

# no evidence.

The decisions of the  
Workplace Safety and  
Insurance Board

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# EXECUTIVE SUMMARY

The 2016 decisions of the Workplace Safety and Insurance Appeals Tribunal tell a stark and troubling story. In hundreds of appeals, Tribunal decision makers comment that the decisions of the Workplace Safety and Insurance Board are “unreasonable” and “arbitrary,” ignore the “unanimous opinions” of doctors, are based on “not a single word of medical or other reliable evidence,” and could place the worker at “medical risk.”

The Tribunal’s decisions confirm what workers and health care professionals have been saying since 2010: in order to get its financial house in order, 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.

In *No Evidence*, we expose the decision making of the WSIB through an in-depth analysis of the Tribunal’s 2016 decisions. Our four primary findings:

1. The Board regularly fails to listen to treating health care professionals about whether return to work is safe.
2. The Board has reversed benefits it had promised to the most vulnerable workers.
3. The Board wrongly denies compensation based on “pre-existing conditions.”
4. The Board targets workers with mental health conditions for denial of benefits and treatment, increased scrutiny and surveillance.



**The WSIB regularly fails to listen to treating health care professionals about whether return to work is safe.**

In 110 cases, the Board failed to listen to workers' treating health care professionals about the safety and appropriateness of return to work.

The Tribunal concluded that the Board disregarded medical advice that the worker should rest and recover before returning to work, even though it had "no evidence" and "no medical documentation to counter" this advice.

The Board's approach appears to stem from its "Better at Work" principle, which strongly discourages rest away from work. This has led the Board to act with disregard for workers' doctors' advice and workers' safety.

In one case, the Board told a welder whose eye and face were burned by hot oil to return to work, even though the trip to work would have exposed him to fumes and particles, increasing his risk of infection or permanent loss of vision. The Tribunal observed that "the journey to and from work was potentially dangerous during this vulnerable period in the worker's recovery." The worker's condition at that time was "precarious." It is troubling that the Board was willing to endanger this worker's health and safety by pushing him back to work too soon.



## **The WSIB reversed benefits it had promised to the most vulnerable workers.**

In 2009, the Auditor General identified “locked-in” claims as a financial problem for the Board because of their long duration and high cost. If a worker is “locked-in” with full benefits, the WSIB is usually obligated to pay full benefits until the worker turns 65.

In 2010, the WSIB started reducing the cost of locked-in benefit claims by reversing the benefits of the most vulnerable workers. The Board had previously promised many of these workers full benefits until the age of 65, often in writing. Then, seemingly out of the blue, the Board changed its mind, just as these workers approached lock-in. Without any apparent justification, the Board told these workers they needed to retrain and somehow return to work. Most or all were not able to find work. But their benefits – their only source of income – were often significantly reduced or ended completely.

These workers continue to be forced to pursue costly, stressful appeals to the Tribunal. In 2016, 28 of these workers had to ask the Tribunal to step in and restore the financial security the Board should never have taken from them in the first place.





### **The WSIB wrongly denies compensation based on “pre-existing conditions.”**

The Tribunal decisions confirm that the WSIB is wrongly denying workers’ fair compensation based on “pre-existing conditions.”

Workers have expressed alarm about how the Board uses so-called “pre-existing conditions” to deny compensation, even when the evidence shows they were able to function perfectly well until the workplace injury derailed their lives.

The typical case is a worker who never had any real back pain before a fall at work, after which she immediately developed debilitating back pain. When an MRI shows the presence of degenerative changes in her back, the Board decides that she “should” have recovered from the fall by a certain expected healing time. The Board attributes any remaining disability to these degenerative findings, rather than the workplace accident.

In 75 cases in 2016, the Tribunal said that the Board’s decision to deny benefits based on pre-existing conditions was based on “little, if any, evidence,” “no evidence” or “no medical opinion” suggesting that any pre-existing factor was the cause of their ongoing disability. The Board’s decisions were contrary to the “inescapable conclusion” that the work accident caused the worker’s injuries.

The Tribunal also noted, in 38 appeals, that the Board cut workers' permanent impairment benefits based on pre-existing conditions that did not impair them before the injury. The Tribunal emphasized that this WSIB practice is contrary to the Board's own binding policy.

Finally, in other cases, the Board attributed psychological injuries to workers' past experiences – like a divorce or their status as a refugee – rather than their workplace injury. The Tribunal found that this ran contrary to the medical evidence: it was unfounded speculation.



#### **The WSIB targets workers with mental health conditions for denials, scrutiny and surveillance.**

The Board's adjudication of psychological injuries stands out as particularly alarming. The Tribunal found that the Board rejected, time and again, the "unanimous" and "overwhelming" opinions of treating doctors and psychiatric specialists that the workplace injury and its fallout caused workers' psychological injuries. In denying entitlement for their psychological disabilities, the Board also denied these workers the treatment they needed to recover and return to work.

Several of the Tribunal's 2016 cases also demonstrate that the Board approaches workers with mental health conditions with undue suspicion. In one case, the Board disregarded a finding of its own Appeals Services Division that a worker had a psychological injury and needed treatment.

Instead of providing him treatment, the Board put him through two independent medical assessments and placed him under covert surveillance, only to then end his benefits by finding him non-cooperative. The Tribunal restored his benefits, observing that the worker had no reason to expect “that the genuine nature of his psychiatric condition was in question.”

### Conclusion

While the WSIB is fixing its finances, workers are falling into poverty and poor health. Workers have long reported that the Board denies benefits without any evidence or justification. These decisions from the Appeals Tribunal provide hard evidence for workers’ claims. They show that in order to fulfill its statutory obligations, the Board must radically transform its current practices.

# I. Overview

The 2016 decisions of the Workplace Safety and Insurance Appeals Tribunal tell a stark and troubling story. These decisions lay bare the reality that the Workplace Safety and Insurance Board is abdicating its statutory obligations to many injured workers.<sup>1</sup> The Board isn't compensating workers for the losses they suffer from workplace injury. It isn't helping them recover. It isn't helping them return to work.

In hundreds of worker appeals, the Tribunal echoes what workers have been saying about the WSIB's conduct since 2010. Tribunal decision makers comment that the WSIB's decisions are "unreasonable" and "arbitrary," disregard the "unanimous opinions" of doctors, are based on "not a single word of medical or other reliable evidence," and would place the worker at "medical risk."

Since 2010, following concerns from the Auditor General about its finances, the Board has "transformed" its financial position.<sup>2</sup> The WSIB claims this financial success is the result of improved "return to work and recovery" programs. It denies reducing costs through benefits cuts.<sup>3</sup>

But those who are forced to deal with the WSIB explain the significant cost injured workers have paid for the Board's improved financial position. They say that the WSIB:

- Routinely disregards medical evidence;

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<sup>1</sup> *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sch A, s 1 [WSIA].

<sup>2</sup> Ontario, Workplace Safety and Insurance Board, *The Transformation of the Workplace Safety and Insurance Board*, online: <<http://www.wsib.on.ca/cs/groups/public/documents/staticfile/c2li/mdyw/~edisp/wsib060404.pdf>>.

<sup>3</sup> *Ibid.* at 4.

- Forces workers back to work before they are fit to do so, sometimes causing re-injury;
- Disregards the psychological health of injured workers;
- Cuts compensation benefits even though workers are still injured; and
- Reduces compensation against established law and policy.<sup>4</sup>

In our recent report, *Bad Medicine*, we analyzed the WSIB's health care statistics and found that the Board has been cutting benefits without improving health care outcomes for workers.

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<sup>4</sup> Ontario Federation of Labour and The Ontario Network of Injured Workers Groups, *Prescription Over-Ruled: Report on How Ontario's Workplace Safety and Insurance Board Systematically Ignores the Advice of Medical Professionals* (05 November 2015), online: <<http://ofl.ca/wp-content/uploads/2015.11.05-Report-WSIB.pdf>> [*Prescription Over-Ruled*]; Ontario Federation of Labour and The Ontario Network of Injured Workers Group, *Submission to the Ontario Ombuds Office* (29 January 2016) [*Submission to the Ontario Ombuds Office*]; Sara Mojtehdzadeh, "WSIB policy pushed hurt workers into 'humiliating' jobs and unemployment, critics say" *Toronto Star* (12 September 2016), online: <<https://www.thestar.com/news/canada/2016/09/12/wsib-policy-pushes-hurt-workers-into-humiliating-jobs-and-unemployment-critics-say.html>>; Sara Mojtehdzadeh, "WSIB critics say spending cuts are 'devastating' injured workers" *Toronto Star* (10 June 2016), online: <<https://www.thestar.com/news/gta/2016/06/10/inadequate-health-care-devastating-injured-workers-critics-say.html>>; "Ontario psychologists claim WSIB unfairly denying patient claims" *CBC News* (04 November 2015), online: <<http://www.cbc.ca/news/canada/toronto/programs/metromorning/ontario-psychologists-claim-wsib-unfairly-denying-patient-claims-1.3302778>>; "Sudbury WSIB claimant's doctor pushes to change 'unresponsive' system" *CBC News* (09 November 2015), online: <<http://www.cbc.ca/news/canada/sudbury/keith-klassen-wsib-paul-chartrand-1.3310497>>; Sara Mojtehdzadeh, "Fair appeals for injured workers under threat, experts warn" *Toronto Star* (06 April 2016), online: <<https://www.thestar.com/news/gta/2016/04/06/fair-appeals-for-injured-workers-under-threat-experts-warn.html>>; Ashley Burke, "WSIB's 'devastating' compensation policy all about board's bottom line, lawyers charge" *CBC News* (27 Oct 2016), online: <<http://www.cbc.ca/news/canada/ottawa/wsib-injured-worker-benefits-1.3803300>>; Sara Mojtehdzadeh, "Class action against WSIB claiming unfair benefit cuts given go-ahead" *The Toronto Star* (14 Feb 2017), online: <<https://www.thestar.com/news/gta/2017/02/14/class-action-against-wsib-claiming-unfair-benefit-cuts-given-go-ahead.html>>; Lisa Xing, "Why a family of 6 in Oakville is living on \$36k a year" *CBC News* (22 Mar 20), online: <<http://www.cbc.ca/news/canada/toronto/family-of-six-lives-on-36000-a-year-1.4035415>>; 2012-2013 IAVGO, "Benefits Policy Review Submissions of IAVGO" (28 Nov 2012), online: <<http://iavgo.org/research-and-resources/>>, at 11-21.

In the present report, we study another source of information about Board decision making since 2010: the 2016 decisions of the Workplace Safety and Insurance Appeals Tribunal. The Tribunal is the final decision maker in the workers' compensation system, and it is independent of the WSIB. Each year, the Tribunal finally decides about 3,000 appeals by workers and employers.<sup>5</sup>

By analyzing the Tribunal's decisions, we were able to identify systemic problems with the Board's adjudicative practices. We reviewed a full year of the decisions of the Tribunal. We found **425** cases where the Tribunal addresses unfair decision making practices that have also been consistently identified by workers, doctors, and representatives.<sup>6</sup>

Our most consistent and stark findings:

- In **110 appeals**, the Tribunal found that the Board failed to respect the medical advice of the worker's treating physicians about return to work.
- In **175 appeals**, the Tribunal found that the Board's decision was contrary to all, or all discussed, medical evidence.
- In **81 appeals**, the Tribunal found that the Board's decision was made without any supporting evidence
- In **75 appeals**, the Tribunal found that the Board denied benefits based on "pre-existing" issues without adequate evidence.

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<sup>5</sup> The Tribunal was legislated into existence by on October 1<sup>st</sup> 1985 by the Ontario Government. The newly created Tribunal was distinguished by its independence from the board, a tripartite adjudicative model, and expertise in decision-making; "Workplace Safety and Insurance Appeals Tribunal: Celebrating 25 Years of Excellence" *Workplace Safety and Insurance Appeals Tribunal* (Jan 2010), online: <<http://wsiat.on.ca/english/about/history.htm>>.

<sup>6</sup> For a detailed breakdown of these 425 cases see [www.iavgo.org/researchandresources](http://www.iavgo.org/researchandresources).

- In **28 appeals**, the Tribunal found that the Board wrongly reversed a worker's entitlement to full loss of earnings payments.
- In **38 appeals**, the Tribunal decided that the Board had wrongly reduced the worker's permanent impairment award based on "pre-existing" issues.

In each of these 425 appeals, the worker had to navigate a complex bureaucracy for several years to resolve their claim. Before they could ask the Tribunal to fix the Board's error, each of these workers had to:

- Meet strict time limits to appeal the Board's decision or, often, multiple decisions denying them benefits;
- Find a representative to help them navigate the appeal system, often at significant cost;
- Bring their case to the internal Appeals Services Division of the WSIB;
- Endure years of delay. For most workers, it takes at least three years, and often closer to five years or more, to reach the stage of a Tribunal hearing;
- Often, live without support to recover and return to work; and
- Often, suffer a fall into poverty.

## II. The WSIB disregards medical advice about return to work

### A. Background

Workers injured on the job often report being pressured to return to work immediately after injury. The Board instructs them to return well before they or their treating physicians believe they are ready.

This trend began in 2011, when the Board instituted the “Better at Work” principle – that “staying at work or returning to work is part of the recovery process.” According to the WSIB, research shows that “return to work is critical to the recovery process” and “should be used as rehabilitation to enhance recovery, increase activity and function, and optimize successful and sustained employment.”<sup>7</sup>

Medical professionals who care for injured workers have expressed serious concerns about the Board’s rigid application of “Better at Work.” These health care providers say that the Board ignores their recommendations about the safe timing of return to work.<sup>8</sup>

Further, the “Better at Work” approach derives from the American College of Occupational and Environmental Medicine, which critics describe as a body designed to legitimize the interests of corporate doctors and their funders.<sup>9</sup>

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<sup>7</sup> Ontario, Workplace Safety and Insurance Board, *Better at Work*, online: <[www.wsib.on.ca](http://www.wsib.on.ca) > Employers > Return to Work > Better at work; Ontario, Workplace Safety and Insurance Board,

<sup>8</sup> *Prescription Over-ruled*, *supra* note 4 at 6. See also the media reports listed in note 3.

<sup>9</sup> The American College of Occupational and Environmental Medicine has been described in the *International Journal of Occupational and Environmental Health* as “a professional association that represents the interests of its company-employed physician members.... [it] provides a legitimizing professional association for company doctors, and continues to provide a vehicle to advance the agendas of their corporate sponsors”: J Ladou *et al*, “American College of Occupational and



For a detailed discussion of the impact of “Better at Work”, see the submissions of the Ontario Network of Injured Workers’ Groups to the WSIB.<sup>10</sup>

## **B. Ignoring medical advice about safe return to work**

In **110** cases, the Tribunal found that the Board wrongly refused to compensate workers for time they took off work on their doctors’ advice. Often, this advice was to rest for a short period of time after injury. The Board refused these workers loss of earnings payments for the missed time.

The Tribunal concluded that the Board:

- disregarded medical opinion about return to work;
- wrongly required workers to disregard medical advice;
- endangered workers by placing them at a risk of re-injury;
- disregarded psychological safety in return to work;
- failed to provide workers with necessary supports during return to work;
- failed to ensure the employer was complying with its obligations;

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Environmental Medicine (ACOEM): A professional association in service to industry” (2007) 13:1 International Journal of Occupational and Environmental Health 404 at para 1; See also M. Lax, “Not Quite a Win-Win: The Corporate Agenda of the Stay at Work/Return to Work Project” (2015) 25:1 New Solutions: A Journal of Environmental and Occupational Medicine 4-24.

<sup>10</sup> Ontario Network of Injured Workers Groups, “Submissions to the WSIB” (7 Nov 2016), online: <[http://injuredworkersonline.org/wp-content/uploads/2017/02/Ltr\\_ONIWG\\_20161107\\_Better-at-Work-response.pdf](http://injuredworkersonline.org/wp-content/uploads/2017/02/Ltr_ONIWG_20161107_Better-at-Work-response.pdf)>.

- ignored the Board’s own adjudicative advice document about timely return to work; and
- made decisions that were illogical or unreasonable.

**i. The WSIB disregarded medical opinion about return to work**

In a number of decisions, the Tribunal determined that the Board had unreasonably disregarded medical opinion. It found that the Board rejected medical evidence without any valid reason or justification.

**Personal support worker  
Suffered head, back, knee injuries**

[I]t is unreasonable to expect an injured worker to ignore the advice of her treating physician. In my view, it is further **unreasonable for the Board to ignore the professional opinion** provided by a worker’s treating physician as noted on an FAF requested by the accident employer and the Board.<sup>11</sup> - 63/16

In *Decision No. 63/16*, for example, the Board refused a personal support worker loss of earnings benefits because it found that the employer’s job offer was suitable. But, the worker’s doctor and physiotherapist had told her and the Board that she should not work for several weeks post-injury. The doctor noted that the worker, who was in her seventies, was suffering severe knee pain, urinary incontinence, back pain and headaches. She followed her doctor’s advice to rest and recover.

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<sup>11</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 63 /16* (11 January 2016) at para 30.

When her doctor and physiotherapist cleared her to return to work a few weeks later, she did. The Board denied her compensation for her time off work. The Tribunal stated it was “unreasonable for the Board to ignore the professional opinion provided by a worker’s treating physician as noted on an FAF [Functional Abilities Form].”<sup>12</sup>

Other decisions similarly criticized the Board for disregarding medical evidence about return to work. In these cases, the Tribunal stated that the Board had:

- **“no basis” to disregard** the medical evidence;<sup>13</sup>
- **“essentially no evidence”** to support their position contrary the opinion of the worker’s doctor;<sup>14</sup>
- “not a **single word of medical or other reliable evidence**” that the worker was able to return to work;<sup>15</sup> and
- **“no medical documentation to counter”** the opinion of the worker’s treating health care professionals.<sup>16</sup>

In *Decision No. 1479/16*, the Tribunal opined that the treating health professional’s role is to provide functional abilities information to the employer and Board. Quoting from a 2014 decision, the Tribunal

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<sup>12</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 63/16* (11 January 2016) at para 30.

<sup>13</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1364/16* (19 August 2016) at para 32.

<sup>14</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1069/16* (28 April 2016) at para 18.

<sup>15</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 989/16* (27 June 2016) at para 45.

<sup>16</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2932/16* (14 November 2016) at para 29.

emphasized that “this information should not be treated lightly and easily disregarded.”<sup>17</sup>

In *Decision No. 2524/16*, the Tribunal stated that there was “no basis” to doubt either the objectivity or appropriateness of the doctor’s opinion that the worker needed several days off work to rest. The Tribunal noted that if the Board wanted to question the doctor’s “clear recommendation” to remain off work, it should and could have requested additional medical information.<sup>18</sup>

**Car factory worker  
Suffered low back and leg injury**

*If the Board had reason to question the worker’s decision to accept the clear recommendation of his attending physician to remain off work during the period in question in the appeal, the CM could have requested further information.”<sup>19</sup> – 2524/16*

In *Decision No. 2525/16*, the Tribunal adopted the reasoning of a previous decision that the “ESRTW process [now known as WR] established under the WSIA is not just about early return to work, it is equally about safe return to work.”<sup>20</sup> In light of an objective medical opinion that the worker should have remained off work for a short period

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<sup>17</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1479/16* (7 June 2016) at para 32.

<sup>18</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2524/16* (23 September 2016) at para 56 [2524/16].

<sup>19</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2524/16* (23 September 2016) at para 56 [2524/16].

<sup>20</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2525/16* (27 September 2016) at para 28.

of time after injury, the worker should have entitlement to full loss of earnings.<sup>21</sup>

**ii. The WSIB required workers to disregard medical advice about return to work contrary to the Act**

In some 2016 decisions, the Tribunal also held that the Board had wrongly suggested that the worker should have disregarded medical advice about return to work. The Tribunal found that it was “unreasonable to expect an injured worker to ignore the advice of her treating physician.”<sup>22</sup>

**Personal support worker  
Suffered knee injury**

Her denial of the offered modified duties in these meetings was based on the *advice of her health care providers, which she was required to follow.* – 1886/16

The Tribunal has stated that workers are in fact required by law to follow medical advice regarding their return to work. In *Decision No. 1886/16*, the Tribunal held that the worker was required by the health care co-operation provision of the *Workplace Safety and Insurance Act* to comply with the advice of her health care providers. The Tribunal noted that the Board was wrong to have suggested she should have returned to work against that advice.<sup>23</sup>

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<sup>21</sup> *Ibid* at para 37.

<sup>22</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 63/16* (11 January 2016) at para 30.

<sup>23</sup> *WSIA*, *supra* note 1, s 34 states that

34. (1) A worker who claims or is receiving benefits under the insurance plan shall co-operate in such health care measures as the Board considers appropriate.

In *Decision No. 2949/16*, the Tribunal held that the worker was also required to comply with her surgeon’s advice to remain off work because of her statutory obligation to cooperate in early and safe return to work. The Tribunal stated that in complying with her doctor’s advice and keeping the employer abreast of her progress, the worker was cooperating in her ESRTW “as is required by section 40(2) of the WSIA.”<sup>24</sup>

**iii. The WSIB endangered workers by requiring them to disregard medical advice**

Tribunal decision makers have found that workers either were re-injured during their return to work or would have been at risk of harm or re-injury if they had complied with the Board’s direction to disregard medical advice about return to work.

**Machine operator  
Suffered finger amputation**

These types of activities require bilateral hand manipulation to some degree, thus posing a **medical risk** to the worker if he were attempting to perform such activities. -1133/16

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(2) If the worker fails to comply with subsection (1), the Board may reduce or suspend payments to the worker under the insurance plan while the non-compliance continues.

<sup>24</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2949/16* (25 November 2016) at para 23; *Ibid* at s 40.

The Tribunal variously observed that the Board's recommended course of return to work:

- posed a “**medical risk**,”<sup>25</sup>
- would “likely have **resulted in re-injury**,”<sup>26</sup>
- was “**potentially dangerous**,”<sup>27</sup>
- failed to give “due consideration” to the **worker's safety**,<sup>28</sup>
- ignored that the worker had attempted the duties “to her detriment,” **exacerbating pain** and symptoms,<sup>29</sup>
- disregarded the fact that the worker had been prescribed painkillers that rendered her **unable to “safely operate** a motor vehicle to attend work.”<sup>30</sup>

In *Decision No. 1437/16*, the worker was a welder. In 2011, a hydraulic hose struck the left side of his face and splashed hot oil in his eye. He was taken to hospital by ambulance. He had a left eye trauma and face laceration and burns. The hospital doctors told him to stay off work for two weeks. The next day, “a few hours after the worker was discharged” from the hospital, the employer offered him modified work. The Board told him he must return to work. It only paid him two days of benefits. The worker explained that his doctor said he should stay at home

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<sup>25</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1133/16* (3 May 2016) at para 26.

<sup>26</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1889/15* (29 April 2016) at para 33.

<sup>27</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1437/16* (16 June 2016) at para 35.

<sup>28</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 989/16* (6 April 2016) at para 48.

<sup>29</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 674/16* (5 April 2016) at paras 53, 54.

<sup>30</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 3068/16* (22 November 2016) at para 26.

in a cool clean environment. There was a risk of infection and possible permanent vision loss. The modified job was in the office, but getting through the work site to the office would expose him to fumes and particles. In the summer, it was also difficult to make sure sweat didn't run into his eye, endangering his recovery. The worker eventually returned to work five weeks after the accident.

The Panel determined that the worker was entitled to benefits for his lost time. They observed that “the journey to and from work was potentially dangerous during this vulnerable period in the worker’s recovery.” The worker’s condition at that time was “precarious”. Since the job posed a health and safety risk to the worker, it wasn’t suitable.<sup>31</sup>

**Welder  
Suffered eye injury**

Although the office to which the worker was assigned was cool and free of fumes and smoke, the journey to and from work was **potentially dangerous during this vulnerable period in the worker’s recovery**. -1437/16

In *Decision No. 1503/15*, the Vice Chair found that the worker’s return to unsuitable work against medical advice caused her shoulder injury to worsen and caused her to develop depression.<sup>32</sup> The worker worked in a poultry processing plant. Her modified work was located in the cold room, and the cold aggravated her injury. Her doctors repeatedly and “without condition” said she should not work in a cold environment,

<sup>31</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1886/16* (21 July 2016) at para 32.

<sup>32</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1503/15* (2 February 2016) at para 62.



but the Board disregarded this advice and found the work suitable.<sup>33</sup> The Vice Chair noted that the worker had “experienced far more than an ‘unpleasant experience with the cold’” because of the Board’s failure to listen to the consistent advice of her treating doctors. She in fact suffered “the deterioration of her right shoulder condition” and the development of a psychological impairment.<sup>34</sup>

**iv. The WSIB disregarded psychological safety in return to work**

*a. Disregarded unanimous evidence that the worker cannot work*

In a significant number of cases, the Tribunal found that the Board had ignored medical evidence showing that a return to work was unsafe or inappropriate because of a worker’s psychological injury.

In *Decision No. 2814/16*, the Vice Chair noted that the Board had “no basis” to question the medical evidence that the worker was not able to return to work due to her compensable psychological state. The Board ignored the opinion of treating medical professionals that the worker “remained unable to return to work at all . . . due to her fragile psychological condition resulting from the work accident.”<sup>35</sup>

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<sup>33</sup> *Ibid* at para 66.

<sup>34</sup> *Ibid* at para 62.

<sup>35</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2814/16* at paras 32, 42, 43.

In *Decision No. 1036/16*, the Panel noted each of the many doctors who examined the worker, including specialists at the Centre for Addiction and Mental Health, had concluded that he was unable to work because of his psychological injury. The worker was a machine operator who suffered a crush injury and amputation and developed Post Traumatic Stress Disorder. Despite the “unanimous opinions” of his doctors that he was unable to work, the Board decided to refer the worker for retraining in 2012 and subsequently decided he was capable of earning minimum wage. The Panel overturned this decision and found that, as established by the chorus of medical opinions, the worker was unemployable. The Panel observed that there was “no reason to question the unanimous opinions of the worker’s treating and assessing health care providers” that he was unable to work.<sup>36</sup>

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**The Panel finds no reason to question the unanimous opinions of the worker’s treating and assessing health care providers ... all of whom opined that the worker was unable to work. –1036/16**

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In *Decision No. 1430/16*, the Vice Chair found that, contrary to the Board’s decision, the “nature and seriousness of the worker’s compensable injuries prevented him from safely engaging in any type of work” during the period of time his doctors said he needed to be off work. The Vice Chair noted that “[t]he worker did not have medical clearance to re-integrate into any type of work over this period.” The Vice Chair noted particularly that “his compensable psychological/ emotional state was unstable” and

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<sup>36</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1036/16* (26 April 2016) at para 44; See also, *Workplace Safety and Insurance Appeals Tribunal Decision No. 919/16* (22 June 2016).

that therefore the Board's advice that he return to work was inappropriate.<sup>37</sup>

In *Decision No. 2935/16*, the Panel once again addressed a WSIB decision that a worker, a sewing machine operator, was employable contrary to “unanimous” medical evidence. The Panel noted that psychiatric assessments had all found that the worker was “incapable of performing any type of work,” since at least 2010.<sup>38</sup> Further, the medical evidence was unanimous that the worker's permanent psychiatric impairment was not “mild,” as decided by the WSIB.<sup>39</sup>

**Sewing machine operator  
Suffered finger amputation, depression,  
PTSD**

Thus, the *medical evidence appears unanimous* in the opinion that the worker is incapable of performing any type of work, and has been since at least 2010 and continuing. – 2935/16

The Panel in this decision also made some observations about the troubling way in which the Board investigated the worker's psychological condition. The worker appealed to the Board's Appeals Services Division in 2013. The ARO decision found that the worker was unemployable and entitled to full loss of earnings, subject to any future material changes.

The Board subsequently asked the ARO if a possible improvement in her condition would be a “material change” warranting a reassessment

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<sup>37</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1430/16* (10 June 2016) at para 47.

<sup>38</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2935/16* (28 November 2016) at para 68.

<sup>39</sup> *Ibid* at para 59.

of her benefits. The ARO replied it would be. The Board’s operating level then decided to conduct covert surveillance of the worker. The Board’s stated rationale for surveillance, provided by the Director of the Industrial Sector, was that the Board was unable to reach the worker without leaving a message. This “lack of availability,” the Director stated, conflicted “with information [the worker] had provided to her psychologists and to the case manager” that she rarely left the house.<sup>40</sup>

The Panel noted that it was “improbable” that the Board’s decision to conduct surveillance was actually spurred by the worker’s failure to answer phone calls: the Board had only tried to contact the worker *after* it started the surveillance. The Panel observed that the Board started surveillance within two weeks of the ARO clarification that it could revisit benefits if the worker experienced a possible improvement in her

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**[W]e do not that the Director’s letter suggests that surveillance was ordered due to incongruities between the worker’s claim she was totally impaired and the information she provided to her doctors and the WSIB staff ... it seems improbable that this was the basis for surveillance. – 2935 16**

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condition.

The Tribunal concluded that the worker was entitled to full benefits, that the surveillance was not inconsistent with her

limitations, and that any failure to contact the Board was explainable given her psychological impairment.<sup>41</sup>

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<sup>40</sup> *Ibid* at paras 4, 35.

<sup>41</sup> *Ibid* at paras 72-74.

*b. Disregarding psychological restrictions in selecting suitable job*

In several cases, the Tribunal found that the Board failed to consider the worker's psychological health when selecting a post-injury suitable occupation.

In *Decision No. 1703/16*, the Panel observed that the Board completely ignored the worker's long-standing disabling depression, anxiety and chronic pain in deciding she could work in a stressful fast-paced job.

**Banquet Server  
Suffered neck, upper back, shoulder and  
psychological injuries**

*For reasons that are not clear to the Panel, the non-organic aspects of the worker's condition were not taken into account* by the Board in the 2011 WT process. ... The occupational therapist cautioned that the worker's depression, her problems with memory and concentration required further attention. This was not addressed. -  
*1703/16*

The worker was a banquet server. After an injury in 2007, she had to appeal all the way to the Tribunal to get her benefits restored, her chronic pain accepted and right to retraining support recognized in 2011. In implementing the Tribunal's 2011 decision, the 2016 Panel noted that "[f]or reasons that [were] not clear to the Panel, the non-organic aspects of the worker's condition were not taken into account by the Board." The Board failed to adjust the worker's restrictions to account for the new

entitlement for chronic pain disability.<sup>42</sup> The Board also failed to consider the “significant evidence” of disabling depression and anxiety and the specific advice by an occupational therapist that her depression and memory problems “required further attention.”

As a result, the Board wrongly decided that the worker could be a service express agent, which would have required her to process and log a large number of calls, and assist guests who were angry or upset about service issues. This decision ignored her psychological limitations including depression, memory and concentration issues. It wasn’t safe.<sup>43</sup>

In *Decision No. 892/16*, the Vice Chair expressed similar puzzlement about the Board’s decision that a worker with a sensitive psychological condition could be a telemarketer. The Board did not explain how the worker would cope with the “potentially confrontational interactions” that telemarketing involves.<sup>44</sup>

In *Decision No. 584/16*, the Panel again decided that the Board did not consider the worker’s psychological disability in selecting the suitable occupation, this time Retail Sales Clerk. The Panel noted that each of the practitioners treating the worker for his psychological disability believed that his condition likely rendered him unemployable. These same doctors explained that the worker’s impatience and frustration with other people was a characteristic of the worker’s psychological disability. The Panel found that this “would be a significant barrier to many types of employment, again including Retail Sales Clerk.”<sup>45</sup>

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<sup>42</sup> Para 20.

<sup>43</sup> Para 41, 38, 37.

<sup>44</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 892/16* (8 April 2016) at para 14.

<sup>45</sup> *Decision No 584/16*

**v. The WSIB failed to provide workers with necessary support during return to work**

As well as ignoring restrictions, the Board also often failed to provide the supports that workers required in order to succeed in return to work.

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**The psychological supports that were identified as required by even the most optimistic of the psychological consultants ... have not been implemented. – 589/16**

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In *Decision No. 589/16*, the Panel found that the Board failed to provide the psychological supports the worker would have needed to have any chance to return to work.

The worker was a police officer who was assaulted on the job and developed Post Traumatic Stress Disorder and Depression. He was involved in a return to work and then had a long period of unemployment while he underwent treatment for his psychological injury.

In 2008, the WSIB decided the worker could be retrained and in 2010 the Board cut his benefits, finding he could be a night watchman or junior office clerk.<sup>46</sup> These jobs were unsuitable for a variety of reasons. But even if they were potentially suitable, expert assessors at CAMH had only said that the worker *might* be able to return to work if the Board provided him with an extensive treatment program. The Board did not provide him with any such treatment program. In this context, there was no prospect of him ever being able to return to work.<sup>47</sup>

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<sup>46</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 589/16* at para 39.

<sup>47</sup> *Ibid* at para 46-47.

In *Decision No. 2475/15*, the Tribunal determined that the Board had similarly failed to provide medical support the expert assessors said the worker needed. The Board also disregarded the impact of the worker's headaches and dizziness, which the Tribunal had previously ruled were work-related.<sup>48</sup>

**Machine operator  
Suffered ear amputation, headaches,  
dizziness and chronic pain**

The worker was **not provided with any such support during his work-hardening period and, not surprisingly, was unable to continue despite his efforts.** -2475/15

In considering his ability to work, the Board had sent the worker, a machine operator, for various medical assessments. The Functional Restoration Program said that, while he was very motivated, the worker's headaches and dizziness were aggravated by many activities. The FRP recommended that any return to work attempts be coupled with a customized treatment program in order to increase his chances of success.

The Board did not provide the worker with the recommended treatment program, but still decided that the worker could return to work in light assembly after a brief job placement program. The worker tried two job placements but his headaches and dizziness prevented him from doing them. The Board decided he was not cooperating in his return to work and cut his benefits. Consequently, the Board penalized him by

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<sup>48</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2475/15* (5 May 2016) at para 37.



deeming him able to earn the maximum earnings for his suitable occupation, thus eliminating his benefits.

The Tribunal decided that the Board's decision that the worker could return to work in light assembly "disregarded the worker's longstanding and ongoing symptoms of dizziness or headache." The Panel found that the worker was not provided with the recommended medical support. In that context, "not surprisingly," he was unable to continue.<sup>49</sup>

**vi. The WSIB failed to ensure the employer was complying with its obligations**

In several cases, the Tribunal also noted that the Board had completely failed to ensure the employer was complying with its obligations to provide modified work before it terminated the worker's benefits.

In *Decision No. 810/14*, the Board decided that the worker had failed to cooperate in suitable work and was not entitled to benefits after the employer fired her. The Tribunal found that, in making this decision, the Board relied on obviously false and "scurrilous documentation" from the employer.<sup>50</sup>

The Vice Chair noted that the ARO completely failed to address the employer's hostile and false communications.<sup>51</sup> The Vice Chair found that these documents:

- were likely "falsely dated" to before the worker's termination to retroactively justify the termination;

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<sup>49</sup> *Ibid* at para 37.

<sup>50</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 810/14* (16 June 2016) at para 54.

<sup>51</sup> *Ibid* at para 51.

- included “general character attacks” against the worker, even though she was a 10-year employee; and
- “clearly demonstrate[d] hostility to the worker during the return to work process.”<sup>52</sup>

**Deli worker  
Suffered a low back injury**

The presentation of *such anonymous, disparaging, irrelevant and quite possibly false information* to the WSIB by the employer in support of its position speaks volumes about the workplace environment that the worker was employed in. There was no established return to work program, there was no formal description of the work that the worker was to perform and there was *clear hostility directly expressed towards the worker.* -810/14

The Tribunal also found that the Board had decided the work was suitable before anybody from the Board either visited the worksite or obtained a job description. In fact, there was no such description. The employer said the worker was to do “whatever.”<sup>53</sup>

In *Decision No. 2514/15*, the Vice Chair once again held that the Board had terminated the worker’s benefits without confirming that the employer was actually offering modified work. As such, the Vice Chair found, it had no “legislative basis for terminating entitlement.” In fact, the Vice Chair observed, the employer never did offer the worker modified work and subsequently fired him.

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<sup>52</sup> *Ibid* at paras 53, 55.

<sup>53</sup> *Ibid* at para 60.

**Transport truck driver  
Suffered concussion, neck injury and  
headaches**

The reduction and eventual termination of benefits was based on **an assumption by the Case Manager that the graduated return to work stipulated by Dr. Waseem would be put into place by the accident employer.** [...] the Case Manager did not, in fact, have any information confirming that fact. -25/4/15

The worker informed the Board that the employer had not offered modified work. The Board's call to the employer for more information went unanswered, but nonetheless, the Board denied the worker benefits.<sup>54</sup>

**vii. The WSIB ignored its own adjudicative advice document about safe return to work**

In 2016, the Tribunal found that some of the Board's decisions were contrary to its own Adjudicative Advice Document, "Recognizing Time to Heal – Assessing Timely and Safe Return to Work." The Tribunal found that the Board's decisions did not comply with the common sense best practices set out in the Time to Heal document.<sup>55</sup>

The WSIB created the Time to Heal document in 2005 after consultation with stakeholders. The document states that sometimes "rest' is an appropriate form of treatment and required in order to speed recovery and facilitate a successful return to work." It also cautions that

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<sup>54</sup> 25/4/15

<sup>55</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1889/15* (29 April 2016) at para 28; See also 2524/16, *supra* note 18 at para 45.

neither the WSIB nor the employer “should insist on a return to work too early.” “Too early a return to work,” the document explains, “could cause damage, result in further injury for the worker, and more time away from work.”<sup>56</sup>

In 2015, the Board retracted the Time to Heal document and implemented a new Adjudicative Practice Document more in line with “Better at Work.” This new document states that “evidence-based best practices do not support ‘rest’ and inactivity for promoting recovery and supporting successful return to work.”<sup>57</sup>

#### **viii. The WSIB’s decision about return to work was illogical or unreasonable**

The Tribunal found that a number of WSIB decisions regarding return to work were just plainly illogical or unreasonable in light of the medical evidence and facts.

In *Decision No. 2122/16*, for example, the Tribunal noted that, given the medical restriction to limit driving to 15 minutes at a time, the worker would have had to stop and rest for one to two hours each way just to drive to and from work. As a result, “in order to drive to work and drive home on any given day, the worker would have required between four to eight hours of rest” just to recover from the effects of the vibration incurred during the commute.<sup>58</sup>

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<sup>56</sup> WSIB, Adjudicative Advice Document, “Recognizing Time to Heal – Assessing Timely and Safe Return to Work.”

<sup>57</sup> WSIB, Administrative Practice Document, “Return to Work Considerations” (May 2015).

<sup>58</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2122/16* (22 August 2016) at para 23.

**Factory worker  
Suffered left arm laceration**

While is it true that the worker injured his left forearm, that does not mean the [worker's] whole person needs are irrelevant nor does it mean that *modified duties that cause pain to a noncompensable body part* are suitable. -1062/16

In *Decision No. 1062/16*, the worker lacerated his left arm while skinning a cow in a meat packaging facility. The employer offered him modified work, but it was located in a freezer and caused him nerve pain because of a prior right shoulder injury. The Board denied the worker benefits because the offered work was suitable for his work injury. The Tribunal rejected the Board's findings, noting that "[w]hile is it true that the worker injured his left forearm, that does not mean the [worker's] whole person needs are irrelevant nor does it mean that modified duties that cause pain to a noncompensable body part are suitable."<sup>59</sup>

In *Decision No. 70/16*, the Tribunal stated that the Board's decision that the worker could find work as a janitor in the wider labour market was "both unrealistic and illogical." It ignored that the worker's own employer, a large institution, had been unable to accommodate his restrictions following his shoulder injury.<sup>60</sup>

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<sup>59</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1062/16* (16 June 2016) at para 29.

<sup>60</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 70/16* (27 April 2016) at para 31.

### **III. The WSIB reversed vulnerable workers' promised benefits**

#### **A. Background to the issue**

##### **i. The WSIB becomes concerned about locked-in claims**

In 2009, the Auditor General reported that the WSIB was in serious financial trouble. Among the culprits, the report stated, were the Board's "locked-in" claims, which had doubled in number between 1997 and 2001.<sup>61</sup>

The Auditor General identified "locked-in" claims because of their long duration and high cost: they involve benefits that, by law, the Board is no longer able to adjust, except in limited circumstances. Most benefits are "locked-in" by statute six years post-injury. If the worker is "locked-in" with full benefits, the WSIB is usually obligated to pay full benefits until the worker turns 65.

In 2011, the Board hired Deloitte & Touche LLP to analyze the WSIB's finances and to specifically address the role of "locked-in" claims in its 12 billion dollar deficit. The Board asked Deloitte to provide advice on "Right Sizing Costs," and outlined the following goals in their contract:

- "Understand[ing] ... key drivers of high duration claims";

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<sup>61</sup> Office of the Auditor General of Ontario, *2009 Annual Report*, at 331.

- “Understanding lock-in percentages – Making better lock-in percentage decisions”<sup>62</sup>; and
- Gaining “greater insight into the key drivers of high impact claims (including locked-in), high duration claims” in order to allow the WSIB to make “strategic decisions around claim management and risk mitigation.”<sup>63</sup>

Deloitte’s report, dated October 26, 2011, advised the Board to “standardize” and “control” its claims adjudication in order to achieve “significant cost savings.”<sup>64</sup> The Board maintains that it “did not commission any reports which were aimed at reducing benefits.”<sup>65</sup>

The Board followed Deloitte’s advice and took significant steps to “standardize” its decision making, especially as it affects full benefits claims and lock-in. The Board now requires management or even director-level approval before allowing full loss of earnings claims. Further, the Vice President of Service Delivery, an extremely senior Board official, is required to *personally review* any “lock-in” of benefits granted to workers under the age of 55.<sup>66</sup>

The intention of these changes is transparently to cut benefits in expensive claims. This process directly introduces senior WSIB

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<sup>62</sup> Ontario, Workplace Safety and Insurance Board, “Deloitte – Executed Contract” (2011) at 1.

<sup>63</sup> *Ibid* at 2.

<sup>64</sup> Deloitte noted that certain of WSIB’s field offices had “significant variances” in total claims costs. The report further found that two offices in particular had “a disproportionate number of claims to survive until lock-in”; See Ontario, Workplace Safety and Insurance Board, “Deloitte – Analytic Review of Claims Data – 26 October 2011” at 50 in *WSIB Disclosure to Standing Committee on Government Agencies* (31 July 31) at 1679.

<sup>65</sup> Ontario, Workplace Safety and Insurance Board, *WSIB Disclosure to Standing Committee on Government Agencies* (31 July 31) at 17.

<sup>66</sup> Ontario, Workplace Safety and Insurance Board, “Oversight and Approval Framework – Service Delivery Manager Review and Touch Points – 29 May 2012” at 9 in *WSIB Disclosure to Standing Committee on Government Agencies* (31 July 31) at 4076

management into the adjudication of individual claims.<sup>67</sup> It also discourages front-line adjudicators from recommending full benefits. They can avoid conflict with management by denying full benefits at lock-in. Further, by targeting claims for full loss of earnings, these requirements have the largest impact on the most disadvantaged workers.

**ii. The WSIB reverses full benefits because of concerns over its finances**

In 2010 the Board appears to have implemented another “control” measure to reduce locked-in benefits: reversing full benefits claims before they could be locked in.

In 2010, the Fair Practices Commission, the organizational ombudsman for the WSIB, received a number of complaints after the Board started reassessing the claims of workers to whom it had previously promised full benefits. The Board had promised many of these workers full benefits until the age of 65, often in writing. The Board had decided these workers were unable to ever go back to work. But then, out of nowhere, as the worker was approaching the statutory “lock in”, the Board changed its mind. As a result, workers’ benefits – their only source of income – were often significantly reduced or ended completely.<sup>68</sup>

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<sup>67</sup> IAVGO saw one such review in a worker’s case record. The document revealed that the Vice President reviews a substantive summary of the facts of the case before deciding whether to approve or deny the lock-in of such claims.

<sup>68</sup> Ontario, Fair Practices Commission, *Fair Practices Commission 2010 Annual Report* (2010) at 3. According to the WSIA, workers who are not able to work in suitable and available employment because of their injury are entitled to loss of earnings support; WSIA, *supra* note 1, s 43.



### iii. The WSIB drastically cuts the number of workers receiving full benefits

The Board has repeatedly said that it cannot provide information on how many times it reversed workers' promised full benefits. The Standing Committee on Government Agencies requested the Board provide this information, and IAVGO filed Freedom of Information requests, but the Board's response has been the same.<sup>69</sup>

While it's therefore impossible to know how many times the Board reversed a worker's promised full benefits, there is evidence to suggest that the numbers are significant.

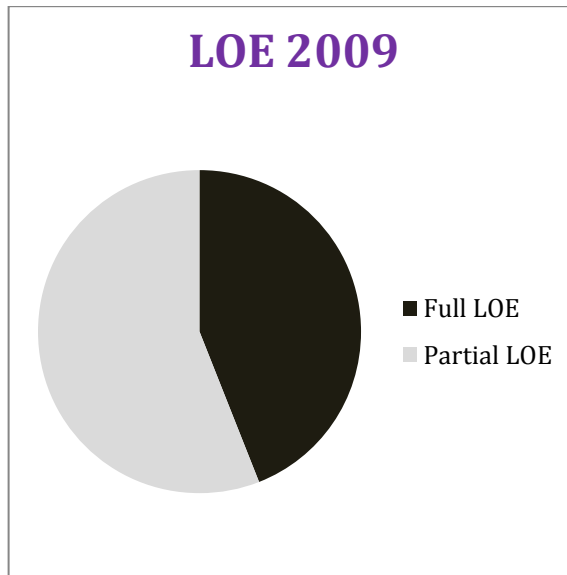
One crucial piece of evidence: the total number of workers receiving full loss of earnings at lock-in fell drastically in the years between 2009 and 2013. In 2009, the Board decided that 1,960 permanently injured workers needed long-term full benefits in recognition of the fact that they were unable to work following workplace injury. In 2013, the Board decided that only 693 permanently injured workers needed long-term full benefits.

This is a **65%** reduction in full benefit cases at lock-in. Another way to look at the numbers: the percentage of workers receiving full benefits, as opposed to partial benefits, at lock-in dropped precipitously during this period. In 2009, 44% of workers receiving any loss of earnings payments at lock-in were receiving full loss of earnings (which means the Board accepted they were unable to find suitable work). In 2013, only 16% of

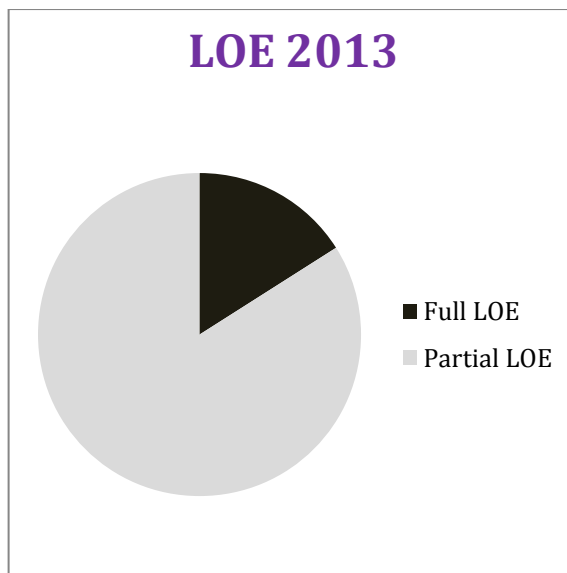
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<sup>69</sup> Ontario, Workplace Safety and Insurance Board, "To IAVGO RE: FIPPA Access Request #14-036" (19 August 2014) at 1, 2; Legislative Assembly of Ontario, Standing Committee on Government Agencies, "Report on Agencies, Boards, and Commissions: Workplace Safety and Insurance Board" (November 2013) at 14.

workers receiving any loss of earnings payments at lock-in received full loss of earnings.



Total number of workers on LOE at lock-in: 4380



Total number of workers on LOE at lock-in: 4140

The Board maintains that this drastic drop in the number of workers on full benefits at lock-in is the result of “better return to work and recovery” outcomes. In providing IAVGO with these statistics, the Board stated that “[c]hanging trends in lock-in awards are directly related to improved outcomes from the New Work Transition Program, which was phased in between 2010 and 2011.” Further, they contended that, “[r]eturn to work rates improved from 34.4% in 2009 to 81.3% in 2014.”<sup>70</sup>

This contention – that the radical cut in full locked-in benefits between 2009 and 2013 can be explained by more “successful return to work,” and not the Board’s own adjudicative practices – is suspect for a number of reasons:

1. The Board has no idea if workers are actually working when they are locked in. At best, it only knows if workers are actually working one year post-injury. It does not do any systemic longer-term tracking of whether injured workers are actually working.<sup>71</sup> So, the Board *does not know* whether workers are actually working at lock-in. It has no reliable information about the rate of return to work “success” at lock-in.
2. The Board’s contention that it improved return to work from 34.4% in 2009 to 81.3% in 2014 is entirely misleading. This alleged improvement is merely a function of changing how return to work

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<sup>70</sup> Ontario, Workplace Safety and Insurance Board, “To IAVGO Re: FIPPA Access Request # 14-011, IPC Appeal #PA14-214 (28 Nov 2014) at 1.

<sup>71</sup> Sara Mojtehdzadeh, “WSIB policy pushes hurt workers into ‘humiliating’ jobs and unemployment, critics say” *The Toronto Star* (12 September 2016) online: <https://www.thestar.com/news/canada/2016/09/12/wsib-policy-pushes-hurt-workers-into-humiliating-jobs-and-unemployment-critics-say.html>. It is still unclear whether the Board actually tracks return to work at all versus whether it merely codes the case “RTW” in its computer system; see Letter from IAVGO, IWC and Gary Newhouse to Tom Teahan, December 21, 2016 re: RTW Tracking, <http://iavgo.org/research-and-resources/>.

is characterized and measured. The former Labour Market Re-Entry program (pre-2010) only included workers who were unable to return to their employers and so had to retrain for a new career. These permanently injured workers represent the minority of all WSIB claims, and often face enormous barriers to entering an entirely new career. The current Work Reintegration program (Post-2010), on the other hand, expanded to include workers who are able to return their employers. These workers make up the majority of WSIB claims – most workers hurt on the job recover and return to work, regardless of any support the WSIB does or does not provide. By combining these two types of workers, the WSIB is able to claim a huge “success” for merely moving numbers from one column to another. Comparing statistics from the two different programs is meaningless.

3. The Board’s new return to work program, phased in between 2010 and 2011, likely had no or little effect on the workers who were locked in from 2011-2013. The new system is largely aimed helping workers return to work with their accident employer.<sup>72</sup> Workers who were locked-in from 2011-2013, as the rate of full benefit awards plummeted, had likely attempted to return to work with their accident employer in the years after their injuries in 2005, 2006 and 2007, not after 2011. Their unsuccessful return to work attempts therefore happened under the previous WSIB “self-reliance” approach to return to work. While there might be some exceptional cases of return to work with the accident employer

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<sup>72</sup> *Operational Policy Manual* Document 19-02-01, Work Reintegration Principles, Concepts, and Definitions, at 1.

many years post-injury, in most cases, the Board's new system had no effect on workers locked in from 2011-2013.

In sum, while it's clear that the number of workers who were locked in with full benefits has fallen precipitously, the Board's explanation for this drop is fundamentally unsatisfying. The real explanation is much more disturbing. The Board has imposed a number of cost-control measures that target workers, especially the most vulnerable workers who are unable to return to work.

## B. WSIAT 2016 cases demonstrate a regular WSIB practice of reversing full benefit entitlements

If the WSIB is correct that workers no longer locked-in on full benefits are actually back to work, we would expect that there would be few or no appeals from

workers who had been cut off full benefits. If workers were actually working, they would have no reason to appeal.

We found the opposite.

By 2016, there was already “considerable case law” at the

Tribunal addressing “the issue of the Board first determining a worker to be unemployable and then later reversing that decision as of the final lock-in date.”<sup>73</sup> To the best of our knowledge, all of these decisions have restored the workers’ full benefits. As the Panel observed in *Decision No. 1997/15*, there is a “consensus of case law on the matter” of the appropriateness of the Board reversing a determination that the worker is entitled to full benefits.<sup>74</sup>

In one of the earlier cases dealing with these benefit reversals, *Decision No. 166/14*, the Vice Chair questioned whether the Board’s decision to reverse full benefits was just and complied with the Board’s

**Is it just for the Board, after providing assurances to the worker that his benefits will not change except if his condition improves, to then unilaterally change that approach? – *Decision No.***

***166/14***

<sup>73</sup> See e.g., *Workplace Safety and Insurance Appeals Tribunal Decision Nos. 1997/15, 2143/14, 2350/14, 2385/15, 2189/14, 1997/15, 166/14.*

<sup>74</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1997/15* (19 October 2015) at para 17.

obligation to make decisions based on the merits and justice of each case.<sup>75</sup>

IAVGO is also aware from our own work that some of these cases were reversed at the WSIB's Appeals Services Division. In one such case, the Appeals Resolution Officer noted that the only thing that changed between 2008 and 2012 was that the worker got four years older. The ARO noted that there is "no evidence to support that advanced age increases employment opportunities or enhances employability." She concluded that the Board's original decision was sound and there was no indication why the Board decided differently in 2012.

**Labourer  
Suffered back injury**

[T]here was sufficient sound basis to support the decision of the adjudicator in 2008 that the worker was not a candidate for LMR services and was unemployable. *It is not clear why the adjudicator in 2012 decided differently* as there was no new information provided to conclude that the earlier decision was flawed. - ARO decision

In 2016, the Tribunal issued an additional 28 decisions in which it found that the Board wrongly reversed a previous determination that the worker was entitled to full benefits.

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<sup>75</sup> Workplace Safety and Insurance Appeals Tribunal Decision No. 166 14 (14 February 2014) at para 26. Emphasis added.

**i. Decision No. 1192/16**

In *Decision No. 1192/16*, the worker was a farmer who, in his mid-fifties, injured his back while working as a truck driver and labourer.<sup>76</sup> He was unable to return to his job. In 2007, the WSIB sent him for a detailed

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**It can be argued that it is not appropriate to keep a worker in limbo for over four years regarding LMR services, once there has been a decision, that such would not be appropriate and employment was not feasible. – 1192/16**

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psycho-vocational assessment of his ability to retrain and work. The worker had a learning disability and the psychologist said he was not a candidate for academic retraining. After receiving this assessment,

the Board decided that the worker would neither benefit from retraining nor be able to find other work. The Board told him he would receive ongoing full loss of earning support.

Four years later, out of nowhere, the Board decided to reassess his ability to work. The Board determined that he could in fact retrain to be a Retail Sales Clerk. However, the Board neither sent the worker for a new assessment nor asked his opinion. His doctor expressed concern to the Board, stating, “I am unclear as to why a vocational reassessment is planned for [the worker]. He has not improved since he was deemed to have a permanent work-related low back injury.”

During the retraining program, the worker was told not to mention his back disability to prospective employers. The worker sent out resumes, but couldn’t even find a placement, let alone a job. At the end of

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<sup>76</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1192/16* (18 May 2016).



the retraining program in 2012, the Board decided that he could work as Retail Sales Clerk. His benefits were reduced by the amount of money the Board believed he could make in this job.

The Vice Chair found that it was “not appropriate” for the Board to keep the worker “in limbo” for four years before sending him for retraining that it had already decided would not succeed. In restoring the worker’s benefits, the Vice Chair made the following observations:

- In 2007, the Board told the worker he was to receive full benefits to age 65.
- There was “no evidence” that there had been any change in the worker’s condition or circumstance since he was deemed incapable of performing the same suitable occupation in 2007.<sup>77</sup>
- In 2011, the worker had been unemployed for close to five years. He was older, and job availability in his community was much worse.

## **ii. Decision No. 2385/15**

In another 2016 case, the worker was injured in 2006 in her job of 32 years as a packer.<sup>78</sup> Her attempts to return to work had failed. The Board sent her for a psycho-vocational assessment which determined that she was not a good candidate for retraining. The assessors explained that the worker, who scored at kindergarten level for literacy and numeracy, would need three years of retraining in order for her English language skills to be adequate for the job of telemarketer. In January 2008, when the

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<sup>77</sup> Ibid at 5-8.

<sup>78</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2385/15* (21 August 2013).

worker was in her fifties, the Board wrote to her and explained that she would receive full loss of earnings support until she turned 65.

**Packer  
Suffered back and shoulder injuries**

The Panel finds *no evidence* to support a conclusion that the worker's condition had improved in the intervening period between Board's decision in 2007 which found the worker was not suitable for LMR services, and its subsequent decision on October 18, 2011, referring the worker for WT services.<sup>79</sup> – 2385/15

In between 2008 and 2011, the Board rarely contacted the worker. There was no change in her medical condition. Yet, in October 2011, as her case approached lock-in, the Board decided the worker could retrain for the job of Retail Sales Clerk. The worker was 62 years old. Contrary to the assessors, who believed the worker required three years of retraining, the Board decided she could retrain in about eight months.

When the worker declined to participate in the retraining plan because of ongoing pain, the Board eliminated her benefits, saying that she failed to cooperate in her return to work. The Board determined she was capable of earning \$21/hour as a Retail Sales Clerk and reduced her benefits by that amount.

The Panel restored the worker's full benefits, and made the following observations:

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<sup>79</sup> Ibid at para 23.

- There was “no evidence . . . to suggest the worker no longer required extensive ESL upgrading, or academic upgrading, prior to attempting a return to the labour market.”<sup>80</sup>
- There was “no evidence to support a conclusion that the worker’s condition had improved in the intervening period” between 2007 and 2011.<sup>81</sup>
- The worker was almost 63 years old when the Board demanded that she participate in retraining, and would have been nearly 64 at the end of retraining.<sup>82</sup>

### iii. *Decision No. 120/16*

In *Decision No. 120/16*, the Board reversed its finding that the worker couldn’t work in the spring of 2010, only six months after it had made it. The Board had no reason for the reversal. In fact, an expert

**It seems reasonable to expect that taking action of this nature should be based on a rationale that is understandable and communicated to a worker. That was not the case here – 120/16**

assessment in March 2010 confirmed again that the worker would be unable to do any formal academic training or upgrading. The Vice Chair observed that, while the Board has the

power to reconsider a LOE entitlement decision, “it seems reasonable to expect that taking action of this nature should be based on a rationale that

<sup>80</sup> Ibid at para 23.

<sup>81</sup> Ibid at para 23.

<sup>82</sup> Ibid at para 23.

is understandable and communicated to a worker.” This was “not the case here.”<sup>83</sup>

#### **iv. Decision No. 920/16**

The Board often failed to consider barriers to retraining and even risks inherent in retraining when reversing entitlement. In *Decision No. 920/16*, the Board had decided in 2009 that the worker should not be retrained. The Board noted expert advice that showed that all the proposed post-injury jobs were physically unsuitable or otherwise not viable. The Board also observed that the stress from a retraining plan could aggravate the worker’s non-compensable epilepsy. In 2011, however, the Board changed its tune. The Board sent her to retraining and then cut her benefits in 2012. The Board appeared to ignore its own concerns about worsening the worker’s health.<sup>84</sup>

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<sup>83</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 120/16* (18 January 2016) at para 53.

<sup>84</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 920/16* (19 April 2016) at 9-12.

## **IV. The WSIB wrongly cuts benefits based on “pre-existing conditions”**

### **A. Background**

In or around 2010, the WSIB began using “pre-existing conditions” to deny or limit workers’ benefits. Now, the Board frequently ends entitlement by deciding that workers have recovered from their workplace injury. Any ongoing symptoms, the Board reasons, must be caused by a pre-existing condition rather than the workplace accident.

This new approach began with the following changes:

- The WSIB started relying more heavily on “expected recovery times”. It often uses these expected recovery guidelines to decide that a worker had recovered from the workplace injury, even if the medical evidence shows the worker is not recovered.<sup>85</sup>
- The Board began to increasingly decide that pre-existing conditions were the predominant or only source of a worker’s ongoing disability. The most frequent “pre-existing conditions” the WSIB cites are degenerative changes, like degenerative disc disease. Often, these degenerative conditions are asymptomatic

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<sup>85</sup> As part of its disclosures to the Standing Committee, the Board provided a document entitled “Expected RTW and Recovery Timeframes Tool (April 2012)”; included in the WSIB’s disclosure to the Standing Committee on Government Agencies July 31, 2012 at 2377.

prior to the workplace injury and are only discovered through post-injury medical tests.<sup>86</sup>

- In or around 2012, the WSIB began reducing (or “apportioning”) the permanent impairment (NEL) ratings of workers with pre-existing conditions, even if the worker had no pre-accident symptoms or diagnosed impairment.<sup>87</sup> This practice was contrary to the plain language of the Board’s policy.<sup>88</sup> In November 2014, the Board revised its policies to try to legitimize this practice.<sup>89</sup>
- In November 2014, the Board implemented its first policy specifically addressing pre-existing conditions. This policy explains

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<sup>86</sup> Maryth Yachnin and Rob Boswell, “Assessing Pre-Existing Conditions and Determining Permanent Impairments” in *Current Issues in Workplace Safety and Insurance Law – 2014* (Ontario Bar Association: Ontario, 2014) at 4.

<sup>87</sup> In early 2012, the WSIB hired a consultant to conduct a review of the NEL system and devise recommendations for a different way to rate these awards (despite the legal requirement that the Board use the third edition of the *AMA Guides*). The consultants recommended, among other things, that the WSIB should not include any permanent impairment assessment for “degenerative processes associated with aging and genetics”. The WSIB immediately implemented the consultants’ recommendation and, without any change in official policy, started apportioning the NEL benefits of workers with pre-existing conditions, even where those conditions were asymptomatic. Particular attention was paid to injuries of the back and neck. In May 2012, the WSIB’s Permanent Impairment Branch issued an internal document directing NEL assessors (who by this point were almost exclusively the WSIB’s own employees) to reduce awards whenever diagnostic or other medical reports show the presence of underlying or pre-existing conditions.

For the consultant’s review, see: Brigham & Associates, *Permanent Impairment Advisory Service: Executive Summary*, (4 April 2012) at 7 (included in the WSIB’s disclosure to the Standing Committee on Government Agencies July 31, 2012 at 1065).

For the internal document on NEL awards, see: Ontario, Workplace Safety and Insurance Board, *Spine and Pelvis: Permanent Impairment Branch*, May 7, 2012 (included in the WSIB’s disclosure to the Standing Committee on Government Agencies, July 31, 2012, at 3549-3581). The document includes a table advising assessors how to apportion where there is evidence of DDD.

<sup>88</sup> Ontario, Workplace Safety and Insurance Board, “18-05-05, “Effect of a Pre-existing Impairment” in *Operational Policy Manual Document*.

<sup>89</sup> Ontario, Workplace Safety and Insurance Board, “18-05-03, “Determining the Degree of Permanent Impairment” in *Operational Policy Manual Document* (03 November 2014).

how entitlement may be limited due to the existence of pre-existing conditions.<sup>90</sup>

The Board's internal training documents further illuminate the Board's current adjudicative approach to pre-existing conditions.<sup>91</sup> These documents instruct decision-makers that if a worker's recovery time is longer than originally expected, they should look for a pre-existing condition as the likely cause:

- In one training document, for example, the Board informs its adjudicators that a worker's diagnosis is usually "compatible with the work related injury." If recovery is prolonged beyond the expected date, the document continues, and "further testing such as x-rays and CT scans are done, the underlying condition becomes apparent." This suggests that the reason for an extended recovery time is usually related to a non-compensable "underlying condition," rather than the workplace injury. The Board concludes the note by reminding adjudicators that "entitlement is not granted for the pre-existing condition."<sup>92</sup>
- The Board's characterization of degenerative changes further encourages adjudicators to attribute an extended recovery period to pre-existing conditions. The Board asserts that the key characteristics of degenerative conditions are a "***Slow and***

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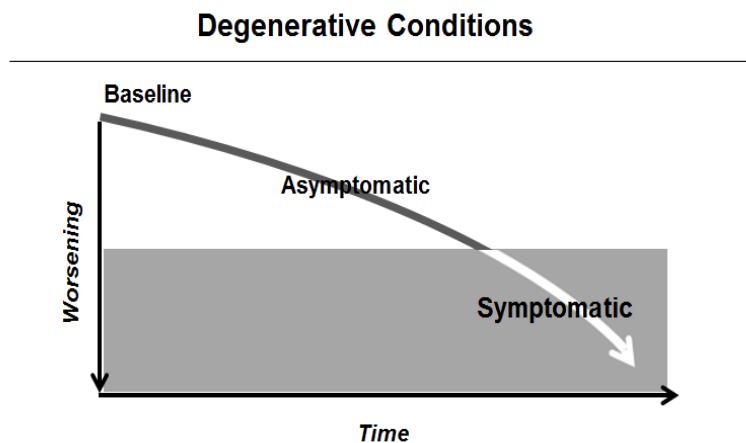
<sup>90</sup> Ontario, Workplace Safety and Insurance Board, "15-02-03 Pre-Existing Conditions" in *Operational Policy Manual Document* (03 November 2014).

<sup>91</sup> These documents were disclosed to Injured Workers' Consultants legal clinic upon a Freedom of Information request.

<sup>92</sup> Ontario, Workplace Safety and Insurance Board, "Training Resource - Delivery Guide: Principles of Adjudication" (28 April 2015) at 5 (disclosed to the Injured Workers' Consultants legal clinic upon a Freedom of Information request, 2016).

**gradual** progression, over years and decades” and an “**Asymptomatic phase** before symptoms appear.” The Board further specifies that “a **single incident** rarely changes the overall course or outcome” and that the major risk factors are “age, family history, prior cartilage damages.”<sup>93</sup> This characterization suggests that any degenerative change would inevitably become symptomatic, regardless of the workplace injury.

- Below is a chart that the Board provides its adjudicators to guide their approach to pre-existing conditions. This chart teaches adjudicators that degenerative conditions follow a course of deterioration over time, regardless of workplace injury.



<sup>93</sup> Ontario, Workplace Safety and Insurance Board, “Training Resource – Degenerative Conditions: Key Characteristics” (2015) (disclosed to the Injured Workers’ Consultants legal clinic upon a Freedom of Information request, 2016). Emphasis in original.



The Board's use of pre-existing conditions to cut benefits has been widely noted and challenged. One law firm has launched a class action about the Board's practice of cutting NEL awards. The plaintiffs allege that by cutting NEL awards in a manner that violates its own policy, the Board engaged in misfeasance in public office, bad faith and negligence.<sup>94</sup>

## B. The WSIB wrongly denies entitlement based on pre-existing conditions

### i. The WSIB wrongly attributes compensable physical injury to pre-existing changes

There are some cases where the evidence really does show that an injury is caused by a pre-existing impairment. However, the case law from the Tribunal reveals that the Board identifies pre-existing conditions to justify cutting benefits in spite of the evidence, not because of it. In 2016, there were **75** cases where the Tribunal found that the Board used a pre-existing condition to deny entitlement without adequate, or any, evidence or reason. The following are some examples:

- In *Decision No. 2625/15*, the Panel found that there was “**little, if any, evidence**” to support the Board's finding that the worker, a roofer, had recovered from her compensable back injury. The Panel further held the decision to attribute the worker's impairment to a pre-existing condition had been “**arbitrary**.”<sup>95</sup>
- In *Decision No. 1968/16*, the Panel found that there was “**no evidence**” that any pre-existing condition was sufficiently severe

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<sup>94</sup> While the class action was at first dismissed on a preliminary motion, the Ontario Court of Appeal recently restored it; *Castrillo v Workplace Safety and Insurance Board*, 2017 ONCA 121.

<sup>95</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2625/15* (8 June 2016) at para 72.

to cause the worker's symptoms. The Panel held that, contrary to the Board's findings, there was "no medical evidence of substance" linking the worker's low back condition to a pre-existing condition.<sup>96</sup>

- In *Decision No. 2396/16*, the Panel found that there were "**no medical opinions suggesting an alternate cause**" for the worker's left shoulder injury "other than work duties." The Panel further observed that the Board had no evidence to suggest age-related degeneration was the sole cause of the worker's ongoing condition.<sup>97</sup>
- In *Decision No. 2705/15*, the Panel once again addressed a Board decision that a worker's injury was pre-existing. The Panel noted that the worker, a migrant farm labourer, had been performing **physically demanding work for 10 to 14 hours per day for 12 years prior to the accident without issue**. The worker only experienced acute symptoms immediately following the accident, and there was "no evidence" of any symptoms prior to the accident.<sup>98</sup>
- In *Decision No. 1980/16*, the Board had attributed the worker's back injury to a non-compensable condition. The Panel stated there was "no indication in the evidence . . . that the worker had a symptomatic low back condition, previous back injuries, or a

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<sup>96</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1968/16* (5 December 2016) at para 63 [*Dec. No. 1968/16*].

<sup>97</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2396/16* (20 October 2016) at para 32.

<sup>98</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2705/15* (4 April 2016) at para 31.

history of back symptoms” before the workplace injury. The Panel further observed that the neurosurgeon and family doctor both opined that the worker’s back injury was work-related, and there was “no contrary medical opinion” in the case record.<sup>99</sup>

**Salesperson  
Suffered back injury**

The Panel notes the opinion of the neurosurgeon with respect to causation reflects that of the worker’s long time family doctor. We also find it is consistent with the evidence before us. There is **no contrary medical opinion** contained in the material before us. – 1980/16

- In *Decision No. 1007/16*, the Vice Chair found that the evidence pointed to the “**inescapable conclusion**” that the work accident, not a pre-existing condition, caused the worker’s chronic back injury. There was “no evidence” of any other event or factor.<sup>100</sup>

**Paving stone installer  
Suffered back injury**

Finally, to the extent that the adjudicator may have been implying that the worker’s back pain is due to a degenerative condition of any kind, there is **no medical opinion** to that effect. – 1442/16

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<sup>99</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1980/16* (15 August 2016) at para 14.

<sup>100</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1007/16* (27 April 2016) at para 35.

- In *Decision No. 1442/16*, the Panel determined that “to the extent that the adjudicator may have been implying that the worker’s back pain [was] due to a degenerative condition of any kind, there [was] no medical opinion to that effect.” The Panel further noted that the Board provided **“no medical support”** for its finding that the worker’s condition was non-compensable.<sup>101</sup>
- In *Decision No. 2461/15*, the Panel found that the Board’s decision that the worker’s ongoing symptoms were attributable to underlying degenerative changes was “unsupported by any medical evidence.” It was also **contrary to its own previous decision** that the worker, a welder, *did not* have a pre-existing bilateral shoulder condition at the time of his accident.<sup>102</sup>

**ii. The WSIB wrongly attributes compensable mental health conditions to pre-existing conditions**

The Board’s tendency to erroneously blame pre-existing conditions extends to cases of psychological entitlement. In a significant number of Tribunal decisions, the Panel or Vice Chair found that the Board had wrongly attributed a mental health condition to a non-compensable factor. The following are some striking examples of this pattern:

- In *Decision No. 694/16*, the Tribunal addressed the appeal of a worker who developed a serious chronic pain condition requiring amputation of his finger. The Board denied the worker entitlement

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<sup>101</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1442/16* (17 June 2016) at para 23,

<sup>102</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2461/15* (15 January 2016) at para 40.

for his psychological injuries diagnosed as social phobia, anxiety and PTSD, stating that he had a non-compensable history of mental health issues dating back to when the worker was a young child. The Panel found that this conclusion was “not supported by the evidence.” In fact, there was **“no medical reporting” the worker had ever sought psychological treatment before the accident.**<sup>103</sup>

- In *Decision No. 2457/16*, the Board denied entitlement for the worker’s psychological injuries because it found they were pre-existing. The Vice Chair found that there was “a lack of medical evidence” to show the worker had any symptomatic psychological condition until the injury.<sup>104</sup> The Board decision’s that the worker had a pre-existing condition was **“not supported” by the evidence.**
- In *Decision No. 2824/16*, the Board had attributed the worker’s condition to a number of non-compensable factors, including high blood pressure, a divorce many years before the injury, and the fact that the worker originally came to Canada as a refugee. The Vice Chair found that there was **“no evidence of substance”** to suggest that these non-compensable factors were in any way connected to the worker’s mental health condition. The worker’s specialist had not opined that any of these factors had caused any component of the worker’s psychological condition.

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<sup>103</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 694/16* (2 May 2016) at para 54.

<sup>104</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2457/16* (3 November 2016) at para 55

The Vice Chair firmly resolved that “**there [was] no substantial basis for concluding that these factors, which caused no**

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The ARO also suggested that the worker’s presentation was not genuine because she was tearful during the ARO hearing but was observed leaving the building “walking, holding, and swinging her large purse in her right hand”. - *Decision No. 2824/16*

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**psychological condition prior to the injury, somehow overwhelmed the causal contribution of her traumatic workplace injury in perpetuating her ongoing psychological condition.”<sup>105</sup>**

In this case, the Vice Chair also raised concerns about the ARO’s suggestion that the worker’s presentation was not genuine because she was tearful during the hearing but was observed leaving the building “walking, holding, and swinging her large purse”. The Vice Chair noted that the worker was not “expected to cry constantly” and that her ability to carry a purse was entirely consistent with her demonstrated abilities. Further, the suggestion that the worker wasn’t genuine ran counter to the weight of evidence on file.<sup>106</sup>

- In *Decision No. 1723/16*, the Board initially decided that the worker’s psychological condition was work-related, but later wrongly rescinded this entitlement. The Vice Chair found that the

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<sup>105</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2824/16* (9 November 2016) at para 32, 33.

<sup>106</sup> *Ibid* at para 34.

Board's initial reasoning in allowing was the claim was correct. The Board originally found that "[t]he worker was capable of getting up and going to work every day for 21 years" before the injury. "While she may have some persisting psychological issues," the original decision maker observed, "there is nothing on file to support that the worker was depressed, having chronic nightmares or suicidal prior [sic] to this injury." The Vice Chair found that those conclusions were still "supported by the evidence" and found **"no reason" to reject the opinions of the three doctors who "unanimously" believed** that the worker's depression was work-related.<sup>107</sup>

The Board's tendency to wrongly attribute workers' mental health conditions to pre-existing facts of their lives like their family or immigration status disproportionately targets workers who are already marginalized.

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<sup>107</sup> Workplace Safety and Insurance Appeals Tribunal Decision No. 1723/16 (August 16 2016) at para 23, 24. See also, Workplace Safety and Insurance Appeals Tribunal Decision No. 2037/16 (19 August 2016) at para 10. The Vice Chair noted,

*"On May 21, 2013, Dr. Omoruyi concluded in a letter to the Board that the worker remained compliant with all medications and treatment, but that she was significantly impaired mentally and physically. He opined in his report that her mental state was directly related to the loss of her function and her job. While the ARO concluded that the worker had prior depression, I see no evidence that she was unable to work and maintain the normal activities of daily living."*

### C. The WSIB decides that workers have recovered contrary to the evidence

As well as erroneously attributing injuries to non-compensable conditions, the Board routinely decides that workers have recovered from workplace accidents despite evidence to the contrary. In **56** cases, the Tribunal found that the Board had ignored medical evidence that showed that the worker had not recovered. For example:

- In *Decision No. 1398/16 I*, the Vice Chair stated there was “no evidence” and “no medical evidence” to support the conclusion that the worker’s left knee impairment had resolved, nor that the condition was pre-existing. The Vice Chair observed that it was “**not clear how the Case Manager and ARO came to the conclusions that they did about this matter.**”<sup>108</sup>

**Labourer  
Suffered leg and knee injury**

There is **no medical evidence stating that this condition was a pre-existing condition**. It is not clear how the Case Manager and ARO came to the conclusions that they did about this matter.<sup>109</sup> -  
*1398/16 I*

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<sup>108</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1398/16 I* (1 June 2016) at para 37 [Dec. No. 1398/16 I],

<sup>109</sup> *Ibid* at para 37.



- In *Decision No. 43/16*, the Panel found that “**all available medical evidence**” showed that the worker’s compensable psychological injury had not resolved.<sup>110</sup>
- In *Decision No. 942/16*, a medical centre had predicted that a worker would fully recover in six weeks. The Board had relied on this prognosis to decide, six weeks later, that the worker was no longer injured. The Panel observed that that “[p]rognostications are not necessarily accurate predictions.” Further, Panel noted, the worker was never referred back to the medical centre to reassess his actual condition. The clinical evidence, on the other hand, showed the worker had ongoing symptoms past the date the Board decided he should have recovered.<sup>111</sup>

**Driver/unloader  
Suffered back injury**

[T]he REC report offered a prognosis indicating that the worker had partially recovered, and a full recovery was expected in six weeks. **Prognostications are not necessarily accurate predictions**, however, and in this case, **the worker was not referred back to the REC to re-assess his actual condition.** – 942/16

<sup>110</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 43/16* (21 January 2016) at para 43. See also *Workplace Safety and Insurance Appeals Tribunal Decision No. 1007/16* (29 April 2016) at para 38, in which the Tribunal states,

“There is no evidence if [sic] substance that the worker does not suffer from a compensable psychological condition on an ongoing basis.”

<sup>111</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 942/16* (25 April 2016) at para 29.

- In *Decision No. 1661/16*, the Board had decided the worker had recovered based on a prognosis from the Board’s Specialty Clinic. The Panel observed that, while it was inclined to give weight to the Board’s specialists, “the evidence before us in this appeal clearly establishes that the anticipated recovery . . . did not occur.”<sup>112</sup>

The Tribunal has also noted instances where the Board’s recovery prediction was predicated on the worker receiving treatment that the Board never provided. In other words, a medical professional predicted a worker would recover by a certain time *if* they received a specific treatment. The Board then relied on that prediction to find the worker had recovered, but never actually provided that worker with the prescribed medical care.

**Labourer  
Suffered back injury**

However, we note that the restrictions of 16 weeks were predicated on the worker receiving an “active rehabilitation program [...] We note that **the worker did not receive this rehabilitation** and was not provided with an independent exercise program.”<sup>113</sup> – *1580/16*

In *Decision No. 1580/16*, for example, the Panel observed that the prognosis of full recovery for the worker’s back injury was based on the

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<sup>112</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1661/16 (14 October 2016)* at para 34. See also, *Workplace Safety and Insurance Appeals Tribunal Decision No. 2596/16 (2 December 2016)* at para 46. Here, the Tribunal stated

“ . . . while Dr. Malcolm reported that a recovery was anticipated in eight weeks’ time, I find the medical reporting before me establishes that the worker’s compensable low back strain did not resolve.”

<sup>113</sup> *Ibid* at para 30.

worker receiving an “active rehabilitation program of 16 weeks duration with attendance three times per week” as well as an “independent exercise program.” The Board withdrew entitlement without providing the worker with either.<sup>114</sup>

#### **D. The WSIB wrongly reduces permanent impairment awards due to pre-existing issues**

In or around 2012, the Board started cutting workers’ permanent impairment (NEL) benefits contrary to its own policy. The Board’s policy states that only pre-existing impairments that actually affected the worker pre-injury can justify a reduction to the NEL. But, following the advice of American consultants, the Board started cutting NELs because of pre-existing conditions that had not impaired the worker pre-injury.<sup>115</sup>

The typical case is a worker who suffers a workplace back injury. Before the injury, she didn’t have any significant back pain and never needed any medical care for her back. But, post-injury, an MRI shows the presence of degenerative findings. The Board decides to cut her NEL by 50% to account for this alleged “pre-existing condition.”

Before 2016, there was already a large body of case law at the Tribunal reversing the Board’s decisions on this issue.<sup>116</sup> In 2016, the Tribunal issued **38** more decisions stating that the Board had wrongly reduced a NEL because of pre-existing issues that are not, as per the law and policy, a reason to reduce a NEL award.

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<sup>114</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1580/16* (12 July 2016) at para 30.

<sup>115</sup> See footnote 77.

<sup>116</sup> See e.g., *Workplace Safety and Insurance Appeals Tribunal Decision Nos. 204/14* (12 February 2014), *588/14* (7 April 2014), *607/14* (2 June 2014), *10/15* (16 April 2015).

In most of these decisions, the Tribunal determined that the Board’s decision to cut the NEL due to an asymptomatic pre-existing condition was contrary to the Board’s own policy. It was therefore inappropriate. The Board had no basis to make such deductions.

In 2016, the Tribunal found:

- The Board’s wrongly reduced a cabinet manufacturer’s NEL for his back injury. The Board’s decision did not comply with “numerous previous Tribunal decisions” that held that a pre-existing condition alone, that did not disrupt employment, “is not a sufficient condition to permit a reduction in NEL benefits.”<sup>117</sup>
- There was **“no basis”** for the Board to reduce an electrician’s NEL for his wrist injury. There was no evidence the pre-existing condition had resulted in periods of impairment or illness requiring health care or caused a disruption in his employment. In the absence of such evidence, the Board should not have cut his NEL award.<sup>118</sup>

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**I note that numerous previous Tribunal decisions have held that a pre-existing condition alone ... is not a sufficient condition to permit a reduction in NEL benefits. – 462 16**

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- The Board wrongly reduced a carpenter’s NEL for his back injury. The Board’s decision did not comply with Board policy 18-05-

05 which contains “no provision for reducing a pre-existing condition (as opposed to a pre-existing impairment or disability).”

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<sup>117</sup> Workplace Safety and Insurance Appeals Tribunal Decision No. 462/16 (1 June 2016) at para 21.

<sup>118</sup> Workplace Safety and Insurance Appeals Tribunal Decision No. 313/16 (28 April 2016) at para 22.

It was therefore “inappropriate” for the Board to apply the policy the way it did to reduce the worker’s benefits.<sup>119</sup>

The Tribunal has also observed that the Board was failing to follow its own prior decisions in making these incorrect deductions. In *Decision No. 558/16*, the Board had already made a final decision that the worker did not have a pre-accident impairment before reducing the worker’s NEL. The Tribunal concluded that, having made this final decision, it was “not open to the Board to subsequently characterize those findings as a pre-injury impairment and make a deduction from the worker’s NEL award with respect to them.”<sup>120</sup>

In another case, the Tribunal went further, taking the unusual step of directing the Board *in advance* not to implement its incorrect practice of apportionment. In *Decision No. 2449/15*, the Panel decided that there was no evidence to counter the medical opinions that the worker did not recover from his work injury and was not impaired before the injury. The Panel then advised, “For greater certainty, since we have found the worker’s left knee was asymptomatic prior to the injury, the NEL benefit shall be calculated without any deduction on the basis of a preexisting impairment or condition.”<sup>121</sup>

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<sup>119</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 946/16* (19 April 2016) at para 25.

<sup>120</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 558/16* (11 May 2016) at para 36.

<sup>121</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2449/15* (9 February 2016) at para 21.

**Electrician  
Suffered neck injury**

*If the Board takes the position that the Tribunal's interpretation of the phrase is incorrect, it has the right to request reconsideration* of a Tribunal decision based on that interpretation. There is no evidence that the Board has done so. -1975/16

The Tribunal has also noted that the Board has not responded to the overwhelming body of Tribunal case law establishing that it is breaching its own policy. In *Decision No. 1975/16*, the Vice Chair observed the consistent body of case law establishing that the Board was cutting benefits in violation of the applicable policy. The Vice Chair commented that “[i]f the Board takes the position that the Tribunal’s interpretation of the phrase is incorrect,” it could “request reconsideration of a Tribunal decision based on that interpretation.” The Board has never done so.<sup>122</sup>

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<sup>122</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1975/16 (12 September 2016)* at para 38.

## V. The WSIB targets workers with mental health issues

### A. Background to the issue

Workers and stakeholders report that the WSIB regularly denies workers' entitlement for their injuries, even in the face of unanimous or near-unanimous medical opinion evidence to the contrary. Doctors have also voiced serious concerns about how these adjudicative failures affect workers.<sup>123</sup>

Our review of the Tribunal's 2016 case law definitively shows that ignoring medical opinion is a systemic problem at the WSIB. The issue is not limited to a couple of poorly adjudicated claims: we found **175** cases where the Board's decision ran counter to all of the medical evidence.<sup>124</sup> In many, the Board ignored the only medical evidence on safe return to work, the only evidence on the impact of a pre-existing condition, or the only evidence on causation and entitlement.<sup>125</sup>

While this indifference to evidence extends to all kinds of claims, the Board's adjudication of psychological injuries stands out as particularly alarming. In this section, we address the Board's troubling willingness to

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<sup>123</sup> *Prescription Over-Ruled supra* note 4; See also "Health Professionals for Injured Workers," (website) online: <<https://www.hpiw.org>>.

<sup>124</sup> Many of these are discussed elsewhere in this report. For a comprehensive chart of our findings, see <http://iavgo.org/research-and-resources/>.

<sup>125</sup> For example, see *Workplace Safety and Insurance Appeals Tribunal Decision No. 2730/15* (5 January 2016); *Workplace Safety and Insurance Appeals Tribunal Decision No. 245/16* (19 February 2016); *Workplace Safety and Insurance Appeals Tribunal Decision No. 788/16* (18 April 2016); *Workplace Safety and Insurance Appeals Tribunal Decision No. 363/16* (16 June 2016); *Workplace Safety and Insurance Appeals Tribunal Decision No. 1633/16* (29 June 2016); *Workplace Safety and Insurance Appeals Tribunal Decision No. 2322/16* (22 September 2016).

ignore the professional opinion of psychiatrists and psychologists. We also address the way the Board has targeted workers with mental health conditions for enhanced scrutiny and surveillance.

## **B. The WSIB denies psychological injuries contrary to unanimous medical evidence**

Perhaps the most disquieting Tribunal cases are those where the Board had denied entitlement for psychological injury despite absolutely unanimous medical opinions that the worker's condition was work-related. Stakeholders and workers have expressed serious concern about how the Board treats workers with mental health conditions. Too often, these workers are denied compensation, denied care, or even subject to surveillance and other breaches of their privacy rights.<sup>126</sup> The Board's approach to workers with mental health issues is particularly inappropriate because of the strong, well-documented connection between workplace disability and psychological injury.<sup>127</sup>

### **Shipper/receiver Suffered shoulder injury**

I find no reason to reject the opinions of Drs. Waldenberg, Fitzgerald and Rootenberg who were ***unanimously of the view that the worker's depression was directly related to her compensable right should injury*** and its sequelae.  
- 1723/16

<sup>126</sup> Joel Schwartz, "Recent Developments on Entitlement for Psychotraumatic Disability" in *Current Issues in Workplace Safety and Insurance Law* (Ontario Bar Association: Ontario, 2014) at 13-15.

<sup>127</sup> Fergal T O'Hagan, Peri J Ballantyne & Pat Vienneau, "Mental Health Status of Ontario Injured Workers With Permanent Impairments" (2012) 103:4 Can J Public Health 303.



Tribunal case law shows the Board has repeatedly refused to recognize psychological injuries despite clear, uncontroverted medical evidence that the worker's condition is work-related. The following cases provide stark examples of this endemic issue:

- In *Decision No. 1714/16*, the Tribunal stated that “**the overwhelming balance of the medical reporting**” showed that the worker's depression was caused by her workplace accident. There was “no contradictory medical opinion in the case materials.”<sup>128</sup>
- In *Decision No. 2780/15*, the Tribunal observed that the medical evidence “**overwhelmingly support[ed]**” the causal connection between the worker's psychological condition and his compensable “persistent and ongoing pain.”<sup>129</sup>
- In *Decision No. 907/16*, the Tribunal held that the Board's decision to deny entitlement for depression and anxiety was **contrary to the “unanimous opinion of the worker's treating and assessing health care providers.”**<sup>130</sup>
- In *Decision No. 914/16*, the Vice Chair observed that there were “several medical reports” indicating that the worker's psychiatric

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<sup>128</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1714/16* (10 November 2016) at para 13.

<sup>129</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 2780/15* (13 January 2016) at para 28.

<sup>130</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 907/16* (21 April 2016) at para 37

condition was work-related, and **“no medical report” to the contrary.**<sup>131</sup>

- In *Decision No. 1723/16*, the Vice Chair found that the worker’s three treating doctors were **“unanimously of the view that the worker’s depression was directly related** to her compensable right shoulder injury and its sequelae.” The Vice Chair held that there was “no reason” to reject these opinions.<sup>132</sup>
- In *Decision No. 1532/16*, the Vice Chair noted that the Board’s decision ran contrary to “the opinions of all the three health care professionals who have assessed or treated the worker.” Each was aware that the worker had experienced depression prior to his compensable accident and still, each opined his psychological condition was work-related. The Vice Chair ultimately concluded that **“all of the medical opinions . . . support the existence of an injury-related psychological impairment”** and “no medical reports indicating an alternative cause.”<sup>133</sup>
- In *Decision No. 1871/16*, the Vice Chair noted that a number of doctors attributed the worker’s psychological condition to his workplace injury and **“there was no objective evidence of significance to challenge [them].”**<sup>134</sup>
- In *Decision No. 43/16* the Panel noted that **“all available medical evidence”** supported finding that the worker’s psychotraumatic

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<sup>131</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 914/16* (16 April 2016) at para 9.

<sup>132</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1723/16* (4 July 2016) at

<sup>133</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1532/16* (21 June 2016) at para 5, 11.

<sup>134</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1871/16* (28 November 2016) at para 30.

disability, accepted by the Board as a temporary compensable condition, had become a permanent impairment.<sup>135</sup>

- In *Decision No. 1503/15* the Tribunal noted that there was “**no evidence of any significance**” that the worker’s ongoing psychological condition was due to non-work-related factors. Rather, the Tribunal found, “the medical evidence [was] essentially silent on . . . non-work-related factors, and instead relates the worker’s psychological condition to her compensable injury.”<sup>136</sup>
- In *Decision No. 435/16*, the Vice Chair noted that the ARO’s decision contradicted “**unanimous opinions** expressed by the worker’s treating psychologists and psychiatrists, and independent assessors that the worker’s depression resulted from her workplace injury.” The Vice Chair further found that the factors the ARO attributed to the worker’s condition – “loss of accommodated work/work with the accident employer, difficulty in retraining; financial strain, difficulty in the pain program and strain with the WSIB” – were all difficulties which “flow[ed] directly from the worker’s compensable injury.” Thus, the ARO not only ignored the medical evidence, but also ignored the Board policy that the sequelae of a workplace injury are also compensable.<sup>137</sup>

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<sup>135</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 43/16* (21 January 2016) at para 43.

<sup>136</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1503/15* (2 Feb 2016) at para 54.

<sup>137</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 435/16* (26 February 2016) at para 56.

## C. The WSIB targets workers with mental health conditions for scrutiny and surveillance

A few cases from the Tribunal further suggest that the Board is unduly suspicious of workers with mental health conditions, and further, uses intrusive methods to scrutinize their claims. Three cases in particular show that the Board ignored credible medical opinion that the worker's condition was genuine and, instead, undertook a suspect and unnecessary investigation of that worker.

### i. *Decision No. 2264/15*

*Decision No. 2264/15* concerned a welder who, at age 33, twisted his knee while lifting a 75 pound pipe. The injury resulted in a permanent knee injury, and he was subsequently diagnosed with major depressive disorder, anxiety, and chronic pain.<sup>138</sup> The Tribunal found that the Board wrongly ignored the decision of its own Appeals Services Division, failed to provide treatment and, instead committed significant amounts of money to investigating the veracity of his claim.

The worker's knee injury took place in 2004 and he was first diagnosed with depression and anxiety in 2007. In 2009, the Board accepted his entitlement for a psychological injury and began a labour market re-entry program. The following year, however, the Board decided the worker was not cooperating in retraining and cut his benefits.<sup>139</sup>

The worker appealed, and in 2011, the ARO found that the worker was entitled to compensation for his pain and major depression. The ARO noted that the "consensus opinion" from the treating specialists (including specialists at the CAMH Psychological Trauma Program) was that the work

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<sup>138</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No.2264/15* (18 March 2016) at para 4.

<sup>139</sup> *Ibid* at para 4.

injury was a major contributor to his pain and major depression.<sup>140</sup>

Further, the ARO found, the Board had been premature in referring the worker to retraining before he had received adequate treatment. At that time, he was totally impaired from a psychological and physical perspective. As such, the Board was wrong to find that he was not cooperating with retraining.<sup>141</sup>

The CM also **continued to focus on returning the worker to the workforce rather than on offering him treatment for his psychological conditions**. It was in this context that the CM posed questions to Dr. Notkin that had already been addressed by the ARO and decided in the worker's favour.<sup>142</sup> - 2264/15

The ARO instructed the Board to provide the worker with treatment for his compensable psychological disability, including Cognitive Behavioral Therapy. The ARO directed the Board to assess the worker's entitlement for a permanent impairment award for his psychological condition after the worker had received medical treatment.<sup>143</sup>

Even after the ARO decision, the Tribunal noted, the Board doubted that the worker actually suffered from a compensable psychological condition or was cooperating in treatment.<sup>144</sup> Instead of focusing on providing the worker with treatment, the Board directed its energies towards returning the worker to work.

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<sup>140</sup> *Ibid* at para 5.

<sup>141</sup> *Ibid* at para 5.

<sup>142</sup> *Ibid* at para 52.

<sup>143</sup> *Ibid* at para 5.

<sup>144</sup> *Ibid* at para 52.

Rather than referring the worker to Cognitive Behavioural Therapy, as directed by the ARO, the Board referred him to an occupational therapist. The OT reported that communication with the worker was difficult because he limited eye contact and was unresponsive to questions. He did participate in assigned physical exercises, but his pain level was very high, and the OT reported no significant improvements in his symptoms or psychosocial barriers.<sup>145</sup>

The CM's conviction that there was a lack of genuineness in the worker's presentation and a failure to cooperate was reflected in the decision to **commit very substantial Board resources to obtaining a new IPE and conducting covert surveillance** of the worker over a period of several days during his participation in the IPE.<sup>146</sup> - 2264/15

At the same time, the Board interpreted the worker's experience with psychiatrists as a suggestion that he was not cooperating with his medical treatment. The worker's psychiatrist did not provide an update to the Board, and the worker attempted to see a new psychiatrist, which the

**Based on the findings of the ARO ... there was no reason for the worker to expect that the genuine nature of his psychiatric condition was in question. – 2264/15**

Board decided was an indication of non-cooperation.<sup>147</sup> The Board then ordered an independent psychiatric assessment. Dr. Cashman, the psychiatrist performing the assessment,

<sup>145</sup> *Ibid* at 55, 56.

<sup>146</sup> *Ibid* at para 53.

<sup>147</sup> *Ibid* at paras 39-40.

met with the worker but advised that he did not believe the worker understood the nature of the interview and was therefore unable to continue the assessment. The Board interpreted this report from Dr. Cashman “as an indication of the worker’s non-cooperation and immediately decided to suspend the worker’s LOE benefits.”<sup>148</sup>

The Board referred the worker for a second independent psychiatric assessment, this time by Dr. Notkin, and arranged for the worker to be placed under covert surveillance. Dr. Notkin’s report doubted the genuineness of the worker’s pain, and opined that he was attempting to feign a mental disorder.<sup>149</sup>

The Board then denied the worker entitlement for a permanent impairment award for his psychiatric injury and decided he was not cooperating in his retraining. It therefore punished him by deeming him able to work fully restoring his pre-accident wage as an experienced CNC Programmer making \$43.27/hour. This eliminated his loss of earnings benefits.<sup>150</sup>

The Panel assessed the evidence and found that the worker was entitled to full loss of earnings and a permanent impairment award.

The Panel held that Dr. Cashman was correct that the worker did not understand the nature and context of the independent psychiatric assessment. There was “no reason for the worker to expect that the genuine nature of his psychiatric condition was in question,” that he would “continue to be viewed as uncooperative by the Board,” or that he would “be referred for further assessments to determine the nature of his psychiatric condition(s), as opposed to being offered psychological

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<sup>148</sup> *Ibid* at para 38.

<sup>149</sup> *Ibid* at paras 42, 43.

<sup>150</sup> *Ibid* at paras 9, 10.

treatment.” The worker thought this assessment was actually psychological treatment. The report was not evidence that the worker was un-cooperative.<sup>151</sup>

The Panel further found that the opinions of the CAMH Psychological Trauma Program and the treating psychiatrist were preferred over that of Dr. Notkin. The Panel noted the Board spent \$17,585.63 on Dr. Notkin’s report but failed to provide Dr. Notkin with a complete and accurate factual background.<sup>152</sup> The Panel held that the Board also failed to inform Dr. Notkin that the ARO had already made binding findings of fact that were central to the topic of his report.<sup>153</sup>

The worker was entitled to full loss of earnings and a permanent impairment award. The OT report showed that the worker did not benefit from further treatment. The only reasonable interpretation of the ARO decision in these circumstances was that the worker was totally impaired until he was provided an effective course of psychological treatments, and even then, only if he actually improved. Since the Board failed to provide any treatment, he remained totally disabled.<sup>154</sup>

Finally, the Panel found that the covert surveillance evidence was of no use to determining the issues in the case.<sup>155</sup>

## **ii. Decision No. 1087/16**

*Decision No. 1087/16* concerned a construction equipment operator who was struck by a piece of asphalt at age 30. He suffered an eye injury and subsequently developed PTSD.<sup>156</sup>

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<sup>151</sup> *Ibid* at para 49.

<sup>152</sup> *Ibid* at paras 45, 50.

<sup>153</sup> *Ibid* at para 50.

<sup>154</sup> *Ibid* at paras 56, 63.

<sup>155</sup> *Ibid* at para 43.



The Tribunal found that the Board used surveillance evidence that was four years old to decide, “without foundation”, that the worker was able to work as a heavy equipment operator.<sup>157</sup>

The worker’s injury took place in 2005. The Board accepted that he developed PTSD and headaches as a result and awarded him a 53% NEL.<sup>158</sup>

In 2009, the Board referred the worker for retraining and, in 2011, decided he had recovered and was able to work as a heavy equipment operator. The Board’s decision in 2011 relied heavily on 35 minutes of surveillance footage obtained by the Board in 2007. The Board felt that that surveillance evidence from 2007, “showing that the worker could walk and park a vehicle in the general vicinity of a construction work-site,” was evidence that he could return to heavy equipment operation.<sup>159</sup>

**The Panel finds that the worker’s walking and parking in the general vicinity of construction activities in 2007 does not equate to him being able to work as a heavy equipment operator in 2011 or since that time - 1087/16**

The Tribunal did not agree with these findings. The Tribunal found, first of all, that the Board’s decision that the worker’s condition had resolved by 2011 was “without foundation.”<sup>160</sup> The worker’s doctors had

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<sup>156</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 1087/16* (10 June 2016) at paras 5, 6.

<sup>157</sup> *Ibid* at para 31.

<sup>158</sup> *Ibid* at para 7.

<sup>159</sup> *Ibid* at para. 34.

<sup>160</sup> *Ibid* at para 31.

not suggested he was recovered. He continued to get psychiatric care and his doctors gave him a “highly guarded prognosis.”<sup>161</sup>

Further, the Tribunal found, the surveillance evidence from 2007 shed “no probative light” on whether the worker was still impaired by his compensable injuries in 2011. The Panel held that “the worker’s walking and parking in the general vicinity of construction activities in 2007 does not equate to him being able to work as a heavy equipment operator in 2011.”<sup>162</sup> The job the Board selected was “unsafe.”<sup>163</sup>

### **iii. Decision No. 86116**

*Decision No. 86116* concerned a general labourer employed by a book binder. At age 37, the worker developed a lower back sprain from repetitive bending and lifting and subsequently developed chronic pain disorder and anxiety. The Tribunal determined that the Board had relied on an “impartial psychiatric assessment” from an unreliable expert to determine that the worker was malingering.<sup>164</sup>

The worker’s lower back injury took place in 2007. In 2011, the Board granted initial entitlement for his psychological conditions including full loss of earnings from 2008 to 2011. In 2012, however, a psychiatrist named Dr. Monte Bail conducted an independent medical assessment and reported that the worker was malingering. Relying on this report, the Board retracted entitlement, denying any ongoing entitlement for psychological injury, chronic pain disability, or loss of earnings benefits.<sup>165</sup>

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<sup>161</sup> *Ibid* at paras 31, 32.

<sup>162</sup> *Ibid* at para 34.

<sup>163</sup> *Ibid* at para 37.

<sup>164</sup> *Workplace Safety and Insurance Appeals Tribunal Decision No. 86116* (3 August 2016) at paras 9, 12, 33-34.

<sup>165</sup> *Ibid* at paras 12, 22-23.

The Panel found that Dr. Bail's report was not credible and preferred to rely on evidence from the assessors at CAMH and the worker's own specialist who reported that the worker's condition was genuine.<sup>166</sup>

The Panel noted that while the CAMH report was "highly detailed" and 27 pages in length, Dr. Bail's report did not provide adequate basis for its conclusions.<sup>167</sup> The Panel also noted the worker's testimony that Dr. Bail had yelled at and belittled him during the appointment, and the appointment only lasted 45 minutes.<sup>168</sup> The Panel further observed that Dr. Bail had been criticized in other legal proceedings before the courts and the Tribunal. These adjudicators had found that he was not a credible expert witness.<sup>169</sup>

The WSIB has used Dr. Bail fairly often for independent psychiatric assessments.<sup>170</sup> Very recently, the Ontario Court of Appeal weighed in on Dr. Bail in the context of his testimony in a car accident case.<sup>171</sup> The Court of Appeal stated that, "the admission of Dr. Bail's testimony resulted in a miscarriage of justice."<sup>172</sup> The Court noted, "[i]t was evident from a review of Dr. Bail's report that there was a high probability that he would prove to be a troublesome expert witness, one who was intent on advocating for the defence and unwilling to properly fulfill his duties to the court."<sup>173</sup>

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<sup>166</sup> *Ibid* at para 24.

<sup>167</sup> *Ibid* at para 27.

<sup>168</sup> *Ibid* at paras 33-34.

<sup>169</sup> *Ibid* at para 37; See also *Daggitt v Campbell*, 2016 ONSC 2742, *Sohi v ING Insurance Co of Canada*, [2004] OFSCD No 106, *Gordon v Greig*, 2007 CanLII 1333 (ON SC).

<sup>170</sup> E.g. *Workplace Safety and Insurance Appeals Tribunal Decision Nos. 1766/14, 266/16, 1290/15*.

<sup>171</sup> *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 (CanLII).

<sup>172</sup> *Ibid* at para 69.

<sup>173</sup> *Ibid* at para 42.

#### **iv. Conclusion**

In these cases, the Board chose to scrutinize workers suffering from psychological injuries despite having no reason to doubt the veracity of their claims. The Board misinterpreted psychiatry reports, misused covert surveillance, and relied on expert witnesses whose credibility had already been questioned. These troubling methods prolonged these workers' wait for badly-needed treatment and left them in a precarious financial position while they navigated the appeal process.

## Conclusion

There is a crisis at the Workplace Safety and Insurance Board. Not a financial crisis; a crisis of confidence and trust. Despite the government's promise to the contrary, the Board has been getting its financial house in order at the expense of injured workers.<sup>174</sup> Using the language of “right-sizing costs” and “modernization,” the Board has reduced its benefit costs the expense of injured workers.

The WSIB denies making adjudicative changes to cut benefits. It denies the cries of concern from doctors that their opinions are being dismissed. But the WSIB cannot deny the lived experiences of the hundreds or thousands of workers who have been forced to pursue lengthy, stressful and costly appeals to the Workplace Safety and Insurance Appeals Tribunal. It is clear their benefits should never have been denied in the first place.

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<sup>174</sup> Mr. Peter Tabuns: *So if, in fact, it's found that there are financial problems with the WSIB, the government will ensure that the changes that are needed are not going to be done on the backs of workers. Is that correct?* Ms. Leeanna Pendergast: *That's correct, Mr. Tabuns. Full funding will not be achieved on the backs of injured workers.*<sup>174</sup> Hansard, Standing Committee on Finance and Economic Affairs, Dec. 6, 2010, page 261.

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