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November 7, 2016

Mr. Paul Dubé, Ombudsman
Office of the Ombudsman of Ontario
Bell Trinity Square
483 Bay Street, 10th Floor, South Tower
Toronto, Ontario
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Dear Mr. Dubé:

Re: WSIB refusal to recognize chronic occupational stress disabilities

We are a group of lawyers and community legal clinics writing to you today to bring to your attention a serious issue affecting Ontario workers who suffer from chronic occupational mental stress disabilities. The Workplace Safety and Insurance Board (WSIB) continues to apply legislative provisions and policy that have been found unconstitutional and discriminate against individuals with mental health disabilities contrary to section 15 of the *Canadian Charter of Rights and Freedoms*.

The WSIB continues to apply its discriminatory policy in adjudicating claims to the grave detriment of workers. Each worker who seeks compensation for a chronic occupational mental stress injury must mount a lengthy and costly appeal to the Workplace Safety and Insurance Appeals Tribunal to have his or her claim recognized. The absurdity of the situation and the grim consequences for workers warrant your office's urgent attention.

Sincerely,



Laura Lunansky



Maryth Yachnin



John Bartolomeo



Ron Ellis



Gary Newhouse

Complaint to the Ombudsman of Ontario

WSIB Refusal to Compensate for Chronic Occupational Stress

9 November 2016

The Workplace Safety & Insurance Board (WSIB) continues to apply legislative provisions and policy that have been found unconstitutional. The provisions and related policy have been found to discriminate against individuals with mental health disabilities contrary to section 15 of the *Canadian Charter of Rights and Freedoms*.

The WSIB continues to apply its discriminatory policy in adjudicating claims to the grave detriment of workers. Each worker who seeks compensation for a chronic occupational mental stress injury must mount a lengthy and costly appeal to the Workplace Safety and Insurance Appeals Tribunal to have his or her claim recognized. The absurdity of the situation and the grim consequences for workers warrant your office's urgent attention.

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 by operation of these sections, unless the mental stress is "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of" a worker's employment. This means that under the legislation, as written, there is no entitlement for chronic occupational mental stress injuries. A worker who develops a psychological disorder after witnessing a traumatic event would be entitled to benefits, while a worker who develops the same disorder as a result of ongoing harassment at work would not.

In 2014, the chronic mental stress provisions were found to be unconstitutional by the Workplace Safety and Insurance Appeals Tribunal. In a well-reasoned decision, *Decision No 2157/09*, the Tribunal found that subsections 13(4) and 13(5) of the *WSIA* infringe the *Canadian Charter of Rights and Freedoms*:

In this case, we have found that subsections 13(4) and the portion of 13(5) of the *WSIA* that restricts entitlement to an acute reaction to a sudden and unexpected traumatic event (and the related TMS policy) infringe the worker's right to equality under section 15 of the Charter, and that infringement is not justified under section 1 of the Charter (at para 310).

The Attorney General of Ontario, who appeared as a party before the Tribunal, declined to appeal the decision to a higher court.

Subsequently, two separate hearing panels of the Tribunal have endorsed the reasoning in *Decision No. 2157/09*, allowing claims for chronic mental stress in two further cases (*Decision*

Nos. 1945/10 and 665/10, dated January 27, 2015 and April 15, 2016 respectively). The most recent decision allowed the compensation claim of a child protection worker who became psychologically disabled from his work with children at risk, which included children who had been physically and sexually abused by their family members. The other two decisions addressed psychological disablement injuries consequent to workplace harassment.

WSIB and Government (lack of) response

As noted, the WSIB continues to apply the impugned provisions and related policy. As a result, workers suffering from chronic occupational mental stress continue to have their claims for workers' compensation benefits denied.

The WSIB has been asked to revise its policy and has declined to do so. On May 19, 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 of Rights*. In its response of July 7, 2016, the WSIB Chair refused to address the Charter of Rights problem with the mental stress provisions of the WSIA. Ms. Witmer states that the WSIB is bound by the current legislation, which has not changed. But current law includes the Charter of Rights. The WSIB's position on chronic occupational stress is inconsistent with the WSIB Appeals Services Division Practice & Procedures document which acknowledges the WSIB's legal responsibility and "jurisdiction to consider a question under the Canadian Charter of Rights and Freedoms (Charter) pursuant to the Supreme Court of Canada decision in *Nova Scotia (Workers' Compensation Board) v. Martin*" (at p.19).

The Ministry of Labour is also aware that parts of the *WSIA* have been deemed unconstitutional but has taken no remedial action. In fact, earlier this year, the Ontario 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 to 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 be in contravention of the *Charter of Rights*. The Bill was passed and the section has been amended, with no regard to the constitutional issue.

Repercussions for Workers

Workers and their families are being doubly injured at the hands of the compensation Board, the very system that is supposed to protect and provide for them. As a result of the WSIB's continued application of its unconstitutional policy, all workers disabled by chronic occupational mental stress must engage in lengthy appeals. These workers must take their claims up to the final level of appeal at the Tribunal, where they must mount a *Charter of Rights* challenge before they receive their rightful compensation.

The costs of mounting a *Charter* challenge, both financial and emotional, are simply too high for many workers to bear. The appeal process is long and complicated. The Tribunal currently has a backlog of appeals resulting in wait times that can be measured in the span of years. There are 9,299 active appeals waiting to be heard, according to the Tribunal's most recent quarterly

report. The process from the time of filing a claim to its resolution at the Tribunal takes at least three years. There are also legal costs to bear since the process is too complex to be undertaken without legal counsel. Many of those affected are unable to earn a livelihood as a result of their mental health conditions, and are forced to deplete their savings and RRSPs, sell their homes, and even turn to social assistance.

The individuals affected are 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.

Our Request

It is untenable that this group of vulnerable workers remain excluded from the compensation to which they are constitutionally entitled. The Tribunal has already decided the issue. It is a waste of time and resources for everyone involved to make each and every worker with a chronic mental stress injury launch a multi-year appeal to the Tribunal before they can receive their rightful compensation.

In light of the foregoing, we formally request that the ombudsman investigate the systemic denial of chronic mental stress injury claims by the WSIB.

Respectfully Submitted,

Injured Workers' Consultants Community Legal Clinic, Workers' Health and Safety Legal Clinic, Industrial Accident Victims Group of Ontario, Ron Ellis, Lawyer, Gary Newhouse, Lawyer.

Encl: WSIAT *Decision Nos. 2157/09, 1945/10, and 665/10*
WSIB Operational Policy Manual Document No 15-03-02 "Traumatic Mental Stress"
Ontario Network of Injured Worker Groups letter to the WSIB of May 19, 2016
WSIB Board Chair letter of July 7, 2016
"Post Trauma" Ontario Federation of Labour Submission to the Standing Committee on Social Policy on Bill 163, March 2016
Injured Workers' Consultants letter to the Standing Committee on Social Policy regarding Bill 163, March 8, 2016