IAVGO
Community Legal Clinic

MENTAL STRESS POLICY SUBMISSIONS OF IAVGO

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Introduction

"The view that courts should require something more [in cases of mental injury] is founded not on legal principle, but on policy — more particularly, on a collection of concerns regarding claims for mental injury … founded upon dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is "subjective" or otherwise easily feigned or exaggerated […] The stigma faced by people with mental illness, including that caused by mental injury, is notorious […], often unjustly and unnecessarily impeding their participation, so far as possible, in civil society."-*Justice Brown for the unanimous Supreme Court*[1]

"The view that courts should require something more [in cases of mental injury] is founded … upon dubious perceptions of, and postures towards, psychiatry and mental illness in general."

– Justice Brown, writing for the unanimous Supreme Court of Canada

The Board's draft mental stress policy continues to discriminate against and stigmatize some of the most vulnerable injured workers in Ontario: those who suffer mental injury because of exposures and risks at work. The Supreme Court of Canada, and the Workplace Safety and Insurance Appeals Tribunal, have rejected the wrongheaded notion that mental injuries are less real, more subjective and more suspect than physical ones.[2] This view is outdated and discriminatory. All injuries can be complex and difficult

[1] *Saadati v. Moorhead*, 2017 SCC 28 (CanLII), http://canlii.ca/t/h42pw at para. 21.
[2] *Saadati v. Moorhead*, ibid; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, 2003 SCC 54 (CanLII); Decision No. 2157/09, 2014 ONWSIAT 938 (CanLII)

to adjudicate. All injuries can nonetheless be adjudicated using a robust fact-finding inquiry. There is no need for arbitrary and discriminatory tests that limit entitlement to workers with mental injuries.

The draft policy fails to reflect the legislature's intention in changing the law. The legislature decided to grant workers with mental injuries equal access to the protection of workers' compensation. The legislature removed the discriminatory exclusion of workers with mental stress injuries from the *Workplace Safety and Insurance Act.*

For workers, the consequences of this exclusion are severe. Often, without support, they won't be able to access timely health care. Often, they will be pushed into poverty when their injuries prevent them from working.

By introducing, by policy, limits on entitlement similar to those that the legislature has removed, the Board will continue to exclude workers with mental health injuries from the recovery and return to work support other workers receive. The draft policies would deny workers suffering from work-related stress their *Charter* right to equal protection and equal benefit of the law without discrimination.

For workers, the consequences of this exclusion are severe. Often, without support, they won't be able to access timely health care. Often, they will be pushed into poverty when their injuries prevent them from working. Often, they will be forced to launch costly and prolonged litigation including *Charter* challenges to discriminatory policy.

The proposed policy creates barriers for workers seeking entitlement for mental stress – barriers not faced by other injured workers. Those seeking entitlement for chronic stress will be required to show that they were exposed to a "substantial work-related stressor," a stressor that is "excessive in intensity or duration." Workers seeking entitlement for traumatic mental stress will be required to prove that the stressors that caused their condition were "objectively traumatic." Workers will also be required to

provide independent confirmation of the workplace risks that caused their injuries, a requirement not barring other workers from entitlement.

Arbitrary requirements that disadvantage people who suffer psychological injuries are unacceptable.

The Supreme Court of Canada has unanimously and strongly advised that arbitrary requirements that disadvantage people who suffer mental injuries are unacceptable. The Supreme Court said that a reliance on arbitrary requirements for people with psychological injuries (in that case, the requirement for expert diagnosis of a recognized psychiatric condition) was steeped in "dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is "subjective" or otherwise easily feigned or exaggerated". The Supreme Court stated that "no cogent basis has been offered to this Court for erecting distinct rules which operate to preclude liability in cases of mental injury, but not in cases of physical injury".[3]

The Board's proposed differential treatment of workers with mental stress reinforces the stigma surrounding mental illness. Imposing a more restrictive standard for mental stress entitlement sends a message that workers claiming entitlement for these conditions are a greater risk for fraud, that their conditions are "all in their head," or that they are frail.

The Board's draft policies should be entirely reworked to reflect the equal rights of all injured workers to fair compensation, recovery and health care support. While it is good that the Board has adopted the "significant contributing factor" test for causation for both chronic and traumatic mental stress, this is not adequate to ensure equality because the policy imposes a number of other arbitrary limits on mental injuries.

[3] Para. 35.

IAVGO's recommended changes:

Recommendation #1: Remove the substantial work-related stressor requirement. Instead, use the same factors that apply to all other claims.

Recommendation # 2: Remove the requirement for a DSM diagnosis.

Recommendation #3: Remove the requirement for independent confirmation of the workplace events and hazards.

Recommendation # 4: Adopt more expansive and current definitions of bullying and harassment in keeping with the Public Services Health & Safety Association and Occupational Health and Safety Act

Recommendation # 5: Remove the reference to "interpersonal conflicts" as an excluded work-related stressor.

Recommendation #6: Broaden the scope of the definition of a "traumatic" event. Consider using the CAMH definition. Remove arbitrary criteria required for entitlement to "traumatic mental stress."

Recommendation #7: The Board should conduct a public review, led by an independent expert, on whether the "employment-related decisions or actions" exclusion is constitutional.

Recommendation # 8: The policy should be retroactive to January 1, 1998.

IAVGO

IAVGO is a community legal aid clinic funded by Legal Aid Ontario. We specialize in workers' compensation law. We have been helping low-income injured workers for over 40 years. We have seven caseworkers, including two with over 30 years' experience helping injured workers navigate the workers' compensation system.

In addition to our caseworkers, IAVGO has a satellite clinic, Advocates for Injured Workers. AIW is staffed by law students from the University of Toronto, Faculty of Law. During the summer, AIW has 8 full-time caseworkers. In the academic year, AIW is staffed by 25-30 volunteers.

Together with AIW, IAVGO has advised and represented thousands of injured workers. Our clients include some of the most vulnerable workers in Ontario. Most of our clients have at least one of the following characteristics, in addition to their work-related injuries:

- Limited ability to read or write
- Little or no English language skills
- Low levels of education: usually high-school or below
- Mental health conditions including depression, post-traumatic stress disorder, or addiction
- No or limited Canadian immigration or citizenship status
- Little or no job security both before and after the accident
- Limited or no vocational skills

- No income other than social assistance or Ontario Disability Support Program income support benefits

Many of our clients suffer psychological injury from their workplaces. We have represented a number of clients in their years or decades-long struggles for recognition of their mental stress injuries. In particular, IAVGO has appeared before the Tribunal in a number of mental stress cases that consumed a large amount of our scarce resources.

In one recent case, we had to fight alongside a worker for eight years to get him the entitlement he should have received immediately. Our client, "Joe", worked as a cook in a small restaurant for 30 years. Joe is Deaf. His employers did not use sign language, so it was hard for him to communicate at work. At first, Joe had a good relationship with the restaurant's owner. But after she died his bosses harassed and ridiculed him. They made threatening gestures, claiming they were "jokes".

They threw food at his head to get his attention. They pulled down his pants. At one point, his boss closed Joe into a pitch-dark freezer, leaving him stranded without any sensory input. Because of the distress all of this caused him, Joe had no choice but to quit his job. Joe experienced the workplace events as terrifying. He developed post- traumatic stress disorder. The WSIB denied Joe any compensation over many years, stating that the law limits benefits for mental stress injuries to those that are objectively traumatic. The WSIB accepted that the employer was "joking".

Our client, Joe, worked as a cook in a small restaurant for 30 years. Joe is Deaf. His employers did not use sign language, so it was hard for him to communicate at work. His bosses made threatening gestures, claiming they were "jokes". They threw food at his head to get his attention.

We represented Joe before the Workplace Safety and Insurance Appeals Tribunal. Joe told his story convincingly. The Tribunal agreed that the events he suffered were traumatic and had a profound effect on Joe's life.

Under the Board's draft mental stress policy, we anticipate it is possible or even likely Joe's case would be denied again today. Joe wasn't able to get his co-workers or employer to stand up and admit the abuse he suffered. The abuse Joe suffered might not meet the Board's vague and ill-defined "substantial work-related stressor" test. The next Joe will, again, have to fight for almost a decade for the entitlement he so obviously needs. This is unacceptable.

The Board's policy must reflect the legislative intention: to give workers with mental injuries equal rights

The legislature has decided to remove discriminatory limitations on mental stress to ensure that workers with mental stress injuries, like all other workers, have fair access to workers' compensation benefits. This is the critical context to consider in assessing the Board's proposed policies.

The legislature's decision reflects the growing understanding of the damaging role of stigma in furthering the social exclusion of people with mental injuries.[4] It also reflects three unanimous decisions of the Workplace Safety and Insurance Appeals Tribunal which found that the limitation of entitlement for mental stress to claims where the worker suffered "an acute reaction to a sudden and unexpected traumatic event" violated the equality rights provided under section 15 of the *Charter of Rights and Freedoms* and was not a reasonable limit on those rights.[5]

In *Decision No. 2157/09,* the first and leading case on this issue, the Tribunal concluded that this differential treatment perpetuated stigma against people with mental injury. The Panel emphasized that the exclusion of workers with mental disability claims sends "the implicit message that mental disability is not "real" and so does not warrant an

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

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

individualized assessment of work-relatedness".[6] It perpetuates the idea that people with mental injuries are weak, lazy or lacking in willpower.

The Panel rejected the notion that a stricter approach to entitlement for mental stress was necessary because of the challenges in establishing work-relatedness. It recognized that causation was challenging for many physical injuries because of their multifactorial nature and because the available scientific and epidemiological evidence is often inconclusive. Singling out workers with mental stress injuries was unjustified.

The government decided not to apply for judicial review of *Decision No. 2157/09*. Instead, after *Decision No. 2157/09* was issued, the Attorney General of Ontario withdrew from two other ongoing cases considering the constitutionality of the mental stress limitation. The message was clear: the government had no issue with the finding that these limitations were unconstitutional.

These amendments are transparently legislative action to remove discriminatory limitations on mental stress entitlement. A policy that re-introduces the limitations removed by the government will not withstand scrutiny and is unreasonable.

The government has now passed significant changes to sections 13(4) and (5) of the *WSIA*. The government struck the provisions that limited entitlement to only situations where the stress was "an acute reaction to a sudden and unexpected traumatic event."

Those provisions were replaced by a statement confirming that a worker is "entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker's employment." This change means that workers with mental injuries are entitled to benefits in the same fashion as all other workers.

[6] *Decision No. 2157/09* at para 204.

These amendments are transparently legislative action to remove discriminatory limitations on mental stress entitlement. A policy that re-introduces the limitations removed by the government will not withstand scrutiny and is unreasonable.

The "substantial work-related stressor" requirement should be removed

The requirement for workers with chronic mental stress to establish that their stressors were "excessive in intensity or duration" is arbitrary and discriminatory. This standard:

- imposes a heavy and arbitrary burden on workers with chronic mental stress;
- is ill-defined and creates serious uncertainty;
- deprives workers with stress-related mental illness of the benefit of the thin-skull rule; and
- perpetuates stigma and violates workers' *Charter* rights against discrimination.

a. The substantial work-related stressor requirement is arbitrary

The "substantial work-related stressor" requirement subjects workers with mental injuries to a higher standard than workers suffering from physical injuries. Injured workers who claim entitlement for chronic mental stress will have to prove that their stressors were "excessive in intensity and/or duration."

The Supreme Court has confirmed, in the context of tort law, that there is no legitimate role for arbitrary requirements imposed only on people with mental injuries in order to limit their compensation for injury. There is no legal reason why mental injuries should be treated differently than physical ones. The only reason for such arbitrary

requirements is ill-conceived and dubious policy concern about the legitimacy of mental injuries.[7]

> ***"Where, therefore, genuine factual uncertainty arises regarding the worthiness of a claim, this can and should be addressed by robust application of those elements by a trier of fact, rather than by tipping the scales via arbitrary mechanisms. – Justice Brown, Saadati v. Moorhead***

There is already sufficient rigour embedded in workers' compensation adjudication to properly adjudicate claims for mental injuries without establishing arbitrary tests that don't apply to workers with physical injuries. Where "genuine factual uncertainty arises regarding the worthiness of a claim", that uncertainty can be resolved by robust adjudication, just as in a claim for a physical injury. The Board should not "[tip] the scales via arbitrary mechanisms".[8]

The "substantial work-related stressor" requirement seems to be a veiled, and vague, rehashing of an "average worker test". The WSIAT in the past has used such an "average worker test" in adjudicating stress claims. To prove initial entitlement, a worker must show that an "average worker" would have been at risk of a disabling mental reaction from the workplace events.

In recent years, the Tribunal has acknowledged that the "average worker" standard is inconsistent with the thin-skull rule and improperly subjects workers with mental stress to a more onerous standard for entitlement.[9] The "substantial work-related stressor" test is even less well developed than the average worker test.

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[7] *Saadati v. Moorhead, supra* at para 21.
[8] Ibid at para 22.
[9] *Decision No. 665/10I2*, 2013 ONWSIAT 1630 (CanLII), and *Decision No. 1572/12*, 2016 ONWSIAT 987 (CanLII).

b. The substantial work-related stressor standard is ill-defined and creates serious uncertainty

The ill-defined "substantial work-related stressor" standard provides no real information about what evidence workers are required to produce. The policy suggests that workers may be required to provide extensive evidence about their workplaces. Depending on how this requirement is interpreted, workers may well have difficulty obtaining this evidence or may face insurmountable barriers in gathering it. Again, these are burdens that no other injured worker will bear – only workers claiming chronic mental stress will be required to furnish this type of evidence.

The lack of clarity and certainty in the "substantial work-related stressor" standard will result in more appeals by both employers and workers. These appeals will consume significant system resources. In the meantime, workers won't get the benefits and services they require and deserve.

c. The substantial work-related stressor standard fails to comply with the thin-skull rule

Workers with physical injuries are entitled to compensation even if they were more vulnerable to injury because of their pre-existing personal characteristics. They are entitled to compensation even if a relatively minor incident caused them an unexpectedly severe injury (the "thin-skull" principle).

The thin-skull principle reflects the fact that it is unfair to deny workers' compensation for pre-existing conditions which did not affect them before they were injured on the job.[10] It applies with equal force to workers with physical and mental injuries. But, by requiring workers with mental injuries to meet the "substantial stressor" test, the Board would remove from these workers the protection of the thin-skull rule.

[10] *Decision No. 915*, 1987 7 W.C.A.T.R. 1, p. 101.

d. The substantial work-related stressor standard discriminates against workers with mental injuries.

The "substantial stressor" standard subjects those suffering from work-related chronic stress to an arbitrary higher standard for entitlement. There is no requirement for workers with physical injuries to prove anything about the "excessive" or "traumatic" nature of the events or exposures that caused their injury. Workers who suffer physical injuries are only required to establish that a work-related factor significantly contributed to their injury.

The requirement for a "substantial work-related stressor" is premised on stereotypes about workers suffering from chronic mental stress. It presumes that if a worker develops mental stress because of something less than an "excessive stressor," there is no injuring process – the injury is "all in the worker's head."

The Board should remove the "substantial work-related stressor" requirement. It is inconsistent with the legislative amendments, which were intended to ensure equality. If the draft policy is adopted as is, it will likely be challenged as discriminatory under section 15 of the *Charter*.

This section of the policy should be replaced with an approach that is more consistent with the general principles of workers' compensation. There are well known common sense factors that ground rigorous adjudication. These factors include whether there was a workplace injuring process and whether there were co-existing or non-work-related stressors or pre-existing conditions. The Board can also consider the temporal connection between the exposures and the injury and medical opinion evidence.[11]

Recommendation #1: Remove the substantial work-related stressor requirement. Instead, use the same factors that apply to all other claims.

[11] *Decision No. 2157/09*, 2014 ONWSIAT 938 (CanLII), at para. 276.

The requirement for a DSM diagnosis should be removed

The Board must remove the proposed requirement that workers have a diagnosis "in accordance with the Diagnostic and Statistical Manual of Mental Disorders" before the Board will even adjudicate any mental stress claim. It is an unfair and unnecessary barrier to entitlement for workers with mental stress injuries. For vulnerable workers, it is likely a complete barrier.

a. The DSM requirement will be a full barrier to access to justice for many workers.

The proposed DSM diagnosis requirement ignores the reality that many workers have little or no access to mental health specialists. Family doctors rarely provide DSM diagnoses and many are unfamiliar with the DSM criteria. At IAVGO, we regularly struggle to even get family doctors to provide basic medical information, let alone a complex DSM diagnosis.

Access to psychiatrists is limited and slow, especially in rural Ontario and for workers with language barriers. Our clients often wait months or even years on waitlists to first see a psychiatrist. Workers suffering from mental health injuries will rarely be able to afford to pay for a psychologist.

The Board's requirement for a DSM diagnosis is also flawed because, in our experience, many psychiatrists and psychologists are reluctant to treat injured workers, or even decline entirely to treat injured workers. These specialists have told us, and the Board, that, frankly, it is too professionally frustrating to work with the WSIB. Too often,

their treatment recommendations are dismissed or denied by the WSIB. Too often, they feel that their patients are not getting the support they need from the WSIB.[12]

If the Board maintains the DSM diagnosis requirement, many workers will not even be able to receive a decision from the Board, let alone entitlement. The most severely affected will be the most vulnerable. Workers whose first language isn't English and who have to wait for months for a psychiatrist who can speak with them. Workers who live in rural and remote areas. Workers who can't afford the steep fee for a private psychologist or psychological report.

If the Board is going to refuse to even adjudicate cases until there is a DSM diagnosis, early intervention for return to work and recovery will only happen in exceptional cases. Again, few workers will have access to a practitioner that will provide a DSM diagnosis. More often, workers will suffer and their conditions go unrecognized and largely untreated.

If the Board maintains the DSM diagnosis requirement … the most severely affected will be the most vulnerable.

b. The proposed DSM diagnosis flies in the face of a recent Supreme Court of Canada decision

The proposed DSM diagnosis requirement is directly contrary to a recent decision by the Supreme Court of Canada. In *Saadati v. Moorhead*, the Supreme Court of Canada emphatically rejected the notion that compensation for mental injury requires proof of a condition identifiable with reference to a diagnostic tool like the DSM.[13] Justice Brown,

[12] 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 at 7.
[13] *Saadati v. Moorhead*, 2017 SCC 28 (CanLII).

writing for the Court, described requiring such diagnoses as "inherently suspect as a matter of legal methodology."[14]

Indeed, the Supreme Court summarily dismissed the argument that a DSM diagnosis should be required to recover for a mental injury.[15] The Court rejected the idea that requiring a psychiatric illness was "necessary to prevent indeterminate liability."[16] The Court said that imposing a requirement for a recognized diagnosis for mental injuries, "accords unequal – that is less – protection to victims of mental injury. And it does so for no principled reason."[17]

Diagnostic tools like the DSM may be helpful in the adjudication of claims. But such a diagnosis must not be required.

Recommendation # 2: Remove the requirement for a DSM diagnosis.

[14] *Saadati*, at para. 31.
[15] *Saadati*, at para. 33.
[16] *Saadati*, at para. 34.
[17] *Saadati*, at para. 36.

The requirement for independent confirmation of the workplace events should be removed

The draft mental stress policy requires that the Board be "able to identify" the workplace events that caused the mental injury by way of independent confirmation provided by co-workers, supervisors or others. This would impose a requirement on workers with mental injuries that those with physical injuries don't have to meet.

By imposing a requirement that the Board must always be able to independently confirm the workplace hazards, the Board will inevitably wrongly deny entitlement to many of the most vulnerable workers. Often, workers who have been the subject of harassment or bullying behaviour are the least able to proffer independent evidence of that conduct.

On a case-by-case basis, the Board can and does accept entitlement for workers' physical injuries where the worker's own account is the only available and reliable evidence of the injuring process. While independent confirmation of workplace hazards is often available, it isn't always. For example, a worker may report that she was injured by an unsafe practice around use of protective equipment. The employer may deny the worker's injury, telling the Board that workers always wear protective equipment and the worker was probably injured at home. Other co-workers may fear for their jobs and so sign statements denying the hazard and denying the worker's injury. But, the Board does (as it must) consider the individual circumstances in deciding whether to allow entitlement. If

the worker's evidence is more consistent and credible than the other evidence, her claim will be allowed.

By imposing a requirement that the Board must always be able to independently confirm the workplace hazards, the Board will inevitably wrongly deny entitlement to many of the most vulnerable workers. Often, workers who have been the subject of harassment or bullying behaviour are the least able to proffer independent evidence of that conduct.

Our client "Joe", discussed above, is a classic example. Joe was subject to years of bullying and harassment, but both employer and co-workers denied the conduct. It seems Joe again would be denied entitlement under the Board's proposed policy because he can't provide independent evidence of the conduct. His word would never be enough.

Recommendation #3: Remove the requirement for independent confirmation of the workplace events and hazards.

"Bullying" and "harassment" are too narrowly defined

The definitions of "bullying" and "harassment" in the draft policy are too narrow and don't reflect the current understanding of these damaging workplace hazards.

a. Definition of "bullying"

The proposed policy's statement that bullying usually involves behaviour that was "intended to be offensive" is troubling. While bad intentions may be present in bullying, that is certainly not always the case.

A better approach would be to adopt a definition of "bullying" in compliance with current understanding of that workplace hazard. We recommend the definition adopted by the Board's prevention system partner, the Public Services Health & Safety Association. According to that organization, "bullying" is defined as "negative and persistent" acts that "could 'mentally' hurt or isolate a person in the workplace."[18]

b. Definition of "harassment"

The Board's definition of harassment is also unjustifiably narrow. It is narrower than that under the *Occupational Health and Safety Act*. Under *OHSA*, the course of comment or conduct must only be "known or reasonably known to be unwelcome;" [19] under the proposed Board policy, the conduct must be "intimidating, humiliating, or degrading." There is no reason that the Board should define harassment differently than under *OHSA*.

Recommendation # 4: Adopt more expansive and current definitions of bullying and harassment in keeping with the Public Services Health & Safety Association and *Occupational Health and Safety Act*.

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[18] http://www.pshsa.ca/wp-content/uploads/2013/02/BullyWkplace.pdf, at pp. 2-3

[19] *Occupational Health and Safety Act*, RSO 1990, c O.1, s. 1.

Interpersonal conflicts should be not excluded

Interpersonal conflicts should not be excluded as potential work-related stressors. A worker who has hostile relationships with colleagues, supervisors, or managers may experience mental injury as a result.

If the Board's concern is that interpersonal conflicts may sometimes lack a connection to the workplace, that issue of work-relatedness should be adjudicated on a case-by-case basis. A rigorous enquiry will reveal whether a workplace conflict caused the worker's injury. The Board will consider the worker's pre-existing and co-existing risk factors. It will consider the nature of the interpersonal conflict. It will consider the contemporaneous medical reporting as the injury developed, and medical opinion evidence. Together, these tools can allow it to determine work-relatedness without a blanket exclusion.

Recommendation # 5: Remove the reference to "interpersonal conflicts" as an excluded work-related stressor.

The proposed policy too narrowly defines what is "traumatic"

The proposed section on "traumatic mental stress" also fails to implement the legislature's intention. The proposed policy essentially leaves the status quo in place: only workers who were at risk of physical violence or threat of physical violence will be recognized as having suffered trauma. This approach continues to ignore the reality of workplace trauma.

The legislative amendments removed a number of requirements that continue to play a significant role in the Board's proposed policy. This makes no sense. The legislature removed the requirement that compensable mental stress must be

- an "acute reaction"
- to a "sudden and unexpected" traumatic event.

This removal of the "sudden and unexpected traumatic event" language from the legislation calls for an entirely different approach to traumatic mental stress, one much more in line with the reality of trauma. But the proposed policy essentially adopts the same restrictive criteria as the current policy, importing requirements for workers' compensation entitlement that are actually diagnostic criteria for a DSM diagnosis for posttraumatic stress disorder. These requirements include that the event be "objectively traumatic" and that the worker suffered or witnessed the event "first hand".

Again, requiring workers to establish an entitlement based on DSM diagnostic criteria for PTSD is arbitrary and does not reflect the real question: whether the workplace events caused the worker to suffer traumatic mental stress.

The amended legislation uses the term "traumatic mental stress," not "posttraumatic stress disorder." The choice of this broader language stands in direct contrast to amendments for first responders, passed only last year. In those amendments,

the legislature specifically identified "posttraumatic stress disorder as described in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), published by the American Psychiatric Association." If the legislature had meant to adopt the same requirement for "traumatic mental stress" entitlement under the amended 13(4) it would have used the same words.

And again, the Board's proposed policy is inconsistent with the legislative intention to create equality for those who suffer from mental injuries. The policy imposes different, unnecessary and arbitrary standards on injured workers who have mental injury as compared to those who do not. These arbitrary standards appear to derive from specific medical diagnostic labels instead of a principled approach to the analysis of causation.

An "objectively traumatic" standard is unnecessary for the legal determination about whether there was an injuring process. The Board has everything it needs for a robust legal adjudication of work-relatedness without resort to arbitrary tests. It can ensure there was an injuring process. It can question whether the injury was pre-existing. It can consider medical opinion evidence. It can consider the temporal connection between the workplace events and the traumatic mental injury. There is no need for a vague and unprincipled analysis of whether the event was reasonably and "objectively" traumatic.

The Board has everything it needs for a robust legal adjudication of work-relatedness without resort to arbitrary tests. … There is no need for a vague and unprincipled analysis into whether the Board thinks the event was reasonably and "objectively" traumatic.

Instead of focusing on the question of whether an event was "objectively traumatic," the Board should focus on the harm that the event caused to the worker. This would be consistent with the definition of "trauma" from the Centre for Addiction and Mental Health. CAMH defines "trauma" as "the emotional response when a negative event is overwhelming." According to CAMH, "trauma is caused by negative events that

produce distress. These events can be physical, sexual or emotional in nature." CAMH states that common traumatic events include "physical, sexual and verbal assault", long-term neglect in childhood, witnessing violence, accidents and natural disasters and community violence.[20]

Singling out workers seeking entitlement for traumatic mental stress by requiring them to prove that the event that traumatized them was "objectively traumatic," encourages stigma. This differential treatment perpetuates the notion that mental illness is the result of individual frailty, purely subjective experiences, or fraud.

Recommendation #6: Broaden the scope of the definition of a "traumatic" event. Consider using the CAMH definition. Remove arbitrary criteria required for entitlement to "traumatic mental stress."

[20] http://www.camh.ca/en/hospital/health_information/a_z_mental_health_and_addiction_information/Trama/Pages/default.aspx

The "employer decisions" exclusion should not be incorporated into Board policy: it is discriminatory

The bar on entitlement for mental stress related to "employer decisions or actions related to the workers' employment" likely violates section 15 of the *Charter of Rights and Freedoms*. The Board has both the power and the obligation to decline to apply unconstitutional legislation.[21] It should consider whether it is appropriate to do so in this case before entrenching discriminatory legislation into policy.

The constitutionality of the "employer decisions or actions" exclusion has not yet been adjudicated. But, given the reasoning of *Decision No. 2157/09* and the two Tribunal cases that followed it, there is strong reason to suspect that the legislation will not withstand constitutional scrutiny.

With that in mind, we recommend that the Board conduct a thorough and public review to ensure that the "employer decision or action" exclusion complies with the *Charter*.

Recommendation #7: The Board should conduct a public review, led by an independent expert, on whether the "employment-related decisions or actions" exclusion is constitutional.

[21] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, 2003 SCC 54 (CanLII) at para. 28.

The policy should be retroactive

The policy should be retroactive to January 1, 1998, when the discriminatory limitations to entitlement for mental stress came into force. Although there are no transitional provisions in the new legislation, the Board has the power to make its policies apply retroactively. And in this case, where the policies result from the amendment of unconstitutional legislation, full retroactivity is appropriate. Full retroactivity also complies with the Board's obligation to monitor advances in the scientific understanding of how workplace exposures cause injuries.

a. The Board can make the policy retroactive.

The Board has the power to make the new policy retroactive. The Board's ability to make policies retroactive was established as early as *Decision No. 915A*, issued by the Workers Compensation Appeals Tribunal in 1987.[22] Shortly following that decision, the Board passed Board Minute #18, which governed its approach to policy retroactivity for many years.

b. Full retroactivity is appropriate because the legislation is unconstitutional.

In the unique circumstances of this case, the Board should make the policy retroactive to the date that the legislation limiting entitlement for mental stress came into force. This legislation and the Board policies that implemented it were unconstitutional from their enactment. The Supreme Court of Canada made this point clear in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*

[22] *Decision No. 915A*, 1988 CanLII 2748 (ON WSIAT).

– a law is unconstitutional from the date of its enactment, not the date that it is declared to be unconstitutional.[23]

The fact that the Board's approach to mental stress was based on the *WSIA* does not absolve it from responsibility for discriminating against workers with mental stress. As we learned from the Supreme Court of Canada in *Martin*, the Board had the power to consider the constitutionality of the mental stress exclusions and the obligation not to apply unconstitutional laws.

c. Full retroactivity is appropriate because of changing scientific understanding of the causes of mental injuries.

The WSIB also has a statutory responsibility to ensure that its policies take changing medical understanding about causation into account.[24]

Since 1998, the scientific understanding of the connection between workplace stressors and mental injuries has been rapidly developing. This is clear from the medical evidence that formed the foundation for *Decision No. 2157/09*. This evidence established that, certainly by 2008 and likely somewhat earlier, there was robust evidence that the work-relatedness of mental disorders was not distinguishable from physical injury claims to the extent that it requires differential treatment. This evidence established that job strain has a moderate association with mental disorder, such as depression, and that epidemiological evidence supporting mental stress claims is "as strong or stronger evidence of workplace causation than exists for several industrial diseases."[25] The Tribunal concluded that physical injury and disease claims are subject to similar weaknesses in the epidemiological evidence, and that clinicians are able to make reliable determinations about causation.[26]

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[23] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, 2003 SCC 54 (CanLII) at para. 28.
[24] *WSIA*, s 161(3)(a).
[25] *Decision No. 2157/09* at paras 137-151, 249.
[26] Decision No 2157/09 at para 249, 228.

We appreciate that making the policies retroactive will take time and money. Surely, however, if the Board can afford premium cuts for employers, it can afford to address the many years of discrimination that workers with mental stress have faced. Workers who have been unfairly denied entitlement for mental stress should not suffer from the Board's failure to meet its constitutional and statutory obligations.

Recommendation # 8: The policy should be retroactive to January 1, 1998.

Conclusion

Workers' compensation is not only about monetary compensation. Just as importantly, it is about the support to recover and return to work. It is about the dignity that comes with work and social inclusion.[27]

The Board's draft mental stress policy perpetuates the exclusion of workers with mental injuries from Ontario's civil society. It sends the dubious message that mental illness is more subjective or easily faked, and that workers with mental injuries merit suspicion and increased scrutiny rather than fair adjudication. The Board's final mental stress policy should reflect the *Charter*-guaranteed equality and dignity of workers who have suffered mental injuries.

[27] *Martin, supra* at para 104.