

## **IAVGO Report: “No evidence. The Decisions of the Workplace Safety and Insurance Board”**

IAVGO, a community legal clinic providing free services to injured workers in Ontario, undertook a review of all of the 2016 Workplace Safety and Insurance Appeals Tribunal (WSIAT) decisions<sup>1</sup>, identifying systemic problems with the Workplace Safety and Insurance Board’s (WSIB) adjudicative practices. IAVGO infers that these practices have resulted in the WSIB’s dramatic decrease of its unfunded liability since 2010 (the WSIB denies that its reduction in its unfunded liability are as a result of any adjudication decisions/processes).

IAVGO specifically identified 425 cases where WSIAT addressed unfair decision-making practices, which IAVGO narrowed down into the following four primary findings, two of which directly impact ONA members:

- The WSIB regularly fails to listen to treating health-care professionals about whether to return to work is safe.
- The WSIB wrongly denies compensation based on “pre-existing conditions.”

### **What does this mean for ONA members?**

The ONA WSIB Appeals Team has had success in appealing the issues outlined above – both at the operations level and Appeals Services Division at the WSIB as well as WSIAT. However, as a result of the decision-making practices at the WSIB, it is possible that more appeals may need to advance to WSIAT to have a successful outcome for workers. This means that ONA members may potentially encounter delays of two to three years to have their matters heard before the WSIAT. During this time period, members are faced with financial constraints if they are unable to work due to their injury, as well as a potential lack of support to recover and return to work successfully.

### **How are we meeting these challenges?**

The ONA WSIB Appeals Team is familiar with the WSIB’s adjudicative practices for the issues that impact its members, and has successfully appealed these issues at all levels of appeal at the WSIB/WSIAT.

With respect to the return-to-work issue, the team specifically makes the argument that the treating practitioner’s evidence should get more weight than someone who has only reviewed the documents on file. With the issue concerning pre-existing conditions, the team will advance arguments that distinguish the pre-existing conditions from the workplace injury, whether the pre-existing condition was asymptomatic and became symptomatic as a result of the workplace injury, or if it is a true pre-existing condition, arguing entitlement on an aggravation basis.

These issues require thorough and detailed medical evidence to successfully proceed, which can be challenging to obtain at times. The team requests the necessary information from the treating practitioners where possible, but if the team is of the opinion that evidence is insufficient, then a referral is made to Occupational Health Clinics for Ontario Workers (OHCOW), or possibly for an Independent Medical Evaluation (IME), which may be time-consuming and costly.

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<sup>1</sup> WSIAT had 3,512 hearing dispositions in 2016 (WSIAT 2016 annual report), and IAVGO advised that they reviewed about half of those decisions based on criteria that aided in narrowing down the volume to review such as withdrawals, employer appeals, etc.)

The ONA WSIB Team does not attend return-to-work meetings for WSIB injuries, but is available to provide advice about the WSIB issues connected with these meetings. It is important that the Bargaining Unit representative attend these return-to-work meetings, especially in light of the WSIB's "Better at Work" approach, and the issues surrounding its decisions concerning return to work. The WSIB will often disregard a member's treating practitioner's advice concerning the safety and appropriateness of return to work. Members may be at risk of re-injury or prolonging a workplace injury as a result of the pressure to return to work, and should consult with her or his treating practitioner regarding the suitability of any return to work following a workplace injury.