

October 12, 2017

Kathleen Wynne, Premier
Legislative Building
Queen's Park
Toronto ON M7A 1A1

Dear Premier Wynne:

Re: WSIB's Discrimination Against Workers with Mental Injuries

We write to you in alarm.

On Friday, October 6, 2017, during Canada's Mental Health Illness Awareness Week, the Workplace Safety and Insurance Board released a new policy that discriminates against and excludes workers who suffer mental injuries at work.

The WSIB's new policy will reverse all of the good the legislature intended to do by revoking the statutory barriers to entitlement for mental stress injuries. In fact, the new policy will put workers with mental injuries in Ontario in a worse position than they have ever been. We are confident it will be found illegal and unconstitutional. It discriminates against the most vulnerable.

Your government has licensed the WSIB to continue to exclude workers through arbitrary and discriminatory entitlement criteria.

Workers with mental injuries already shoulder a serious burden of stigma and social disapproval.¹ In its new policy, the WSIB places additional burdens on them that they

¹ The government that has publicly recognized the importance of eliminating the stigma associated with mental illness http://www.health.gov.on.ca/en/common/ministry/publications/reports/mental_health2011/mentalhealth_rep2011.pdf at p. 12.

cannot withstand. As a result, they will be denied compensation. They will be denied return to work support. They will be denied the health care they need.

We ask you to take action to finally denounce and end the government's discrimination against workers with mental injuries.

Our coalition

We are a coalition of injured workers, community legal clinics, private bar lawyers, and doctors. We have decades of direct experience in the workers' compensation system in Ontario and with workers with mental health disabilities.

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 Board's regressive new policy about workers with mental injuries.

The history of discrimination against injured workers with mental injuries

For 20 years, the government has excluded by statute workers with mental injuries from the protections of workers' compensation. This exclusion continued even after the Workplace Safety and Insurance Appeals Tribunal said, back in 2014, that this

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differential treatment violated workers' *Charter* rights.²

Earlier this year, the

² Decision No. 2157/09, 2014 ONWSIAT 938 (CanLII); Decision No. 1945/10, 2015 ONWSIAT 223 (CanLII); and Decision No. 665/10, 2016 ONWSIAT 997 (CanLII).

government announced it had finally decided to end this discrimination. The legislature removed the discriminatory exclusion of workers with mental stress injuries from the *Workplace Safety and Insurance Act*.

We thought and hoped that the government was committed to improving the mental health of Ontario's injured workers.

The government gave the WSIB the license to discriminate

Then, in May 2017, the government gave the WSIB a license to imbed discrimination into its policies. The WSIB promptly used this power to discriminate against workers with mental injuries. It intends to continue the long history of exclusion of workers with mental illnesses.

When the government proposed this unprecedented new power, we wrote to your government and expressed serious concern. We explained that such a power could allow and invite the WSIB to introduce by policy the same or similar limits on mental injuries that the legislature decided to repeal.

In fact, exactly that has happened. The impact is even worse than we anticipated.

The WSIB's new policy excludes and dismisses those with mental injuries

The WSIB's new mental stress policy requires workers with workplace mental injuries to meet rigorous legal and medical tests that many of them won't be able to meet. As a result, many of them won't be able to access workers' compensation support in their return to work and recovery.

Your government has licensed the WSIB to discriminate against many of the most vulnerable workers, those in distress because of workplace mental illnesses. The

WSIB's policy includes barriers that will make access to workers' compensation worse than it has even been for workers with mental injuries. You have licensed the WSIB to require these workers to:

1. Prove that the workplace events were the "primary or main cause" (predominant cause) of their mental illness to get initial recognition of their injuries.
 - No other workers have to meet this test. The firmly established test for entitlement, based in tort law, is that the workplace factors were one significant contributing cause to the injuries.
 - This new test directly discriminates against workers with mental injuries. Workers who are the most vulnerable will be most seriously affected because they will be told that the workplace wasn't the "main" cause of their injury. So, refugees, people from disadvantaged backgrounds, racialized workers, workers who have experienced abuse or domestic violence, and otherwise vulnerable workers will be excluded.
2. Prove that the workplace events remain the "primary or main cause" of their mental illness at every stage of their workers' compensation claim. This requirement will make access to ongoing benefits for mental injuries more restrictive than it has ever been. Workers currently only need to establish entitlement based on arbitrary and discriminatory criteria one time. Now, workers will have to meet an arbitrary and discriminatory test for entitlement over and over again.
 - This is an especially offensive requirement because of the multiple life events the WSIB can wrongly use as an excuse to end entitlement. A nurse who is harassed mercilessly at work, and develops depression. One year later, she gets divorced. The WSIB will decide that her depression is now related more to her divorce than the harassment. Her health care, recovery and return to work support will end.

3. Prove that the work-related stressor was substantial; in other words, that the stressor was “excessive in intensity and/or duration” such that it would have caused a mental injury to an “average worker”.
 - This requirement adds to the Board’s discrimination against workers with mental injuries. There is already sufficient rigour in workers’ compensation adjudication to properly adjudicate claims for mental injuries without a second arbitrary test that does not apply to workers with physical injuries. This imposes an even greater burden on vulnerable workers to adduce evidence to meet this new, vaguely defined requirement.
4. Provide a diagnosis under the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) in every case, before the WSIB will even consider entitlement.
 - The Supreme Court of Canada has very recently said that arbitrary requirements like the requirement for a DSM diagnosis are unacceptable. These arbitrary requirements disadvantage people who suffer mental injuries.³
 - Many of the most vulnerable workers have no or poor access to specialist medical care or even family physicians. Certainly, many will be unable to get the DSM diagnosis required to even get their case decided.

Many workers with mental injuries, especially the workers we represent, won’t be able to meet these strict criteria. They and their families will be shut out of the compensation system.

The WSIB’s new policy will be found illegal and unconstitutional

The Board’s new policy denies workers suffering from work-related injuries their *Charter* right to equal protection and equal benefit of the law without discrimination.

³ *Saadati v. Moorhead*, 2017 SCC 28 (CanLII), <http://canlii.ca/t/h42pw>.

This policy cannot survive constitutional scrutiny. The Supreme Court of Canada, and the Workplace Safety and Insurance Appeals Tribunal, have rejected the wrongheaded notion that mental injuries are less real, more subjective and more suspect than physical ones.⁴ The courts and tribunals have said time and again that there is no justification for arbitrary and discriminatory tests that limit entitlement to workers with mental injuries. As the Supreme Court of Canada said this year, arbitrary requirements for people with psychological injuries are steeped in “dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is “subjective” or otherwise easily feigned or exaggerated”. The Supreme Court stated that “no cogent basis has been offered to this Court for erecting distinct rules which operate to preclude liability in cases of mental injury,

but not in cases of physical injury”.⁵

The new policy obstructs the improvements to access to health support, recovery and return to work for worker with mental injuries that this government intended to achieve.

The WSIB’s differential treatment of workers with mental stress reinforces the stigma surrounding mental injury. Imposing a more restrictive standard for

mental injury entitlement sends a message that workers claiming entitlement for these conditions are a greater risk for fraud or that their conditions are “all in their head.”

⁴ *Saadati v. Moorhead*, *ibid*; *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, 2003 SCC 54 (CanLII); Decision No. 2157/09, 2014 ONWSIAT 938 (CanLII)

⁵ *Saadati v. Moorhead*, *ibid*, para. 35.

You are allowing the WSIB to make injured workers and their families bear the costs of workplace illnesses

While we believe that the WSIB's new policy will eventually be declared illegal, we cannot abide the reality that the most vulnerable injured workers will shoulder the burden of workplace disease until this happens.

This new WSIB policy obstructs the improvements to access to health care support, recovery and return to work for workers with mental injuries that this government intended to achieve.

We ask you to take action to stop this discrimination

You need to step in to correct this injustice to injured workers before it further pushes workers with mental injuries to the margins of society.

You should do the following:

- Revoke s. 159 of the *Workplace Safety and Insurance Act*, the recently introduced provision that allows the WSIB to impose different standards through policy for chronic mental stress claims;
- Amend s. 13, the chronic mental stress provision, to confirm that the same legal principles should be used to adjudicate these claims as all other claims; and
- Meet with our Coalition and other key stakeholders **before** the WSIB policy and changes to the Act will be in force (January 1st, 2018).

We look forward to your reply.

Yours truly,

Antony Singleton

ARCH Disability Law
Centre

Ellen Lipes

Gary Newhouse

Hamilton Community
Legal Clinic

Health Professionals
for Injured Workers

IAVGO Community
Legal Clinic

Injured Workers'
Consultants

Ontario Network of
Injured Workers'
Groups

Peter Bird

Renfrew County Legal
Clinic

West Toronto
Community Legal
Services

cc. Minister of Labour Kevin Flynn

Coalition Members

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.

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.

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, IAVGO 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.

Hamilton Community Legal Clinic is a community legal clinic funded by Legal Aid Ontario and provides free legal services to the people of the City of Hamilton. It is an amalgamation of three Hamilton legal clinics some of which have been serving the Hamilton Community for over 30 years. During this time we have represented hundreds of injured workers in their individual cases at all levels of appeal. In addition to case by case representation of individuals, our mandate includes public legal education and community development. We also work with the members of provincial parliament and senior bureaucrats to seek improvements in law and policy affecting the people of Hamilton. As part of this we have represented the Hamilton and District Injured Workers' Group and the Ontario Network of Injured Workers' Group in their legal cases and law reform efforts to improve Workers' Compensation law for injured

workers. Our experience with respect Workers' Compensation and the plight of injured workers is extensive.

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 losing 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.

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.

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.

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.

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

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RENFREW CLC · WTCLS

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.

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.