

Injured Workers' Consultants

Representing injured workers free of charge since 1969

8 March 2016

Mr. Peter Tabuns, MPP, Chair
Standing Committee on Social Policy,
Room 1405, Whitney Block
Queen's Park, Toronto, ON
M7A 1A2

Sent electronically to: kkoch@ola.org

Dear Mr. Tabuns:

Re: Commentary on Bill 163
 Supporting Ontario's First Responders Act (Posttraumatic
 Stress Disorder)

Thank you for the opportunity to make submissions to the committee on these proposed changes to the *Workplace Safety and Insurance Act*.

Injured Workers Consultants is a specialized community legal clinic in the Ontario legal aid plan which provides legal advice and representation without charge to injured workers having difficulties with their workers' compensation claims and related matters. In addition, the clinic is involved in public legal education, community development and the improvement of workers' compensation laws and policies. Our mandate is province wide. The clinic works closely with injured worker community organizations, labour unions and peer support groups in Toronto and across Ontario.

Recent Developments at the WSIB

Everyone who has come to our clinic in the past 47 years has encountered problems with a claim in our workers' compensation system. However, it is our experience that difficulties getting work related injury and illness recognized by the Workplace Safety and Insurance Board have increased markedly in recent years. Post-traumatic stress disability is one of many areas of concern.

Although the WSIB's austerity policies and practices have substantially improved the organization's financial reserves, at the same time the amount of benefits paid by the

WSIB to injured workers has decreased substantially as a result of changes in policy and practice. The annual cost of benefits has been reduced by over \$800 million since 2009, from \$3.2 billion to \$2.4 billion in 2014 and the WSIB expects to reach its funding target 5 to 6 years ahead of schedule.¹ The number of appeals waiting to be heard by the Workplace Safety and Insurance Appeals Tribunal has more than doubled, to over 9000.² Based on this experience, in our submission, immediate remedial action by the government and the WSIB is necessary in order to honour the commitment given to you and the Standing Committee on Finance and Economic Affairs by the government on December 6, 2010, that “Full funding will not be achieved on the backs of injured workers.”³

Injured Workers and Mental Health Disabilities

The extent of mental health disabilities among injured workers has been examined in several recent studies. In addition to post traumatic stress disorder, many injured workers develop mental health difficulties as a consequence chronic workplace stress and others develop mental health problems after their injury, as a result of their injury and the workers’ compensation process. An international review of qualitative studies that addressed injured workers’ experience of their interactions with the various parties in workers’ compensation systems found that injured workers’ experienced multiple mental health consequences as a result of being involved with the compensation process. These psychological consequences developed secondarily to the physical injury, and were reported in every study in the review.⁴

Another recent study of mental health issues for injured workers presents “a troubling mental health picture among injured workers with permanent impairments...Post-injury onset mental health problems are elevated compared to pre-injury onset ... Diagnosed depression, medication abuse, inability to concentrate, and sleep problems are elevated compared to general Canadian population prevalence.”⁵

We would welcome efforts to address all of the mental health needs of injured workers for treatment and for compensation for loss of earnings as well.

¹ WSIB 2015 Economic Statement.

² WSIAT Message of the Chair, <http://www.wsiat.on.ca/>

³ http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?DocumentID=25436&Date=2010-12-06&ParlCommID=8858&BillID=2433&Business=&locale=en&detailPage=%2Fcommittee-proceedings%2Ftranscripts%2Ffiles_html%2F06-DEC-2010_F017.htm page 260.

⁴ Interactions between Injured Workers and Insurers in Workers’ Compensation Systems: A Systematic Review of Qualitative Research Literature, Elizabeth Kilgour et al., 2014 <http://link.springer.com/article/10.1007%2Fs10926-014-9513-x#/page-1>

⁵ Mental Health Status of Ontario Injured Workers With Permanent Impairments, O’Hagan et al., Can J Public Health 2012;103(4):303-8.

Under-Compensation of Work Related Mental Health Disabilities

We welcome the government's efforts to begin to address the issue of work related mental health issues. The fact that working conditions often cause disabling psychological conditions is well established. However, since the Bill 99 amendments to the Workers' Compensation Act came into effect in 1998, most of these injured workers have been left without recourse. They all lose their right to sue their employer by virtue of s.26 of the Workplace Safety and Insurance Act because it is a work related disability. But under s.13(4) of the WSIA, compensation benefits are only available to those whose disability was caused by a sudden and unexpected traumatic event.

Most work related mental health problems are not caused by a sudden and unexpected traumatic event. For example, consider workplace violence issues like bullying and sexual harassment that are current concerns in workplace health safety. What about the mental health consequences for the victims? These conditions are known as chronic stress disabilities. Five other provinces, British Columbia, Alberta, Saskatchewan, Quebec and the Yukon provide workers' compensation for chronic stress, as did Ontario before 1998.⁶

Ontario is now taking action on the prevention side of the issue but there is still no compensation for the injured. Although the Workplace Safety and Insurance Appeals Tribunal has ruled that the limitation of compensation for mental stress to sudden and unexpected traumatic disabilities discriminates on the basis of disability, and is therefore unlawful under the Charter of Rights, the government has not addressed this problem.

Bill 163 amends s.13(4) of the Workplace Safety and Insurance Act. This is the very section that has been ruled contrary to the Charter of Rights by the Workplace Safety and Insurance Appeals Tribunal.⁷ The Ontario Attorney general has decided not to dispute that ruling in the courts and yet there is no move to remedy that issue. It seems unwise to patch the Bill 163 amendments onto a section that is admittedly unconstitutional, unless you are going to solve the constitutional problem as well.

At present, only those injured workers disabled by chronic stress who have the wherewithal to mount a Charter of Rights challenge at the WSIAT can get compensation. Chronic stress cases include a much larger group of disabled workers than just our first responders. They should not have to wait for a legal challenge to get compensation for their work related disability. In our submission, an amendment to Bill 163 could easily address their compensation as well. Section 1 of the Bill should read:

⁶ Association of Workers Compensation Boards of Canada, <http://awcbc.org/wp-content/uploads/2014/02/Stress.pdf>

⁷ Workplace Safety and Insurance Appeals Tribunal Decisions No. 2157/09 and No. 1945/10.

1. Subsection 13 (4) of the Workplace Safety and Insurance Act, 1997 is repealed.

Section 2 may remain as it stands and provide important assistance to first responders.

The Bill 163 Requirement of a Psychiatrist/Psychologist Diagnosis

We welcome the government's efforts to improve the workers compensation system for first responders. The introduction of the presumption, that the post-traumatic stress disorder is presumed to have arisen out of and in the course of the worker's employment, makes good sense given the expectations our society places on first responders every working day. In fact, the presumption makes sense for many other occupations where workers are frequently exposed to traumatic circumstances and the government should consider expanding the list of occupations in the new s.14(2). However, we are concerned about the impact of the requirement of a diagnosis of by a psychiatrist or psychologist. Waiting times to see a psychiatrist are a year or more in many areas of the province. Similar wait times apply to seeing a psychologist. In addition, psychological treatment is not covered by OHIP. People who are disabled from work often cannot afford the fees for private medical care. In our experience, many psychologists and psychiatrists will no longer accept patients in the workers compensation system because the WSIB will not provide the treatment they recommend for their patient. The government should take steps to improve access to psychological and psychiatric treatment so that first responders and other Ontarians can get access to the mental health services that they need and that the legislation requires for their claim to be allowed.

Under the current legislation, first responders' claims may be allowed for post-traumatic stress disorder without a formal diagnosis from those two professions. It is sufficient if the WSIB is satisfied by other information, such as a report from a family physician or social worker, that they have a mental stress disability from a sudden and traumatic event at work. Will this legislative change have the effect of raising the threshold that first responders have to cross to get their claim allowed? It is our submission that the government should instruct the WSIB that first responders' workers' compensation claims are not to be denied simply because they do not have a diagnosis by one of those two specialists.

Will Treatment Needs be Honoured under Bill 163 as well as the Diagnosis?

Another area of concern is whether the mental health treatment needs of these first responders will be respected by the WSIB. In a published report last year by the Ontario Network of Injured Workers Groups and the Ontario Federation of Labour, "Prescription

Over Ruled”⁸ a group of psychologists and other health care professionals has documented numerous cases where the WSIB has refused treatment prescribed by the psychologists for injured workers whose claims have been accepted by the WSIB. This causes harm to their patients and the injured workers find themselves re-victimized by the very system that is mandated to compensate and protect them. We understand that WSIB took no action on the report and these provincial groups have now filed a 200 page request for an investigation by the Ontario Ombudsman.⁹

Given the government’s respect for the opinion of psychologists and psychiatrists in the proposed legislation, it is submitted that the government should amend the proposed legislation to require the WSIB to accept their treatment plan as well as their diagnosis.

Outline of Submissions

1. Immediate remedial action by the government and the WSIB is necessary honour the commitment given to the Standing Committee on Finance and Economic Affairs on December 6, 2010, that “Full funding will not be achieved on the backs of injured workers.”¹⁰

2. Compensation for chronic stress should be addressed by amending Section 1 of the Bill to read:

1. *Subsection 13 (4) of the Workplace Safety and Insurance Act, 1997 is repealed.*

Section 2 may remain as it stands and provide important assistance to first responders.

3. The government should expand the list of occupations in the new s.14(2) to include other similarly stressful types of work where workers are frequently exposed to stressful and traumatic circumstances.
4. The government should take immediate steps to improve access to psychological and psychiatric treatment so that first responders and other Ontarians can get access to the mental health services that they need and the diagnosis that the legislation requires them to have in order for their claim to be allowed.

⁸ See <http://ofl.ca/index.php/prescription-overruled-report/>

⁹ Toronto Star, 29 Jan. 2016 <http://www.thestar.com/news/gta/2016/01/29/provincial-watchdog-urged-to-investigate-wsib.html>

¹⁰ See footnote 1.

5. The government should instruct the WSIB that first responders' workers' compensation claims are not to be denied simply because they do not have a diagnosis by one of those two specialists.
6. The government should amend the proposed legislation to require the WSIB to accept the treatment plan prescribed by the treating psychologist or psychiatrist as well as their diagnosis.

In conclusion, we welcome improvements to workers' compensation decision-making for first responders with post-traumatic stress disorder, but steps must be taken to ensure that there is the same access to a psychiatrist or psychologist as there is to other health care professionals so that it is realistic to expect first responders to be able to get the required diagnosis. And we would welcome efforts to address the much larger issue of fair compensation for those who develop work-related stress disabilities from workplace events other than sudden and unexpected traumatic events because right now they cannot get workers' compensation in Ontario.

Respectfully submitted,
Injured Workers' Consultants
per:



John McKinnon
Executive Director