

Ontario Nurses' Association

Submission

Amendments to the *Workplace Safety and Insurance Act* (“the Act”) proposed under Schedule 33 of the *Bill 127 Stronger, Healthier Ontario Act (Budget Measures), 2017*

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**Standing Committee on
Finance and Economic Affairs**



ONTARIO NURSES' ASSOCIATION

85 Grenville Street, Suite 400 Toronto, ON M5S 3A2

Phone: (416) 964-8833

Fax: (416) 964-8864

Website: www.ona.org

Summary of ONA Recommendations

We submit a summary of our recommendations below to the proposed changes to Section 13 and Section 159 of the *Workplace Safety and Insurance Act* (“the Act”) outlined in Schedule 33 of Bill 127. They are based on the findings and principles articulated in Decision No. 2157/09 of the Appeals Tribunal, which provides the most comprehensive analysis of the issues regarding adjudication of mental stress injuries/claims and physical injuries/claims.

We recommend:

1. The changes to Section 13 should apply retroactively to claims already in the appeals system. It is costly and unfair for injured workers to have to mount a Charter challenge and wait years for a WSIAT Panel to grant entitlement.
2. The wording of Subsection 13(5) is potentially discriminatory to workers who suffer mental stress due to increasing workloads and the physical and psychological demands from cuts to staffing and resources. Workers who suffer physical injuries as a result of employment decisions are not denied benefits.
3. The Bill 127 additions to section 159 of the Act are:
 - a) Unnecessary in light of the Board’s already well-established power to make policies which are binding on the Appeals Tribunal;

And, if implemented will:

- b) Allow the Board to impose even greater restriction on entitlement to mental injuries than the existing legislation and these restrictions pose significant and unacceptable (for a fair and democratic system) imposition on the substantive rights of workers with work-related mental stress; and
- c) Allow the Board to limit entitlement by policy to other types of injuries that are “difficult” to adjudicate such as psychological injuries due to work-related physical injuries (which the Board already limits as generally only temporary conditions in Policy 15-04-02: Psychotraumatic Disability); Chronic Pain Disability and repetitive strain Injuries such as Carpal Tunnel Syndrome and all injuries under the Disablement definition of accident including gradual onset back and other musculoskeletal injuries that arise out of employment due to the nature of the job duties.

For all of the above reasons, we strongly request that the Standing Committee remove the proposed changes to Section 159 to allow meaningful discussion and input from stakeholders and the public on the policy consultations.

I. Introduction

The Ontario Nurses' Association (ONA) is the union representing 64,000 registered nurses and allied health professionals, as well as almost 16,000 nursing student affiliates, providing care in hospitals, long-term care facilities, public health, the community, clinics and industry.

Our Submission to the Standing Committee provides recommendations related to the proposed changes to Section 13 and Section 159 of the *Workplace Safety and Insurance Act, 1997* (“the Act”). Our recommendations are based on the findings and principles articulated in Decision No. 2157/09 of the Appeals Tribunal, which provides the most comprehensive analysis of the issues regarding adjudication of mental stress injuries/claims and physical injuries/claims.

We also provide some commentary and serious concerns related to the funding amounts allocated in the budget to health care.

II. Schedule 33

In finding Section 13 provisions of the existing Act unconstitutional, the panel in that case deliberated on two days of expert oral testimony, volumes of scientific, epidemiological and legal studies, articles and case law concerning the alleged greater difficulty of establishing causation in mental stress cases compared to physical injuries – which was the basis of the government’s case.

Their findings that Subsection 13(5) violated the equality provisions of the Charter of Rights and Freedoms, and that the discrimination was not justified by any bona fide (purpose or reason), has an immediate and urgent message in the context of proposed amendments in Schedule 33 of Bill 127. That is: there is no practical or principled reason for imposing limitations or special rules and tests on workers who suffer mental or psychological injuries instead of physical ones.

Allowing the Board to do so – as the amendments to Section 159 do – contravenes long-standing legal and adjudicative principles on which the worker’s compensation system is based, including: each case must be adjudicated on its own merits and justice.

On that basis, we submit the following on the Bill 127 amendments to Section 13 and Section 159 of the Act as outlined in Schedule 33:

1. The changes to Section 13 should apply retroactively to claims already in the appeals system. It is costly and unfair for injured workers to have to mount a Charter challenge and wait years for a WSIAT Panel to grant entitlement.
2. The wording of Subsection 13(5) is potentially discriminatory to workers who suffer mental stress due to increasing workloads and the physical and psychological demands from cuts to staffing and resources.

This is a growing problem among ONA members in health care who are increasingly overburdened by concerns about being able to provide the level of care to their patients that they need and deserve. For ONA members, this is a constant source of anxiety.

Moreover, workers who suffer physical injuries as a result of employment decisions are not denied benefits. For example, a worker who suffers a gradual onset back strain as a result of an employer decision to increase workload is not barred from making a claim for entitlement.

3. The Bill 127 additions to Section 159 of the Act are:

- a) Unnecessary in light of the Board’s already well-established power to make policies which are binding on the Appeals Tribunal;

And, if implemented will:

- b) Allow the Board to impose even greater restriction on entitlement to mental injuries than the existing legislation and these restrictions pose significant and unacceptable (for a fair and democratic system) imposition on the substantive rights of workers with work-related mental stress.

One example from the Draft Policy on “Chronic Mental Stress” that was released by the Board for “public consultation” purposes justifies our concern: under the guidelines for traumatic mental stress, in addition to having to “occur in the course of and arise out of employment” (as it is for all injuries) the traumatic events must be: “clearly and precisely identifiable and objectively traumatic, which means that the events can be established by the WSIB through information or knowledge of the events provided by co-worker’s, supervisory staff, or others and is/are generally accepted as being traumatic.”

This additional corroboration required for a worker with work-related traumatic mental stress to claim compensation reproduces, makes explicit and legitimizes the perception that workers with mental stress are “making up” their injuries and that the reports and opinions of their treating professionals cannot be relied upon because they are based only on the subjective reporting of the injured worker. As the panel found in Decision No. 2157/09, there is no rational or reasonable basis for this caution against workers with mental injuries, no more than it is for workers with physical injuries.

Even more egregious is the invasiveness of this requirement on the privacy rights of a worker with mental stress – chronic or traumatic – compared to workers with physical injuries. Under this requirement the worker who is sexually assaulted at work by a co-worker and who suffers traumatic mental stress as a result would have to rely on the aggressor to admit or supervisors, co-workers, or others to have witnessed the assault(s) AND the assaults have to be agreed to have been “generally accepted as being traumatic” before she could be compensated.

- c) Will allow the Board to limit entitlement by policy to other types of injuries that are “difficult” to adjudicate, such as psychological injuries due to work-related physical injuries (which the Board already limits as generally only temporary conditions in Policy 15-04-02: Psychotraumatic Disability); Chronic Pain Disability and repetitive strain Injuries such as Carpal Tunnel Syndrome.

We are already very familiar with the Board’s “difficulty” in adjudicating most “disablement” type injuries/claims including repetitive strain injuries and gradual onset back and other musculoskeletal injuries that arise out of employment due to the nature of the job duties.

The Board routinely denies these claims with little or no investigation and we have no faith that they won't simply limit entitlement for these types of injuries entirely by changing the "evidentiary requirements and adjudicative principles" pertaining to these types of injuries. The longstanding principles of the significant contributing factor test and the standard of proof of the Balance of Probabilities derived from common law are both at risk under the proposed amendments.

For all of the above reasons, we strongly request that the Standing Committee remove the proposed changes to Section 159 to allow meaningful discussion and input from stakeholders and the public on the Workplace Safety and Insurance Board (WSIB) policy consultations.

III. Health Care Funding

On page 111 in Budget 2017, the government made a commitment that every hospital will receive a minimum two-percent increase in 2017-18.

ONA was cautiously optimistic when we learned that all hospitals would receive a minimum two-percent increase, and others three-percent, because this funding increase could improve quality patient care and could mean that the erosion of RN positions might end.

Now we are not so sure, especially when most stakeholders, including ONA, were requesting a five-percent increase to maintain hospital services. Since the release of the budget, we have been further informed that the two-percent increase for hospitals includes ongoing funding amounts so that the two-percent increase hospitals were expecting to receive is not really a two-percent increase on top of the funding they received last year.

We have also been informed that this will mean massive RN layoffs. If this is true, our patients will be facing serious limitations on the quality of care they may receive and in addition, wait times will undoubtedly be exacerbated. Rather than an end to the erosion of RN positions in our hospitals, we now face massive RN eliminations. We are asking the Standing Committee to confirm that the government's commitment to a minimum two-percent increase is a two-percent increase on the funding that each hospital received last year.

Turning to the funding for other health sectors, while we commend the government for increasing the funding for food in long-term care homes, the two-percent increase for the nursing and personal care envelope for long-term care homes simply maintains the status quo for Ontario's elderly.

Unfortunately, we will not make any real progress to achieve what is necessary - a daily minimum staffing standard of four hours of nursing and personal care per resident, including 48 minutes of daily RN care out of the four hours to meet increasing resident care needs.

For community and home care, the budget allocates a five-percent increase, which is the same funding as last year. This increase is unlikely to improve the capacity that is necessary for this sector.

Finally, we were disappointed to learn that the budget continues to flatline funding for our public health units. We will now await the recommendations coming from the Expert Panel on Public Health that we believe must include a strong focus on expanding capacity in our public health sector. Expanding capacity in public health is critical for improved health outcomes throughout our life spans.

IV. Conclusion

We thank the Standing Committee for the opportunity to bring our concerns to your attention.

We have outlined serious concerns with respect to the proposed amendments in Schedule 33 related to the lack of retroactivity and limitations in Section 13 and, most importantly, to the fundamental changes proposed to Section 159. While we commend the government's action to provide entitlements for chronic mental stress, the additional restrictive proposals may negate the government's intention.

We strongly request the Standing Committee remove the proposed amendments to Section 159.

We have also alerted the Standing Committee to our serious concerns related to the actual funding amounts that hospitals will receive under the commitment in the budget to a minimum two-percent increase for all hospitals. Anything less than this minimum funding increase will not meet the government's intent to stabilize funding for our hospitals.

We ask the Standing Committee to confirm the minimum two-percent increase for all hospitals so that our patients will be able to access the care they need.