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ONTARIO NETWORK of INJURED WORKERS GROUPS

IN UNITY THERE IS STRENGTH

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July 7, 2017

Workplace Safety & Insurance Board
200 Front St. West
Toronto, Ontario

Attn: Elizabeth Witmer
Chair

Dear Ms. Witmer,

Re: Consultation on Draft Traumatic and Chronic Mental Stress Policy

The Ontario Network of Injured Workers Groups (ONIWG) was founded in 1991 and since then has actively advocated on behalf of injured workers; this is done primarily on a systemic basis. We intervened in a number of Supreme Court of Canada cases that affected the rights of injured workers including the Martin & Laseur v Nova Scotia; the latter case involved a Charter challenge to the strict limits to the Nova Scotia chronic pain regulation. We also routinely meet with senior levels of the Ministry of Labour, including the Minister of Labour and also with senior management at the Workplace Safety & Insurance Board (WSIB) and participate in public consultations on issues that affect injured workers. At these meetings, the Ontario Network of Injured Workers' Groups advocate for systemic change to benefit all injured workers.

Our group members are injured worker organizations in the province of Ontario. ONIWG is a democratically governed organization, with member groups from all parts of Ontario. These individual groups also work closely with other groups and agencies in their individual communities in order to advance the interests of injured workers. The individual injured workers' group typically works with and has strong ties to both local labour councils and to local labour unions. They often will work with local legal clinics, which provide much needed advice and support. They also work with the local Office of the Worker Advisor, local Members of Provincial Parliament, and in many cases local municipal governments. It is these community roots that have enabled events like Injured Workers' Day (June 1) and the Day of Mourning for Workers Killed and Injured on the Job (April 28) to be successful province-wide events.

We have also provided numerous submissions to the Government, the Legislature, the WSIB and numerous commissions on topics relating to injured workers. We are taking this opportunity to provide our thoughts and concerns with respect to the draft policy on the compensation for Chronic and Traumatic Mental Stress.

## 1) Introduction

We feel that the recent changes to the Workers' Compensation legislation regarding entitlement for disabilities arising out of chronic mental stress are a significant stride for injured workers in Ontario. This legislation removes many of the unconstitutional barriers that were faced by workers making claims for disabilities arising out of work-related stressors. We feel however that the proposed policy is an attempt by the Workplace Safety & Insurance Board to unreasonably and potentially illegally narrow the scope of the legislation to restrict an injured workers' ability to successfully claim for benefits arising out of work-related stress.

## 2) Concerns with respect to Traumatic Mental Stress Policy

The change in the legislation brought an opportunity to make welcome changes to what has always been a problematic policy document regarding Traumatic Mental Stress. The main problem with the Board's treatment of Traumatic Mental Stress is that it has an unreasonable focus on violence and threats of violence. The policy on traumatic limits entitlement to those situations where a worker is exposed to violence, threats of violence or the witnessing of horrific accidents.

One group that are left out of entitlement are people (mainly women) who have been sexually harassed on the job. The traumatic mental stress policy would not compensate the many women who were sexually harassed on the job unless the harassment includes physical violence, threats of physical violence or being placed in a life-threatening situation. We would submit that this narrow focus eliminates many victims of sexual harassment from entitlement for the disabilities that arise out of these incidents. Most cases of sexual harassment do not involve violence or threats of violence; typically harassers will fire, demote, transfer or do other such things to women who refuse their advances.

While many of these issues may be resolved by reference to the policy on entitlement to Chronic Mental Stress, women who are faced with single incidents of sexual harassment would not likely be covered by the Chronic Mental Stress provision of the policy. These women would have to rely on a deeply flawed traumatic mental stress policy.

These issues are not new issues. The Ontario Network of Injured Workers' Groups had raised these issues in the policy consultation for the original Traumatic Mental Stress Policy. We stated at the time[1]:

> We feel that there are positive elements in this policy proposal that the Board ought to be congratulated on. First, we feel that the recognition by the Board that workplace stressors can cause disabilities is a significant step forward and that the Board ought to be congratulated for this. We also feel that the Board's explicit recognition that harassment of workers' is wrong and that any disability that arises out of this harassment is a good thing. This is the first time that the Board has explicitly recognized this and the Board ought to be congratulated for this recognition.
>
> However, there is some room for improvement.

[1] In a 2001 letter to Slavica Todoric, the Director of the benefits policy branch

> First we feel that the details of the policy language on harassment are overly narrow. The policy explicitly requires that the harassment include physical violence or threats of physical violence. This focus on physical violence needlessly narrows the provisions of the Act.
>
> ...
>
> Secondly requiring that the abuse include threats of physical violence is narrower than permitted by section 13(4) and (5) and has the effect of condoning many types of abuse because of the lack of a threat of physical violence.
>
> To illustrate, suppose that we have two cases of sexual harassment on the job. In both cases male supervisors are making unwanted and repeated sexual advances to members of their female staff. In both cases the women develop psychiatric disabilities consistent with this form of abuse and become disabled from working for a period of time. Suppose further that the only difference between the two cases is that in the first case, the male supervisor threatens to beat or rape his victim, whereas in the second case this does not occur. The policy as written would compensate only the first woman. Implicit in this statement is that the Board condones sexual harassment, as long as it does not include threats of violence.
>
> Obviously this is wrong. The Board and adjudicators must recognize that violence is implicit in all forms of abuse, regardless of whether there is an explicit threat. This is true in cases of abuse on the basis of gender, race, religion or sexual orientation. Board policy must recognize this, and this can be done by eliminating physical violence or threats of physical violence as a necessary pre-condition for receiving compensation. This is not required by the legislation and this will lead to perverse decision making.

Our concerns were not addressed in the policy and this focus on violence and threats of violence remain central to the determination of entitlement for Traumatic Mental stress.

Since 2001 there has been a growing recognition in provincial law that harassment is violent *per se*. In March of 2016 the province passed the Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016, S.O. 2016, c. 2 - Bill 132. This amended a variety of statutes to expand the protections that persons faced when faced with sexual violence, including sexual harassment.

The Occupational Health and Safety Act was amended to include Workplace Sexual Harassment as part of Workplace Harassment and defined Sexual Harassment as:

"workplace sexual harassment" means,

> (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where

the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

(b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome;

This policy consultation was an opportunity to make the board Policy with respect to traumatic mental stress consistent with our societies understanding of sexual harassment. The Board did not take the opportunity to do so.

### 3) Concerns with "Substantial Work-related stressors"

The policy proposes to limit entitlement for work-related stress disabilities by limiting compensation to only those workers that are subjected to substantial workplace stress. The clear implication is that a worker who becomes disabled as a result of workplace stress that is not substantial would not be compensated for his or her disability.

This limitation sets a standard for entitlement for a mental health impairment that is very different than the standards for entitlement of physical impairments. When adjudicating a physical impairment that is a result of the repetitive nature of the job, that worker does not have to show that the repetitive motions are excessive in duration or intensity; all that an injured worker would show is that those motions significantly contributed to the development of the physical impairment. Entitlement for a mental health impairment that is the result of exposure to chronic mental stress is directly analogous to a repetitive strain injury. There is no reason for the differential treatment between adjudicating for physical impairments and the adjudication for analogous mental health impairments. We would submit that this is an unreasonable limitation that is inconsistent with both the Act and the WSIAT jurisprudence on compensation for work-related stress disabilities.

The policy also purports to make the adjudication of mental stress claims different depending on the type of job that a worker may be engaged in. A worker that is engaged in a job or category of jobs that is characterized by routine stress can receive compensation regardless of whether the high levels of stress are consistent with the expectations of that job. However all other workers must show that that the stressors are excessive in intensity and/or duration in comparison to the normal pressures and tensions experience by workers in that particular job.

There are two problems with this distinction. First, the distinction has no scientific basis. The WSIAT canvassed the epidemiological evidence regarding the association between job strain and the development of mental health impairments in 2157/09; this was one of the three WSIAT's that found that the limitations in the act to compensation for chronic stress were unconstitutional. The panel stated:

> [140] The Panel notes that there is no dispute that numerous studies have shown an association between job strain and the onset of mental disorders, such as depression. Dr. Gnam acknowledged this in his book chapter; Dr. Stansfeld cited several

more recent studies in his report. The primary point of contention for Dr. Gnam was that the studies did not account for selection bias. In lay terms, this is the effect that people who are depressed are more likely to report job strain or select employment with job strain characteristics. Dr. Gnam testified that this may result in "reverse causation."

[141] In response, Dr. Stansfeld referred to the methodology of several studies which accounted for selection bias and still showed an association.

[142] As we noted earlier, we accept that both experts are qualified to give opinions, although Dr. Stansfeld has published more extensively in this area. Upon consideration of the evidence as a whole, we prefer Dr. Stansfeld's opinion on the strength of the association, as it supported by several publications, which were put into evidence before this Panel.

In other words, the WSIAT has already found that a worker can develop mental health impairments as a result of exposures to mental strain, and that there is no requirement that the mental strain be unusual. Placing a requirement that the WSIAT has explicitly rejected in a charter decision runs the risk of being equally found to be contrary to the Charter.

Our second concern is that the proposed distinction between high stress jobs and low stress jobs may become a gendered distinction. We worry that jobs that are characterized as high stress jobs will be male dominated jobs and that female dominated jobs will be less likely to be seen as high stress jobs. This is a very real concern as we saw this in the first responders' legislation where firefighters and police officers were included in the legislation, but emergency room nurses were not.

### 4) Workplace Bullying and Workplace Harassment

There are a few positive portions of the policy with respect to Workplace Bullying Harassment. The policy clearly indicates that workplace bullying and harassment is a substantial workplace stressor. There is also recognition that real or perceived power imbalances between the bully and his or her victim are factor in workplace bullying.

Unfortunately, we have a number of concerns.

First, the policy states:

> Workplace bullying includes unreasonable or inappropriate behaviour directed towards a worker, or group of workers, **that creates a risk to health and safety**.
> (emphasis mine)

Clearly the policy on workplace bullying requires that the workplace bullying creates a risk to health and safety. This requirement ought not to be in the policy because workplace bullying is a risk to health and safety; it does not need other factors to show that it is a risk to health and safety.

With respect to the Workplace Harassment, the definition is vague and narrow. No mention is made of harassment because of age, ancestry, place of origin, colour, ethnic origin, citizenship,

creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability; these are all grounds for discrimination in employment under the **Ontario Human Rights Code**. In addition to the language in the draft policy, engaging in a course of vexatious comment or conduct against a worker in a workplace because of any of the prohibited grounds should be seen as harassment and it should be presumed that this form of conduct is intimidating, humiliating and degrading.

The policy clearly indicates that sexual harassment includes workplace sexual harassment. Unfortunately there is no definition in the policy workplace sexual harassment. The occupational health and safety act defines workplace sexual harassment as:

> (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or
>
> (b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome;

Subsection (b) is especially important as sexual solicitation would not be caught by the proposed policies definition of harassment, nor would it be caught by the traumatic mental stress language because of the Board's inappropriate fixation on violence and threats of violence.

We feel that the sexual harassment ought to be defined in the policy and that the definition should be identical to the definition of sexual harassment in the Occupational Health and Safety Act.

### 5) Standard of Proof and causation

We are glad to see that the policy on Chronic and Traumatic Mental stress is clear that the standard of proof and causation for Chronic and Traumatic Mental stress disabilities is the same as for all other disabilities under the Act. There is no reason to treat Mental Health disabilities differently than any other disabilities. To do so would be a violation of both the **Ontario Human Rights Code** and the **Canadian Charter of Rights and Freedoms**.

### 6) Diagnostic requirements

We are happy to see that Workplace Safety & Insurance Board will accept a diagnosis of a mental health impairment from any regulated health care professional. We have some concerns for the requirement that entitlement only be accepted if there is a DSM diagnosis. This appears to run contrary to the decision of the Supreme Court of Canada in **Saadari** v. **Moorehead** (2017 SCC 28)

At the Supreme Court, Justice Brown stated that requiring expert testimony leaves recovery in the hands of psychiatry, including the Diagnostic and Statistical Manual of Mental Disorders (DSM) and International Statistical Classification of Diseases and Related Health Problems

(ICD). The focus of a claim should be on the level of mental harm caused, not if the symptoms experienced can be labelled based on the above systems of classifications, which are constantly changing. Justice Brown ruled that recovery for mental injury does not require proving a recognizable psychiatric illness, especially when proving physical injury does not require an expert's diagnosis. However, expert evidence can still be called upon to help prove a mental injury has occurred.

Of greater concern is that the WSIB may require and assessment by a psychiatrist or psychologist to confirm the ongoing entitlement.

We in the injured worker community have a historic opposition to the assessment of injured workers by WSIB doctors. "No Board Doctors" was one of the original demands of the Union of Injured Workers'. This demand has not been met, and the Board's recent history of ignoring the opinions of an injured worker's treating doctors in favour of the opinions of WSIB paid medical consultants makes the demand still relevant.

We feel that if the injured worker has a treating psychiatrist or psychologist that the WSIB would have no need to have the injured worker assessed by another psychiatrist or psychologist. In any case, the psychiatrist or psychologist used should be a psychiatrist or psychologist of the injured workers own choosing and the assessment ought to include an examination of the injured worker.

**7) Employer decisions or actions relating to employment**

The legislation has an expressed limitation with respect to disabilities that arise out of employer decisions. The legislation states:

> (5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

We have two concerns with this. First, we do not believe that this limitation should be in the legislation at all. Secondly we have grave concerns with the draft policy regarding this legislative limitation.

*a. Problems with the legislation's limits regarding employer decisions*

There should not be any limitations for entitlement for disabilities that arise as a result of employer decisions. If an employer's decision regarding a worker causes that worker to develop a disability then that worker ought to be compensated.

Workers' Compensation is the complement to workplace health and safety. An employer provides a safe and healthy workplace, but even the healthiest and safest workplaces have risks inherent in going to work. The risks inherent in going to work are covered by the Workers' Compensation system by compensating workers' for their injuries. Paying compensation for

work-related accidents acknowledges that no worker ought to be hurt simply because they went to work and that all workers that are hurt as a result of work ought to be compensated. This is one of the fundamental principles of Workers' Compensation.

The limitation on compensation for mental health disabilities because of employer decisions violates this fundamental principle. In no other circumstance does the Workers' Compensation system shift the full risk of an injury from the Workers' Compensation system to the injured worker. By failing to compensate a worker whose mental health disabilities arises out of employer decisions, the Act is saying that a worker is not protected from employer decisions that are unsafe or unhealthy when the disability is a mental health disability.

We would submit that this breaks the link between compensation for workplace accidents and the provision of a safe and healthy workplace. By saying that a worker will not be compensated for being exposed to the mental health risks of employer decisions the Act is implicitly saying that an employer can make decisions regarding a worker that will endanger a worker's mental health. This is fundamentally wrong.

We would be shocked if an injured worker were denied compensation for Carpal Tunnel Syndrome simply because the disability arose out of a decision of the employer to increase the production rate of the assembly line. We should be equally shocked if a worker were denied compensation for depression because of changes to the employer's mandatory overtime policy. We feel that the limitation on entitlement for disabilities arising out of employer decisions has no place in a Workers' Compensation System and that this particular limitation ought to be repealed.

*b. Concerns with the policy on employer decisions*

We appreciate that the Workplace Safety & Insurance Board cannot ignore the limitations that are imposed by the legislation. However in drafting the policy regarding this limitation the policy assumes that all employer decisions are subject to this limitation.

We feel that not all employer decisions ought to receive the protection of the legislative limits on compensation. It is not unusual in situations of harassment where an employer uses employment decisions as a form of harassment; it is also not unusual to see reprisals on the part of the harasser against the victim. There are numerous cases at both the Workplace Safety & Insurance Appeals Tribunal and the Human Rights Tribunal of Ontario where the employer would use shift scheduling, overtime decisions and the discipline process as a way of retaliating for an employee refusing advances, complaining about harassment or, as a way of harassing a worker; for an example of this see WSIAT Decision 589/98 or *Vipond* v *Ben Wicks Pub & Bistro* 2013 HRTO 695. The policy is silent on this form of harassment; the implication of this silence is that the Workplace Safety & Insurance Board will condone the actions of employers that engage in this course of conduct.

This type of conduct is not acceptable, nor should it be condoned by Board policy. The **Workplace Safety and Insurance Act** must be interpreted in a manner that is consistent with the **Ontario Human Rights Code**. We feel that doing so requires and understanding that implicit in the Act is that employer reprisals and other forms of harassment using employer

decisions are not employer decisions regarding the employment function. We feel that there ought to be explicit policy language to deal with this type of situation.

**8) Return to Work and Work Transition**

An injured worker and his or her employer are required to co-operate in early and safe return to work. Failure to do so can have grave consequences for both the injured worker and the employer. The Board has developed Work Transition Policies with respect to this.

We foresee that in situations of Workplace Bullying and Workplace Harassment, the current Work Transition Policies will not be adequate. In many case regarding workplace bullying and harassment it is the victim of the bullying and harassment that is given undesirable shift changes and work hours to help the victim avoid the bullying and harassment. Having the victim of workplace bullying face the negative workplace consequences re-victimizes the worker. In cases where a worker becomes disabled as a result of workplace bullying and harassment, there ought to be specialized policy regarding Work Transition and Return to Work to avoid these issues and Work Transition Specialist ought to receive training on how to deal with these sorts of situations.

9) Conclusion

The Ontario Network of Injured Workers' Groups has also had an opportunity to review the submissions on the proposed policy prepared by the Ontario Federation of Labour. We entirely agree with their submissions, and support their position.

We would like to thank the Workplace Safety & Insurance Board for the opportunity to make submissions on this important topic. We look forward to seeing an improved operational policy.

Sincerely,

Per !

Willy Noiles
President