

Injured Workers' Consultants
Community legal Clinic
815 Danforth Avenue, Suite 411
Toronto, Ontario
M4J 1L2
Attn: Laura Lunansky
lunansl@lao.on.ca
Tel: 416-461-2411

Workers' Health and Safety Legal Clinic
180 Dundas Street West
Suite 2000, Box 4
Toronto, Ontario
M5G 1Z8
Attn: John Bartolomeo
bartolj@lao.on.ca
Tel: 416-971-8832

IAVGO Community Legal Clinic
1500-55 University Avenue
Toronto, Ontario
M5J 2H7
Attn: Maryth Yachnin
m_yachnin@lao.on.ca
Tel: 416-924-6477

Gary Newhouse, Lawyer
1415 Bathurst St. Suite 103
Toronto Ontario
M5R 3H8
Tel: 416-538-2737
gnewhouse@sympatico.ca

Ron Ellis, Lawyer
405-955 Millwood Rd.,
Toronto, Ontario
M4G 4E3
sronaldellis@gmail.com
Tel: 416-425-7412

November 14, 2016

VIA EMAIL (c/o Dionne Cunningham)

Chief Commissioner Renu Mandhane
Ontario Human Rights Commission
180 Dundas Street West, 9th Floor
Toronto, ON M7A 2R9

Dear Chief Commissioner:

Re: Urgent Matter Affect Ontario's Workers with Mental Health Disabilities

We are a group of lawyers and community legal clinics. We are writing to ask you to intervene. Ontario workers with mental health disabilities are being denied their rights to claim workers' compensation based on a law that has been declared discriminatory.

Three decisions of the Workplace Safety and Insurance Appeals Tribunal have decided that the law and policy limiting entitlement to workers with mental stress disabilities

are in breach of the equality provision of the *Canadian Charter of Rights and Freedoms*. The government has elected not to judicially review any of these decisions, the first of which was issued more than two years ago. And yet, the government has taken no steps to change the discriminatory law. And, the WSIB has not changed its discriminatory policy.

As a result, the WSIB continues to apply discriminatory law and its discriminatory policy to deny claims by workers who suffer, for example, depression because of harassment at work. These disabled workers are shut out of the workers' compensation system.

Each worker who needs compensation for a chronic mental stress injury must mount a lengthy and costly appeal to the WSIAT, complete with a complex *Charter* or *Code* challenge. This is an untenable situation. We are asking you to step in by conducting an investigation or inquiry into the government and WSIB's inaction.

The Issue

The provisions in question are subsections 13(4) and 13(5) of the *Workplace Safety and Insurance Act, 1997 (WSIA)*. Workers with mental stress injuries are excluded from WSIB benefits unless the mental stress is “an acute reaction to a sudden and unexpected traumatic event” arising from the worker’s employment. This means that under the legislation, as written, there is no entitlement for chronic mental stress injuries. A worker who develops a psychological disorder after witnessing a traumatic event would be entitled to benefits, but a worker who develops the same disorder as a result of ongoing harassment at work would not.

On April 29, 2014, the Workplace Safety and Insurance Appeals Tribunal held that the chronic mental stress provisions were unconstitutional. In *Decision No 2157/09*, the Tribunal found that subsections 13(4) and 13(5) of the *WSIA*, and the [WSIB policy](#) on these provisions, infringe the *Canadian Charter of Rights and Freedoms* by discriminating against workers based on their disabilities and that the discrimination was not justified by section 1.¹

Subsequently, two separate hearing panels of the WSIAT have also found the law and policy to be contrary to section 15 of the *Charter* and allowed claims for chronic mental stress without regard to the discriminatory law and policy (*Decision Nos.*

¹ Decision No. 2157/09, 2014 ONWSIAT 938 (CanLII)

1945/10 and 665/10, dated January 27, 2015 and April 15, 2016 respectively).² The most recent decision allowed the compensation claim of a child protection worker who became psychologically disabled from his work with children at risk. The other two decisions addressed psychological disablement injuries consequent to workplace harassment.

The Attorney General of Ontario [declined to seek judicial review](#) of any of the three WSIAT decisions.³ In fact, after *Decision No 2157/09* was issued, the Attorney General elected not to participate in either of the subsequent cases considering the issue.

The Ontario Human Rights Commission intervened in one of these leading cases, *Decision No. 665/10*. The Ontario Human Rights Commission had already shone a light on the discriminatory law affected disabled workers with mental health disabilities. In its 2012 *Minds that matter: Report on the consultation on human rights, mental health and addictions*, the Commission stated that “The Government of Ontario and the Workplace Safety and Insurance Board should change the WSIA and the policy provisions governing workplace insurance benefits to ... ensure that there is equality of benefits for people who experience physical disabilities and people who experience mental health disabilities as a result of workplace incidents.”⁴

WSIB and government (lack of) response

The WSIB continues to deny workers’ claims based on the discriminatory law and policy.

The government has taken [no remedial action](#) to change the discriminatory law. Nor has the government given any indication when, or if, it plans to do so. In fact, earlier this year, the government passed Bill 163, *Supporting Ontario’s First Responders Act*, which amended section 13(4) to provide presumptive entitlement for post traumatic stress disorder for some types of workers. In their [submissions on Bill 163](#), the Ontario Federation of Labour and other organizations pointed out that subsection 13(4), the very section under amendment, had been found to contravene the *Charter*.⁵

² Decision No. 1945/10, 2015 ONWSIAT 223 (CanLII); Decision No. 665/10, 2016 ONWSIAT 997 (CanLII). In both of these cases, the worker alleged that the law and policy violated the Ontario *Human Rights Code* as well as the *Charter*, though the WSIAT decided it was unnecessary to decide the *Code* issue given its findings on the *Charter*.

³ See <https://antonysingleton.files.wordpress.com/2016/05/2016-05-19-email-from-minister-of-labour.pdf>, in which the Minister of Labour confirms that the government did not seek judicial review of the WSIAT decisions. See copy of email attached.

⁴ *Minds that matter: Report on the consultation on human rights, mental health and addictions*, p. 70.

⁵ <http://ofl.ca/wp-content/uploads/2016.03.08-SUB-Bill163.PTSDOFL.pdf>. See also the submissions of Injured Workers’ Consultants at http://injuredworkersonline.org/documents/law-and-policy-submissions/Subm_IWC_20160308_Bill163_PTSD.pdf.

The Bill was passed and the section has been amended, with no regard to the constitutional issue.

The WSIB has also failed to revise its discriminatory policy. In April of 2016, the Ontario Network of Injured Worker Groups wrote to the WSIB Board of Directors to request that the WSIB revise its “Traumatic Mental Stress” policy to make it compliant with the *Charter*. In its response of July 7, 2016 (attached), the WSIB Chair said that the WSIB is bound by the *WSIA* and would continue to apply the illegal provisions.

Repercussions for Vulnerable Workers

The WSIB continues to deny entitlement to workers disabled by chronic mental stress injuries. A worker who suffers severe depression and anxiety following a decade of harassment by her boss, for example, will get a letter from the WSIB stating that the law and policy prevents her from having entitlement. She has no reason to doubt what the WSIB is telling her. So, she won’t appeal. And she will be forever shut out of the workers’ compensation system. She will be denied access to the many important benefits granted to injured workers including compensation, assistance in return to work, and health care support.⁶

Some workers may seek legal advice and find out that the law can be successfully challenged. But even these few workers face tremendous barriers. The financial and emotional costs of mounting a *Charter* challenge are simply too high for many workers to bear. They must argue a complex and expensive *Charter* and/or *Human Rights Code* challenge before the WSIAT. At a minimum, this appeal takes 3-5 years. Workers practically speaking cannot do the appeal without legal counsel. Many are unable to work because of their mental health conditions. They are forced to deplete their savings and RRSPs to fund their appeals, sell their homes, and even turn to social assistance.

The individuals affected are exclusively people with mental health disabilities. These workers, many of whom are already emotionally fragile, are simply not able to cope with the demands of a lengthy appeal process. Many give up. Instead of being able to rely on their rights to compensation, many are forced into poverty and unemployment.

The government’s refusal to amend its discriminatory law and the WSIB’s failure to amend its discriminatory policy furthers the stigma facing injured workers who have

⁶ Exclusion from compensation is not just a matter of financial benefits. As the Supreme Court has observed, beyond the financial benefits at stake, injured workers denied compensation “are also deprived of ameliorative benefits, such as vocational rehabilitation services, medical aid and a right to accommodation, which would clearly assist them in preserving and improving their dignity by returning to work when possible”; *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, 2003 SCC 54, para. 104.

mental health disabilities. It makes these workers feel less worthy of dignity and respect. It deepens their poverty and disadvantage.

Our Request

We are writing to ask you to intervene on behalf of Ontario's disabled workers who are being denied compensation on plainly discriminatory grounds.

We ask you to use your powers to conduct an investigation or inquiry into the government and WSIB's inaction on this important matter.

Yours truly,



Laura Lunansky



Maryth Yachnin



per: John Bartolomeo



Gary Newhouse



Ron Ellis

cc. Kathleen Wynne

Elizabeth Witmer

Elizabeth Witmer
Chair
Présidente du conseil



July 7, 2016

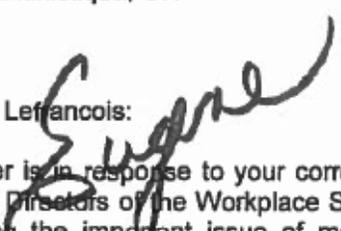
Head Office: 200 Front Street West
Toronto, Ontario
Canada M5V 3J1

Siège social : 200, rue Front Ouest
Toronto (Ontario)
Canada M5V 3J1

Eugene Lefrancois
Ontario Network of Injured Worker Groups
RR#1, Kaministiquia, ON
P0T 1X0

Phone / Téléphone : 416-344-1000
Fax / Télécopieur : 416-344-4869
TTY / ATS : 1-800-387-0050
www.wsib.on.ca

Dear Mr. Lefrancois:

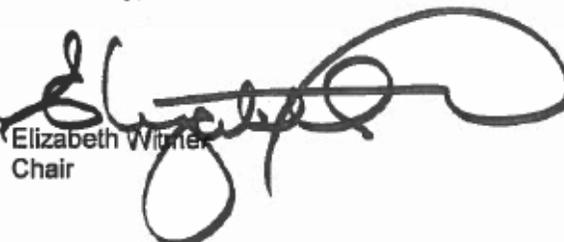

This letter is in response to your correspondence of May 19, 2016 addressed to the Board of Directors of the Workplace Safety and Insurance Board (WSIB). Thank you for raising the important issue of mental stress disabilities and the mental stress provisions of the Workplace Safety and Insurance Act (WSIA).

As you are no doubt aware, as a public sector agency created by statute, the WSIB is bound by the WSIA. The mental stress provisions of the WSIA are within the purview of the provincial government and have not been changed. As such the WSIB is required to evaluate each claim based on the current policies and legislation.

I understand the provincial government and in particular, the Ministry of Labour is aware of the scope and implications of the Workplace Safety and Insurance Appeals Tribunal decisions on mental stress that you reference in your letter. The WSIB stands ready to support their response.

Again, thank you for taking the time to raise your concerns on behalf of your membership. The WSIB's goal is to be a national leader in supporting the prevention and recovery of all work-related mental health illnesses, and the input and support from all workplace safety and insurance system partners and stakeholders will be critical to achieving that goal.

Yours truly,


Elizabeth Witmer
Chair

Cc: Board of Directors
The Honourable Kevin Flynn, Minister of Labour

Antony Singleton From: Minister of Labour (MOL) <MinisterofLabour@ontario.ca> Sent: Thursday, May 19, 2016 4:00 PM To: Antony Singleton Subject: Ontario Minister of Labour's response

Mr. Antony Singleton Barrister and Solicitor antony@asingletonlaw.ca

Dear Mr. Singleton:

Thank you for your thoughtful correspondence regarding chronic mental stress and for your support of the Supporting Ontario's First Responders Act, 2016, which received Royal Assent on April 6, 2016. I appreciate hearing your concerns about these matters.

The health and safety of Ontario workers is a priority for this government. As you know, with regards to chronic mental stress, under subsections 13(4) and (5) of the Workplace Safety and Insurance Act, 1997, a worker is not entitled to benefits for mental stress unless they have "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment."

I am aware of the Workplace Safety and Insurance Tribunal (WSIAT) decisions regarding entitlement for mental stress. As you note, the government did not apply for a judicial review of the WSIAT decisions. At this time the government continues to consider options on next steps.

Thank you again for raising this important matter with me.

Sincerely,

[Original signed by]

Kevin Flynn Minister of Labour

Confidentiality Warning: This email contains information intended only for the use of the individual named above. If you have received this email in error, we would appreciate it if you could please advise us through the Minister's website at <http://www.labour.gov.on.ca/english/feedback/index.php> and destroy all copies of this message. Thank you.