries. As renowned Human Rights expert Prof. Jeffrey Hilgert states, “injured workers are right holders and government and employers are duty bearers.”¹⁰

The rest of this document will explain what our three demands are, why we are focusing on them, and provide our proposed solutions. We have also included a number of real case examples of injured workers who have experienced the issues we are addressing in our campaign. The injured workers’ names have been changed in order to protect their privacy.

⁹ Kosny Agneszka et al., *The Role of Health-Care Providers in the Workers’ Compensation System and Return-to-Work Process*, Institute for Work & Health, 2016, p.35

¹⁰ Hilgert, J. A. “Building a human rights framework for workers compensation in the United States: Opening the debate on first principles.” *American Journal of Industrial Medicine*, Volume 55, Number 6, 2012, p. 510

History:

Worker's Compensation in Ontario

(For a very thorough timeline of the history of workers compensation, visit www.meredith100.ca/timeline)

Prior to 1914, compensation for work injuries had to be acquired through civil lawsuits and it depended on a worker being able to prove employer negligence in court. However, as mechanization of production grew at the turn of the century, so did accident rates, and juries were increasingly holding employers responsible for workplace safety.

Meredith Commission

Workers were organizing and agitating for fair compensation, and employers were seeking stability against the increasingly unpredictable costs of civil suits. In response, a Commission of Enquiry was established in 1910, headed by Chief Justice of Ontario and former Conservative Party leader, Sir William Meredith. By the time he issued his Final Report in 1913, Meredith had gathered written evidence, travelled to several countries in Europe to see up close how workers' compensation systems were working there, and held 27 sittings around the province where he heard from almost 100 witnesses, including injured workers themselves.

Based on Meredith's reports and draft legislation, the Ontario Legislature passed the 1914 Workmen's Compensation Act, based on a "historic compromise" that saw workers give up their right to sue in return for a no-fault, employer-paid system that would provide speedy and secure payments for as long as the disability lasted. On this front, Ontario became a leader, as the foundational Meredith Principles were adopted in similar legislation across Canada and around the world.

The 100+ years since have seen a number of changes following the findings of government commissions, as well as the ongoing struggles of labour and the injured workers' movement. The late 1960s in particular saw the rise of an injured workers' activism that addressed issues of a hostile and discriminatory Board administration and its medical consultants, and the need for improvements in benefits and services for workers with permanent disabilities.

Meredith principles

There are various ways of articulating the principles laid out by Justice Meredith, but however they are named, they rest on the historic compromise that gave both sides financial security. Employers would be protected from lawsuits by injured workers and be able to calculate payments as a stable cost of doing business, and in exchange, injured workers would receive prompt benefits for as long as the disability lasted in a non-adversarial system.

More specifically, the Meredith principles are:

No fault

There should be no need to prove the accident was the employer's fault.

Non-adversarial

Workers' compensation should be an inquiry system, based on benefit of the doubt that does not pit employer vs. worker in an injury scenario.

Compensation for as long as disability lasts

Workers should be able to depend on security of benefits based on lost wages and promptly paid. The injured worker should not become a financial burden on their family or the community.

Employer pays

Meredith felt that the system should be funded by employer payments based on their total payroll. This made sense because employers can pass on costs (for example in prices of goods and services and in wage negotiations) in ways that workers cannot, and injured workers pay in other ways, including some level of lost income despite the compensation.

Collective liability

Employers should pay into single accident fund and not suffer financial consequences from the cost of a specific accident.

Independent public agency

The Workers' Compensation Board should be a non-partisan organization that is set up to administer claims and assessments.

Present day

Workers' compensation has not been immune to the forces of austerity that have affected working people all over the world. In the 1990s, under the Mike Harris Conservatives, the Workers' Compensation Board changed its name to the Workplace Safety and Insurance Board, and we began to see an accelerated pace of changes that focussed more on providing "cheap insurance" for employers, and less on "just compensation" for injured workers.

Among other things, the rates employers had to pay into the system were dramatically slashed. The resulting reduction in premiums collected have created what the WSIB calls an "unfunded liability" (the difference between what the WSIB has in the bank, and what it has committed to paying out in the future). This unfunded liability has been used repeatedly to justify changes in the way benefits are given to injured workers.

In 2010, the WSIB hired former investment banker David Marshall and gave him the express mission of reducing the unfunded liability. Mr. Marshall explicitly told the legislature that he would begin cost-cutting measures by bringing forward "some tough, tough proposals... I mean you can't recover this amount of money without ... pain somewhere in the system ...". In a very short period of time, Mr. Marshall introduced changes to policy and practice that cut the WSIB's costs by reducing compensation, and transformed the WSIB into an entity that many ONIWG members say has become increasingly hostile to workers.

Justice for injured workers

Even though it was published in 1913, the final paragraph of Justice Meredith's report sheds some light on how a compensation system was achieved, and how it must work:

In these days of social and industrial unrest it is, in my judgment, of the gravest importance to the community that every proved injustice to any sections or class resulting from bad or unfair laws should be promptly removed by the enactment of remedial legislation and I do not doubt that the country whose Legislature is quick to discern and prompt to remove injustice will enjoy, and that deservedly, the blessing of industrial peace and freedom from social unrest.

Half measures which mitigate but do not remove injustice are, in my judgment to be avoided. That the existing law inflicts injustice on the workingman is admitted by all. From that injustice he has long suffered, and it would, in my judgement, be the gravest mistake if questions as to the scope and character of the proposed remedial legislation were to be determined, not by a consideration of what is just to the workingman, but of what is the least he can be put off with, or if the legislature were to be deterred from passing a law designed to do full justice owing to groundless fears that disaster to the industries of the Province would follow from the enactment of it.

It is with this legacy in mind that ONIWG is launching the *Workers' Compensation is a Right* campaign.

Our Demand: **No Cuts Based on Phantom Jobs!**

Background: What do we mean by “phantom jobs”?

One of the WSIB’s primary ways of reducing benefits to injured workers is through the practice of “deeming”. In essence, deeming – which can also be called “determining” – is when the WSIB deems (pretends) that an injured worker has a job that they do not in fact have in reality. The Board then pretends that the worker is earning a salary from the non-existent job, and cuts their benefits by the amount of the imagined salary. Injured workers who have been “deemed” are left with little or no compensation benefits, regardless of whether they are in fact employed.

We refer to deemed jobs as “phantom jobs” because the reality is that there often is no actual job for the injured worker. The WSIB has simply dreamed up a job that it claims an injured worker could get, and then used it as an excuse to cut benefits.

A typical example of deeming looks like this:

- Harpreet is making \$20/hour when she suffers a permanent back injury and cannot go back to her old job.
- She receives loss of earnings benefits from the WSIB for a few weeks. The WSIB then “deems” Harpreet able to work as a customer service representative – even though she has limited English skills, has no related work experience, and her doctor says she is not medically able to return to work.
- The WSIB deems Harpreet to be earning the current minimum wage of \$11.40/hour as a customer service representative, even though she has not been able to get a job and the WSIB knows she is not actually employed.
- Her benefits are cut by \$11.40/hour, and she now only gets about \$218 per week in workers’ compensation benefits.

Instead of looking at what the injured worker is actually earning in reality, the WSIB comes up with a phantom job and pretends that the worker has returned to full-time gainful employment after their injury.

This practice is codified in several of the WSIB's policies, including one on how they pay benefits for lost wages. That policy says that if a worker is unemployed at the end of a retraining program – and retraining programs are often minimal and unhelpful in actually helping people obtain real employment – “benefits are paid using the earnings the worker would earn if employed” in the deemed job. In other words, if the worker is unemployed, the WSIB will pretend they are working and earning money anyways, and cut their benefits accordingly.

It should be noted that the provincial government and WSIB has shifted away from using the word “deeming” in recent years, preferring to call the process “determining.” However, it is clear to injured workers in this province that their practices have not changed along with their terminology.



Deborah's Story

Deborah worked as a printing press operator, and in 2014 she had multiple accidents that resulted in, among other things, nerve damage in her arm, tendon damage in her thumb, a torn rotator cuff, and a broken bone in her hand. Many of her injuries are permanent, and she will never regain full use of her hands.

For almost a year and a half after the injury, she was denied any compensation for her lost wages, or for prescriptions and medical treatment. In 2016, the WSIB finally accepted that her injuries were caused by her work. However, they still found a way to restrict her benefits by “deeming” her to be working as a storefront greeter – a phantom job that Deborah never actually had.

Because the WSIB pretended that Deborah was earning a salary as a greeter, she only received \$11,000 in compensation benefits for 18 months of lost wages. Before her injury, Deborah was earning about \$35,000 per year.

For the year and a half that Deborah was unable to work and also not getting anything from the WSIB, she had to withdraw all of her retirement savings – complete with penalties from the bank – in order to cover her living expenses. Additionally, after her RRSP was exhausted, she was forced to use up her son's education fund, which she had been building since his infancy. This happened just as he was graduating from high school and considering his post-secondary options. He has now had to postpone his post-secondary education indefinitely. Deborah's struggles with the WSIB have directly and negatively affected her son's future opportunities.

The WSIB continues to deny her coverage for prescription medication and physiotherapy, even though her doctors are clear that she needs them because of her work injuries.

Deborah's case demonstrates the absurdity of the phantom job phenomenon, as she was retroactively deemed to be working, even though the WSIB knows that she was not actually working – and was in fact unable to work – for those 18 months.

Why is this a problem?

Poverty

The fundamental impact of deeming people to have phantom jobs is that injured workers like Deborah – in particular, those who have permanent disabilities stemming from their work injuries – are systematically forced into poverty, and forced to turn to publicly funded social assistance programs.

As was stated above, a comprehensive 2015 study found that 46% of injured workers with a permanent disability were at or near the poverty line, with 9% living in deep poverty.¹¹ The study also makes the important observation that often, when the injured worker falls into poverty, their entire family does as well. These statistics suggest that over 250,000 individuals (workers with permanent disabilities and their family members) have fallen into poverty since the practice of deeming began in 1990.

A primary reason for these staggering levels of poverty is that these are the workers whose benefits have been reduced or cut off completely because the WSIB has deemed them to have jobs that do not actually exist and that they are not actually able to obtain.

The financial impact is heightened even further when an injured worker who has been deemed reaches age 65. At 65, compensation for lost wages is cut off, meaning even benefits that were already reduced due to the practice of deeming are no longer provided to the worker. Workers who have been deemed but unable to return to work also lose years of contributions to the CPP retirement plan. With no compensation benefits and meagre CPP contributions, they are at risk of even more devastating levels of poverty once they reach retirement age.

¹¹ Ballantyne et al, p.15

Ignoring systemic barriers

The practice of deeming is also detached from reality in that it ignores the stigma that people with disabilities face in the labour market. A January 2017 poll found roughly half of Canadians with disabilities are unemployed, with the vast majority saying that they are out of work directly because of their disability.¹²

Ostensibly in recognition of this fact, the Ontario minister responsible for accessibility, Tracy MacCharles, launched a strategy to “break down barriers for people with disabilities” when it comes to employment.¹³

Injured workers face the same stigma and discrimination when they attempt to return to the workforce. Quite simply, they are likely to face unemployment, in large part because of their work-related disabilities. Indeed, the 2015 study found that 54 months after their injury, 45% of injured workers with a permanent disability were unemployed and experiencing full wage loss.¹⁴

However, the WSIB ignores these facts, and deems injured workers with permanent disabilities to have the same access to the labour market as able-bodied people.

Of course, we want to work towards a society where disability is not a barrier to employment. ONIWG has been engaged on this front for many years, and the WSIB should be part of this push as well. It can do this by meaningfully supporting injured workers and treating them with empathy, compassion, and dignity. However, the current practice of cutting their benefits and sending them into poverty does nothing to alleviate the discrimination faced by people with disabilities.

¹² McQuigge, Michelle. “Only Half of Disabled Canadians are Employed, Poll Finds.” *The Globe and Mail*. January 17, 2017 <https://www.theglobeandmail.com/report-on-business/economy/only-half-of-disabled-canadians-are-employed-poll-finds/article33650160/>

¹³ Kristin Rushowy. “Job Strategy for Ontarians with Disabilities Lacks Specifics, Critics Say.” *Toronto Star*. June 5, 2017 <https://www.thestar.com/news/queenspark/2017/06/05/job-strategy-for-ontarians-with-disabilities-lacks-specifics-critics-say.html>

¹⁴ Ballantyne et al., p.10

Ignoring labour market realities

It is also important to note that the WSIB frequently deems people to be earning full time wages in job categories where full time employment is rare. Some of the more common phantom jobs that the WSIB deems people to be performing include customer service representatives, cashiers, telemarketers, and ticket takers. These are precarious jobs that are often only available on a part-time basis, and with little job security.

As such, even if an injured worker were to obtain one of these jobs, it is likely that they would only be working part-time hours. They would also be at risk of losing the job completely if they could not keep up with the fast pace and job demands. And yet the WSIB generally assumes that people in these scenarios are “voluntarily under-employed,” and deems them to be working full time, with benefits reduced accordingly.

At the end of the day, it should go without saying that it is patently unfair to deem people to be working stable, full time hours in jobs where stable, full time opportunities rarely exist.

“Deeming” and the minimum wage increase

The Ontario government has just announced plans to increase the minimum wage to \$15/hour by January 2019. A raise to the minimum wage is an excellent and long-overdue initiative that will raise the floor for all workers across the province. However, because of the way that the WSIB applies its deeming policy, it can actually use the minimum wage increase to pretend people are earning higher phantom wages, and cut their benefits even further.

In Harpreet’s example above, when the minimum wage increases, her deemed (pretend) wages will also increase. At a minimum wage of \$15/hour, her workers’ compensation benefits are reduced to \$127 per week.

On the next page is a chart that shows how injured worker poverty will increase if the WSIB is given free rein to deem people to be earning higher phantom wages.

Injured workers and advocates have reached out repeatedly to the Ministry of Labour and the WSIB to seek assurances that a minimum wage increase intended to help everyone in the province will not hurt injured workers. The minister and the Board have both stated in reply that they have no current plans to address the issue or change the practice of deeming.

Pre-injury Wage Single no dependants	Net Average Earnings - (40 hour work-week avg.)	Loss of Earnings is calculated at 85% of net	Impact of Deeming Min Wage Deducted \$11.40 x 40 hours x 85% + deductions	Impact of Deeming Min Wage Deducted \$15.00 x 40 hours x 85% + deductions
\$13.00 per hour	\$520.00 - deductions = \$437.88	85% of \$437.88 = \$372.20	\$372.88 - \$332.26 = \$40.62 Loss Of Earnings paid (weekly)	\$0 Loss Of Earnings paid (weekly)
\$28.00 per hour	\$1120.00 - deductions = \$864.31	85% of \$864.31 = \$734.66	\$734.66 - \$331.57 = \$403.09 Loss Of Earnings paid (weekly)	\$734.66 - \$422.92 = \$311.68 Loss Of Earnings paid (weekly)
\$20.00 per hour	\$800.00 - deductions = \$647.02	85% of \$647.02 = \$549.97	\$549.97 - \$331.58 = \$218.39 Loss Of Earnings paid (weekly)	\$549.97 - \$422.99 = \$126.98 Loss Of Earnings paid (weekly)

Disregarding medical evidence

In deeming people able to return to work, the WSIB frequently disregards the medical evidence provided by injured workers' treating healthcare professionals. This can happen by entirely ignoring a doctor's opinion that their patient remain off work in order to allow time to heal, or by selecting a phantom job that the doctor believes to be medically unsuitable, given their patient's disabilities.

As will be discussed in the following section, disregarding the opinions of injured workers' treating healthcare professionals is another systemic problem that can exacerbate physical and mental health issues, and accelerate the slide into poverty.

Harvey & Evelyn's Story – The Family is Affected Too

Harvey worked as a highrise window cleaner. In 1995, the clips on his ladder extension broke, and he fell 44 feet. His right foot took the full impact of the fall, shattering his ankle and turning his heel into dust. A year later, he managed to return to his job, on a rebuilt foot.

In July 2009, though, Harvey re-injured his metal foot, in another incident with a ladder at work. He couldn't walk and needed another surgery. Harvey was still waiting to see a surgeon when the WSIB deemed him able to work. Some of the jobs they declared him able to do were parking lot attendant and light assembler – jobs that were not actually suitable or available to him.

After being deemed to be earning a salary in the phantom jobs, Harvey's compensation was reduced to \$419 per month. He and his wife, Evelyn, were forced onto social assistance. Harvey had never been put in this kind of position before. He started working at the age of 15 and was proud of that. At 18, he started his career as a highrise window cleaner and loved every moment of it.

Now, he not only had to deal with the stigma of being an injured worker, but both he and Evelyn also had to cope with the stigma of relying on social assistance, using food banks, and falling behind on rent and utility payments.

The WSIB refused to wait to see the surgeon's opinion before deeming Harvey able to work in a phantom job. They also ignored the fact that he had already had a life-altering injury to the same foot in 1995. When Harvey tried to explain to the WSIB that he had learning disabilities that affected his ability to work, his Case Manager asked if he was "retarded or just plain stupid." From that moment on, Evelyn insisted that all communication with the WSIB had to go through her.

Harvey has now had four surgeries on his foot. The financial punishment from phantom jobs began while waiting for the first surgery. His ankle still has an S shape to it, and he requires a custom brace, orthotic shoes and boots, a four-post cane, and a mobility scooter. He is at 8 out of 10 on the pain scale every day.

Harvey and Evelyn's life will never return to what it was before the workplace accident. Their financial future is one of unending poverty, brought on by the WSIB's practice of deeming. Harvey didn't just lose his ability to work, he lost the ability to live his life as he'd planned.

As Evelyn says, "the WSIB is a 'safety net' full of holes big enough to drop a highrise window cleaner and his spouse through."

What are the solutions?

When the deeming system was first designed by Professor Paul Weiler, the intention was that injured workers could only be deemed under very limited circumstances. In effect, it could only happen if the Board could prove that the worker had turned down an offer of suitable work. Otherwise, their benefits should be based on their actual earnings, not phantom jobs and phantom wages.

ONWIG is calling upon the provincial government to introduce legislative changes to return to that original intention. We have two major proposals to help make this happen, which are summarized below. There are also several additional safeguards that must be put in place, which are discussed in the following section.

Proposals

- 1) **No deeming unless there is proof of actual work refusal.** As suggested by Weiler, the WSIB must have a very high standard before it can “deem” an injured worker to be at fault for not working after injury. He proposed a “tangible indication test,” i.e. documentation of a written job offer being refused:

“...when the board had a tangible indication that suitable work was in fact available to this worker, presumably through evidence that the employer, the Board , or some other agency had made a specific job offer to him/her.”¹⁵

- 2) **Return to one-year support and compensation for job search assistance.** The WSIB must provide permanently disabled injured workers with meaningful assistance in securing suitable work, via supportive vocational rehabilitation counsellors and wage loss benefits while they engage in their job search.

¹⁵ Paul Weiler, *Reshaping Workers' Compensation in Ontario*, 1980, p.62.

When first introduced in 1990, the law provided up to 12 months of job search assistance and full compensation for injured workers. This allowed the WSIB rehabilitation counsellors to provide job search assistance and leads for injured workers to find suitable work. It also allowed the worker and the WSIB to have a better idea of what the job market is like for the worker.

If no job is available after the job search assistance, full compensation should be in order on an ongoing basis, subject to non-intrusive reviews.

Additional safeguards

- 1) **Recognize systemic barriers.** The WSIB must recognize that injured workers with permanent disabilities face systemic barriers in returning to work and compensate accordingly.
- 2) **Require a job offer in good faith.** If an injured worker is offered a job, it must be a bona fide (in good faith) offer. We do not want a new industry creating a “revolving door” of exploitative jobs offered to injured workers.
- 3) **Recognize wage losses to the individual worker.** “Suitable” and “available” work must be defined in relation to the individual injured worker, rather than an “average” worker.
- 4) **Properly define “suitable work.”** “Suitable work” means meaningful, productive work consistent with all physical and psychological limitations of the worker, as well as their personal and vocational characteristics. For instance, a teacher should not be retrained as an assembler, and a person who is ill-suited to dealing with the public should not be retrained to be a customer service representative.
- 5) **Definition of “available work.”** “Available work” means suitable work that is actually offered to the injured worker, rather than being generally available in the competitive labour market.

- 6) **Reverse the onus of “cooperation.”** Currently, injured workers must cooperate with whatever the WSIB says, and if they do not, benefits are reduced or cut off. This has led to widespread abuse and fear, as cooperation has become “obedience to the WSIB or else...” The late Professor Terrence Ison, one of the foremost experts on workers’ compensation in Canada, predicted that with deeming, WSIB rehabilitation would take on a “paramilitary flavour” and it is happening. We propose that the legislation place the onus of cooperation with the WSIB, codifying the fact that it should be the WSIB who should cooperate with and listen to the injured worker.

- 7) **Create non-intrusive reviews of wage losses.** Reviews of wage losses must be non-intrusive and according to Weiler’s vision. He envisioned a questionnaire sent by the WSIB with an auditing procedure similar to our income tax system.

- 8) **End the age 65 cut-off for wage loss compensation.** Currently, wage loss compensation is cut off once an injured worker turns 65 (with minor exceptions). This provision must be scrapped, and compensation must be available past age 65 if the worker intended to work beyond that date, as many workers do in 2017.

- 9) **Change must begin at the top and extend through the whole system.** No reform of deeming – or any other issue – can be lasting unless the WSIB returns to the founding philosophy of the system: that the compensation system is designed to help, not hinder, the injured. We also need people at the top and spread through the entire organization who understand and believe in this philosophy.

The proposals outlined above are methods of fixing the phantom jobs problem within the current system by significantly limiting the use of deeming. In effect, we propose to get rid of the current approach, which deems virtually everyone to have phantom jobs and wages, by returning to the principles and processes that were promised when the system was introduced.

Our Demand: **Listen to Injured Workers' Treating Healthcare Professionals!**

Background: Our doctors know us best¹⁶

In 2016 and 2017, a series of reports were released by injured worker groups, labour organizations, and legal clinics that said what injured workers and advocates have long known: There are serious problems with the way that the WSIB considers medical information.¹⁷ These reports highlighted a broad range of issues, including failing to heed medical advice regarding readiness to return to work, insufficient treatment, blaming 'pre-existing conditions' for injuries clearly caused at work, and using reports from independent medical reviewers who never meet the worker, even when these reports contradict the evidence provided by a worker's healthcare team.

Legally, workers are entitled to treatment from the healthcare provider of their own choosing. Section 33 of the Workplace Safety and Insurance Act states that:

*A worker who sustains an injury is entitled to such health care as may be necessary, appropriate and sufficient as a result of the injury and is entitled to make the initial choice of health professional for the purposes of this section.*¹⁸

The act goes on to state that "The Board shall pay for the worker's health care."¹⁹

¹⁶ Portions of this section are drawn from a 2015 report entitled "Prescription Overruled : Report on How Ontario's Workplace Safety and Insurance Board Systematically Ignores the Advice of Medical Professionals, co-published by ONIWG and the Ontario Federation of Labour.

¹⁷ Prescription Overruled; Bad Medicine; No Evidence.

¹⁸ *Workplace Safety & Insurance Act*, Section 33 <http://www.ontario.ca/laws/statute/97w16#BK36>

¹⁹ *Ibid.*, Section 33(2)

Gabriela's story

Gabriela worked in an MPP constituency office. In 2007, she developed PTSD, depression, and other mental health problems after a violent and agitated client blockaded her in her office, and threatened to find out where she lived and come after her. Police later informed Gabriela that the client was well-known to them and had a long history of gun violence.

Although the police were able to diffuse the situation, Gabriela has never fully recovered from it. She still gets nightmares and flashbacks about the incident, she goes through periods where she feels frozen and numb, she has difficulties with her memory and concentration, and she has a fear of working in any situation where she has to deal with the public.

Her family doctor and psychiatrist have directly related all of these symptoms to the PTSD stemming from the work incident. Additionally, they have diagnosed her with chronic fatigue syndrome/fibromyalgia, also connected to the effects of her PTSD. The same treating doctors have said she is unable to work, and is seriously disabled due to her mental health conditions. Her psychiatrist has said that she requires complex and multifaceted care, and if she does not receive this, further harm will come to her.

The WSIB, however, has disregarded these opinions. They have cut off her benefits, saying that not only is she able to work, but that she is able to work as an experienced Communications Specialist – a job she's never done before – earning over \$30.00/hour. She has been deemed to have this phantom job, and her benefits have been cut off entirely. Now, in addition to her mental health struggles, Gabriela is facing poverty.

The WSIB has also dismissed the chronic fatigue/fibromyalgia, despite the medical opinions from her treating doctors. Additionally, her psychiatrist's recommendation that she get complex continuing care has been ignored.

Predictably, her psychiatrist also stated that her dealings with the WSIB have exacerbated her mental health conditions.

Why is this a problem?

When you are injured or sick, one of the most important relationships you have is with the treating healthcare professionals that are helping you get better. The doctors, nurses, psychologists, and physiotherapists who are treating you know more about your condition than anyone else. Yet we all know cases where the WSIB ignores advice of injured workers' doctors and cuts their benefits or sends them back to work before they are medically ready.

Both workers and their doctors in this province have raised a number of concerns about the way a worker's doctor's opinions are weighed as evidence, resulting in inadequate services.

How are opinions ignored?

- The WSIB refers injured workers to medical professionals for assessment, and then fails to follow the professionals' recommendations.
- Despite medical opinions to the contrary, the WSIB often attributes illness or injury to "pre-existing conditions," and refuses to fund benefits or care.
- The WSIB will often seek second opinions from so-called "paper doctors," who simply review the file without ever meeting the patient. At least one of these doctors has alleged that the WSIB inappropriately pressures them to deliver dishonest reports so that they can avoid paying benefits, and has filed a lawsuit against the WSIB that has been allowed to move forward.²⁰
- The WSIB pressures workers to return to work even when their treating doctors recommend more time to heal.
- Injured workers' well-meaning attempts to return to work are being used against them as evidence that they are employable and healed, even when these attempts fail, resulting in loss of benefits.

²⁰ Gallant, Jacques. "Hamilton-Area Doctor Gets Green Light to Sue WSIB, Employer. : *Toronto Star*, April 21, 2016 <https://www.thestar.com/news/gta/2016/04/21/doctor-sues-wsib-employer-after-refusing-to-change-medical-opinion.html>

- The WSIB actively tries to discredit the opinions of treating health care professionals when those opinions are likely to lead to increase benefit costs.

How does this affect services?

- Approval for services can take months, when patients' needs are often immediate.
- Treating physicians' referrals for physical and psychological therapy are often denied, even in dire situations.
- The WSIB will refer an injury claimant to a specialist but will not fund sufficient time for a proper assessment and report. The WSIB also demands frequent progress reports that it will not pay for and the recommendations of which are often ignored.
- The treatment allowed is often too narrow, such as not covering activities related to brain injury rehabilitation; or occupational therapy.
- In cases where the WSIB *does* provide funding for physical or psychological treatment, the sessions are often cut off before the treating professional determines that healing is complete. Some health care professionals report that when they ask why funding for services has been discontinued, they are simply told that the Board is not required to provide explanations to care providers.
- If the caregiver feels that his patient is still struggling at the time that care is cut off, they are forced to either abandon a patient in need or provide services for free.
- Physiotherapists report that when ongoing treatments ("maintenance treatments") are denied, injured workers' conditions can degrade. This often leads to increase use of pain medication, loss of function, or self-medicating with drugs and alcohol, all of which come with significantly more side effects than proper physical treatment.

Consequences

The effect ignoring the advice of treating doctors can have – not just on workers, but on their families, and on the province as a whole – is difficult to overstate.

When the board refuses to cover health care costs, one of two things happens:

1. If the health care service is not funded by OHIP, the cost is shifted to the injured worker. The worker will pay out of pocket if possible, but for many patients who are unable to work as a result of their injuries it is often not. If the worker cannot afford the treatment, he or she simply goes without. This includes prescription medication, physiotherapy, psychotherapy and health care aides.
2. On the other hand, if the necessary treatment is covered by OHIP, the cost shifts from the employer-funded WSIB to the publicly funded health care system.

Likewise, when the WSIB declares a worker ‘healed’ and cuts their benefits, the effect is the same as it is with deeming, and many more injured workers end up on welfare or the Ontario Disability Support program, again shifting the costs from an employer-funded system and onto every taxpayer in Ontario. When an injured worker’s benefits are cut before they are better, they face poverty and all of the social and medical problems associated with it. This creates significant costs to society as a whole that would not have existed if the worker were properly cared for by the WSIB.

Finally, when someone gets sent back to work too early and against their doctor’s advice, they face a very real risk of re-injury.

Bassem's Story

Bassem worked in a prepared food manufacturing plant and was injured in 2011 when he fell at work and fractured a vertebra. Unaware of the seriousness of his injury, he continued to try to do his job while working through discomfort for about 9 months, until he was stopped from continuing by increasing pain. He received loss of earnings benefits and WSIB sponsored physiotherapy.

In January and March 2012 the WSIB sponsored clinic reported to the WSIB that it had concerns about his pain levels and the potential for it to become chronic. The doctors recommend that the WSIB refer Bassem for "a concurrent mood disorder psychological assessment." The WSIB ignored this treatment recommendation from their own specialists.

Bassem asked his family doctor to make the referral. The family doctor tried to make the referral to the Humber River Regional Hospital, and was told to get the WSIB to refer his patient to CAMH. The WSIB refused to make the treatment referral.

When the family doctor tried to make the referral to CAMH, he was told that they would not accept the referral because it involves workers' compensation.

In March 2012, instead of referring Bassem for a psychological assessment, the WSIB asked Bassem to return to work on gradually increasing hours, and agreed to sponsor concurrent physiotherapy. He agreed to try it and began working. The employer complained to the WSIB about the fact that Bassem was only working part time. With no new medical information because of the lack of available care, the WSIB declared Bassem fit to work full time and cancelled the physiotherapy.

Bassem was not physically able to tolerate the job on a full time basis and had to stop working. The WSIB cut off his loss of earnings benefits on the argument that he could earn his old full time wages. Bassem had no income and his wife had to support the family on her own meagre wages.

The family doctor again asked the WSIB to approve physiotherapy so that Bassem could condition himself to return to work. The WSIB ignored this treatment request.

Bassem started the WSIB appeal process, and in 2015 the WSIB finally changed its decision and agreed that he had a permanent impairment. They asked him to return to work on a gradually increasing basis. The family doctor yet again asked the WSIB to approve physiotherapy to condition Bassem to be able to return to work after years of inactivity. The WSIB yet again refused.

Bassem tried to return to work with no physiotherapy but was unable to sustain it

What are the solutions?

ONIWG believes that the WSIB's current use of private consulting firms to collect medical consultant reports is irreparably flawed. The fact that these private firms have a financial interest in maintaining lucrative contracts with the WSIB can make it difficult for workers to trust their opinions. The fact that some of the firms used by the WSIB also operate as private "claims management firms" that work explicitly to reduce claims costs for employers makes this even worse. If the compensation board truly believes that a system of acquiring additional information from doctors that a worker never meets, the circumstances in which this is acceptable must be tightly defined in legislation and faithfully carried out by the WSIB in policy and operations.

- 1) **Institute clear legislation that prioritizes and respects the evidence put forward by the treating health professionals** who know the injured workers best.
- 2) When there are gaps in the medical information, the WSIB should **always try and address those gaps with a worker's treating healthcare professional(s)** before seeking outside opinions.
- 3) **Establish a process independent of the WSIB to resolve medical disputes** that involves actual medical experts in the specific areas of dispute.
- 4) When medical consultants are necessary, the reasoning for this must be quickly and clearly communicated to the worker, and the **doctors should be drawn from a roster maintained by an independent body**, rather than the current fee-for-service model currently used by the WSIB.
- 5) If "paper doctors" must be used, their role should be re-imagined as **one of supportive case-consultant**, rather than end-of-the-road expert opinion. After all, they have never met the worker and know only a small section of their medical history.

- 6) Before deciding that a worker has recovered from an injury, **decision-makers should have a report from the worker's treating physician verifying recovery.**

- 7) When it is determined that a worker has a permanent disability, this worker's **"Non-Economic Loss" assessment must be done by a physician in person**, rather than by a WSIB nurse consultant who simply reads the file. The permanent impairment rating a disabled worker receives is extremely important, and could affect what benefits they receive for the rest of their lives. It is both essential and suggested in the Workplace Safety and Insurance act that these assessments be done in person, by a doctor that can gauge the true effect of a disability on a worker's whole person.²¹

**WORKERS' COMP
IS A RIGHT**

²¹ Workplace Safety & Insurance Act, Sections 47 (4) and 47 (5) on 'Selection of Physician'.

Our Demand: **Stop Cutting Benefits Based on “Pre-Existing Conditions”!**

Background: What’s the issue with “pre-existing conditions”?

In and around 2010, the WSIB began a practice of aggressively reducing or eliminating benefits to injured workers who they claim have “pre-existing conditions.” Essentially, rather than compensating somebody for a work injury, the WSIB searches through their medical records and tries to find something else that it can blame for their ongoing disability, essentially some other “condition” that it can claim is the “real” source of the disability.

All too often, though, the “pre-existing conditions” that the WSIB points to never actually affected the person at all until they were injured at work. In many cases, they were never diagnosed by a doctor before the work injury, and never caused the person any symptoms.

In fact, the WSIB’s interpretation of “pre-existing conditions” is so broad that it includes factors that are simply a part of the normal aging process. Rather than treating injured workers like human beings, they are treated like used cars, with depreciating value as they age.

This differs from the WSIB’s previous policy and practice, in which they only limited entitlement for “pre-existing impairments.” The difference is that a “pre-existing impairment” is a medical issue that has symptoms, and that previously limited a worker’s ability to do their job. The WSIB has now virtually eliminated the distinction between a “condition” and an “impairment,” and it regularly and openly reduces benefits for issues that never affected the worker before, as a matter of policy.

Tellingly, a recent report on decisions from the Workplace Safety & Insurance Appeals Tribunal (WSIAT) – an independent body that is the highest level of appeal for WSIB decisions – found that in 2016, there were 113 cases where benefits were cut or denied based on “pre-existing conditions,” even though the worker was able to function perfectly well until the injury.²² In overturning the WSIB’s decisions, the WSIAT wrote that there was “little, if any, evidence,” “no evidence,” or “no medical opinion” suggesting that a pre-existing condition was a factor of the worker’s ongoing disability.

²² Yachnin, p.5

According to the report, some of “...[t]he Board’s decisions were contrary to the ‘inescapable conclusion’ that the work accident caused the worker’s injuries.”²³

Similarly, an analysis by the *Toronto Star* found that roughly 80% of injured worker appeals relating to pre-existing conditions have been successful at the WSIAT.²⁴

The WSIB attempts to use the “pre-existing condition” excuse for both physical and mental health injuries. In mental health cases, the WSIB frequently blames work-acquired conditions like PTSD, depression, and anxiety on family issues or immigration status, disproportionately targeting workers who are already marginalized.²⁵



²³ Ibid.

²⁴ Mojtehedzadeh, Sara. “Injured Workers Routinely Cut off WSIB by Improper Rulings.” *Toronto Star*. July 21, 2016 <https://www.thestar.com/news/gta/2016/07/21/injured-workers-routinely-cut-off-wsib-by-improper-rulings.html>

²⁵ Yachnin, p.59

Jonathan's Story

Jonathan was 30 years old when he injured his back while working as a labourer, erecting steel frames for commercial buildings. He did heavy work, sometimes 10-11 hours per day, 7 days per week.

About 10 months into the job, Jonathan started to feel pain in his low back. It was difficult for him to do some of the heavy tasks, and even sitting down caused pain. At first, he assumed the pain would go away, and he tried to work through it. But the spasms kept getting worse, and he had to see a doctor. He was diagnosed with a disc bulge, and had to stop working.

The WSIB denied Jonathan's claim, saying that his back problems were caused by the "pre-existing condition" of degeneration in his spine. In other words, the Board said that the 30 year-old's back problems were caused by age-related issues. He was not provided benefits for lost wages, treatment, medication, or retraining.

Before the injury, Jonathan led a healthy and active lifestyle. He exercised regularly, played competitive soccer, and led outdoor expeditions. He did not have back problems that affected his ability to work. His treating health providers all said that his job was the reason for the back issues. Yet the WSIB declared that his issues were "pre-existing," essentially that his 30 year old back was simply old, and that is what was causing the problems.

Jonathan has not able to return to his job as a labourer. He has tried to do other, lighter jobs but has not been able to sustain them, largely because he still gets debilitating flare-ups of back pain. He cannot afford regular treatment to address the issue. Jonathan has been forced to rely on Ontario Works, and is applying for the Ontario Disability Support Program.

Why is this a problem?

Poverty

The WSIB's reliance on the "pre-existing conditions" excuse is a primary method of cutting people off benefits. If the WSIB can blame permanent disabilities on "pre-existing conditions," then it can attempt to free itself from its responsibility to provide benefits for long-term injuries.

In 2010, the WSIB accepted that 9.3% of injured worker claims resulted in a permanent disability. By 2015, that number was reduced by more than 1/3, to 5.9%. According to the WSIB, the drop in injuries that cause permanent disabilities is due to better healthcare outcomes. However, injured workers and advocates who see the front-line realities know that a primary reason for the sharp reduction in accepted permanent disabilities is that the WSIB is blaming permanent disabilities on "pre-existing conditions."

In other words, contrary to the WSIB's spin, workers are not receiving better healthcare and miraculously healing from serious injuries. Rather, the WSIB is simply using a convenient excuse to reduce their permanent impairment award and ongoing benefits.

As we have discussed at length, for thousands of injured workers each year, being cut off of benefits means being forced into poverty and onto social assistance, resulting in significant costs to the public purse.

The WSIB's aggressive approach to "pre-existing conditions" is very similar to the insurance industry approach. Insurance companies are well known to try and find ways of avoiding paying benefits, and using "pre-existing conditions" as way to do that. We are also seeing this same phenomenon in the United States, with Donald Trump's attempts to pass a healthcare bill that would use a wide range of "pre-existing" conditions to deny healthcare benefits to those who need them.

Injured workers in Ontario deserve better, and our workers' compensation system should not follow such notorious and ill-reputed examples as these.

Illegality

One of the fundamental principles of the workers' compensation system is called the "thin skull doctrine." In essence, the thin skull doctrine says that injured workers cannot be denied benefits for a "pre-existing condition" that did not affect their ability to function before the work injury.

This principle is explained well one of the seminal decisions from the WSIAT (which was at that time called the Workers' Compensation Appeals Tribunal), Decision 915: "...in a compensation system injured persons become entitled to compensation because they have been engaged as workers. They have functioned as workers with any pre-existing condition they may have had. It seems wrong in principle that conditions which did not affect their employment as workers should be relied upon to deny them compensation as injured workers."²⁶

The WSIB's approach to "pre-existing conditions" is in direct violation of the thin skull doctrine, as it effectively leads to the assumption that any sign of a "pre-existing condition" – even if it was asymptomatic and never impacted the worker – means that an ongoing disability is not work-related.

Many advocates have warned that by violating the thin skull doctrine, the WSIB may be adjudicating claims illegally. According to widely respected legal expert and founding Chair of the WSIAT, Ron Ellis, "I have yet to see the legal opinion in which (the Board) argues the legal merits of their new policy. They appear to have decided it was cheaper to overrule the thin skull doctrine."²⁷

A class-action lawsuit against the WSIB has also been launched and allowed to proceed, claiming that the WSIB sought to cut costs by blaming permanent injuries on "pre-existing conditions."²⁸ As a result, workers with permanent disabilities due to their work injuries were "denied the full extent of benefits to which they were entitled."

²⁶ Workers' Compensation Appeals Tribunal, *Decision 915*

²⁷ Mojtehdzadeh, Sara. "Injured Workers Routinely Cut off WSIB by Improper Rulings." *Toronto Star*. July 21, 2016 <https://www.thestar.com/news/gta/2016/07/21/injured-workers-routinely-cut-off-wsib-by-improper-rulings.html>

²⁸ Mojtehdzadeh, Sara. "Class Action Against WSIB Claiming Unfair Benefits Cuts Given Go-Ahead." *Toronto Star*. February 14, 2017 <https://www.thestar.com/news/gta/2017/02/14/class-action-against-wsib-claiming-unfair-benefit-cuts-given-go-ahead.html>

In addition to the allegations of illegality, until 2014, the WSIB was also violating its own internal policies with its approach to “pre-existing conditions.” As discussed above, prior to 2014, the WSIB had policies that distinguished between a “pre-existing condition” and a “pre-existing impairment.” Benefits could be reduced to a worker with a “pre-existing impairment.” A “pre-existing condition,” on the other hand, did not cause any problems and therefore could not be used as a justification to reduce benefits. As such, when the WSIB began using “pre-existing conditions” to cut benefits in 2010, it was doing so in contravention of its own policies.

In 2014, the WSIB, under the leadership of David Marshall, introduced a new set of policies on “pre-existing conditions” to try and legitimize and entrench the practice that it had begun using four years prior. The new policies were met with loud and unanimous opposition from the injured worker community. When the policies were in draft form, a group of lawyers representing injured workers went so far as to say, “[w]e would consider describing these draft policies as regressive, but that word would be inaccurate, as no workers’ compensation policies have ever been such an explicit attack on the rights of injured workers in all of the years since the Meredith principles and workers’ compensation system were established 100 years ago.”²⁹

Despite the response from the injured worker community, the WSIB went ahead and implemented its “pre-existing condition” policies with some window dressing, but leaving the fundamental injustices – and probable illegalities – remaining. They continue to reduce injured worker benefits in this manner every single day.

²⁹ Bird, Peter et al. Correspondence to Premier Kathleen Wynne, March 14, 2014

Invasions of privacy

As mentioned above, the WSIB often searches through an injured worker's medical history in order to try and find a "pre-existing condition" that it can blame for the worker's ongoing disability. This especially happens in cases involving mental health conditions, as the WSIB will not even issue a decision on whether or not they accept a worker's mental health condition as being related to their work injury until they have obtained the full clinical records from the worker's family doctor for at least five years prior to the accident.

This practice means that the WSIB has access to every private matter that the worker has spoken to their family doctor about for the past five years. Whether it be medical conditions that are totally unrelated to the work injury, marital and relationship issues, family history, sexual history, or any of the other myriad issues that people talk to their family doctor about, the WSIB demands access to it.

This is a gross invasion of people's privacy. WSIB should not be able to search through such sensitive and confidential information that often has absolutely nothing to do with the work injury or claim history, particularly if their reason for searching it is in order to find an excuse to cut benefits.

To make matters worse, the worker's employer may gain access to this information when they are sent a copy of the worker's WSIB file. Unless the worker specifically requests that certain pages of the file not to be released to the employer – which typically results in significant delays – all of the information contained in the file will be sent to them, including intimately personal medical details.

Masking post-injury medical problems

In May of this year, a brand new study was released on injured workers and chronic health conditions, which found that workers with a permanent disability from their work injuries are at significantly greater risk of developing

chronic health problems after their injuries.³⁰ For instance, conditions such as depression, high blood pressure, ulcers, and arthritis are more likely to afflict injured workers after their injuries, than the general population. Work injuries, therefore, likely accelerate the aging process through the onset of what may have seemed to be unrelated chronic conditions.

These chronic health issues are likely related to the injury, but the WSIB does not recognize them as being compensable. In fact, with its current approach, the WSIB is more likely to point to these types of health issues as the “pre-existing” reason for a person’s ongoing disability, rather than the work injury. The Board refuses to understand that the chronic health problems may well be caused by the injury itself.

In contrast with the WSIB’s standard practice of blaming ongoing disabilities on “pre-existing conditions” and “aging,” this research suggests that work injuries lead to cascading health effects after the injury and, and that the WSIB is not recognizing the full extent of the injuries.

³⁰ Casey, Rebecca and Ballantyne, Peri. “Diagnosed chronic health conditions among injured workers with permanent impairments and the general population “ *Journal of Occupational and Environmental Medicine*. Volume 59, No. 5, May 2017

Wei's story

Wei injured her right knee in a fall at work, and had to undergo surgery and a full knee replacement as a result. After the injury happened, it was revealed that she had arthritis in her knee, though it was never an issue before the accident. In fact, she had never had previous knee problems at all. Wei's surgeon even stated that the arthritis came on as a result of the fall at work.

Wei's surgeon directly asked the WSIB to consider the connection between the accident and the surgery. In a report to the Board, the surgeon wrote:

“...unfortunately her WSIB claim for the right knee has actually been rejected. I am really confused as to why this has occurred...The patient did have post-traumatic arthritis in the patellofemoral joint from that fall and ultimately did require a knee replacement. I am uncertain as to why the claim was rejected, (I hope the WSIB) will reconsider this based on the original note....as well as my notes from today.”

Despite of the surgeon's very specific opinion about the cause of the arthritis, the WSIB used what it considered to be a “pre-existing condition” as an excuse to reduce Wei's benefits. She has had to go through years of stressful and cumbersome appeals at the WSIB and the Appeals Tribunal in order to get the compensation she is entitled to.

Mr. R's Story

Mr. R. sustained multiple injuries, including a head injury when he fell several feet inside a steel transformer tank and lost consciousness. He received a non-economic loss award from the WSIB, but it was reduced by 25% for a “pre-existing condition”. Mr. R did not have any previous head injury diagnoses. He did not lose time from work, he did not seek medical care for any concussion related symptoms, and he did not have any imaging studies (MRI, CT) that showed any abnormalities. Nonetheless, the WSIB declared him to be suffering from a pre-existing condition because he was hit in the eye with a ball while playing a game in his youth.

It may be possible that his prior play-related injury made him more vulnerable to the effects of the head injury. Even so, this would make Mr. R a “thin skull”, and he did not have any symptoms prior to the workplace fall. His “pre-existing condition”, according to the WSIB, was being hit with a ball many years prior.

What are the solutions?

- 1) The WSIB must return to its previous policy and practice of only reducing benefits if a worker had a verifiable pre-existing impairment. “Pre-existing conditions” that were asymptomatic and undiagnosed prior to the work injury, and that did not affect a worker’s functioning, must not be used to cut or deny benefits.
- 2) These principles must be codified in the *Workplace Safety & Insurance Act*, to prevent the WSIB from attempting to skirt them again in the future.

Conclusion

With these issues as the backdrop, ONIWG is launching the Workers' Compensation is a Right campaign. Injured workers all across Ontario are organizing around the three campaign demands, and we will not be silenced or swept under the rug. We are asserting our collective strength, and we will continue our struggle until we see justice for injured workers.

Further Resources

For campaign info, or to join our mailing list, email:

workerscompisaright@gmail.com

For up-to-date campaign news, visit:

injuredworkersonline.org/workers-comp-is-a-right-campaign/

To get your own campaign materials for online and print, visit:

injuredworkersonline.org/workers-comp-is-a-right-campaign/action-toolkit/

Follow ONIWG online at:

Twitter: [@ONIWG](https://twitter.com/ONIWG)

Facebook: facebook.com/OntarioNetworkIWG/

To find injured worker groups and supports in your community, visit:

injuredworkersonline.org/resources/links/