DRAFT MENTAL STRESS POLICY SUBMISSION

Submission by the Ontario Federation of Labour
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Introduction

The Ontario Federation of Labour (OFL) is the central labour organization in the province of Ontario. The OFL represents 54 unions and speaks for more than a million workers from all regions of the province in the struggle for better working and living conditions.

With most unions in Ontario affiliated, membership includes nearly every job category and occupation. The OFL is Canada's largest provincial labour federation. The strength of the labour movement is built on solidarity and respect among workers.

We commit ourselves to the goals of worker democracy, social justice, equality, and peace. We are dedicated to making the lives of all workers and their families safe, secure, and healthy. We believe that every worker is entitled, without discrimination, to a job with decent wages and working conditions, union representation, free collective bargaining, a safe and healthy workplace, and the right to strike.

Organized labour, as the voice of working women and men, promotes their interests in the community and at national and international forums. We speak out forcefully for our affiliates and their members to employers, governments, and the public to ensure the rights of all workers are protected and expanded.

The OFL is pleased to offer our comments on the WSIB's Chronic Stress Policy.

We have serious concerns about the draft mental stress policy. The draft policy fails to reflect the legislative amendments to the restrictions on mental stress entitlement, which were intended to address the discriminatory aspects of the mental stress provisions of the *Workplace Safety and Insurance Act*. By so doing, the Board would repeat the mistakes of the past and deny workers suffering from work-related stress their *Charter* right to equal protection and equal benefit of the law without discrimination.

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." These standards unfairly exclude workers seeking entitlement for mental stress from the thin-skull principle.

This 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 OFL recommends scrapping the proposed approaches to chronic and traumatic mental stress and moving to an approach more consistent with the principles of workers' compensation law and the Charter of Rights and Freedoms.

The OFL also believes that the proposed policy should be retroactive to 1998. While the legislature did not enact transitional provisions, the Board has the power to make retroactive policies. In these unique circumstances, that power should be applied to make the policy retroactive to when the unconstitutional limitation on mental stress was enacted.

The Context: The Amendment of Unconstitutional Legislation

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.

Three decisions of the Workplace Safety and Insurance Appeals Tribunal found that the limitation of entitlement for mental stress to only 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.[1]

In *Decision No. 2157/09,* the first and leading case on this issue, a panel of the Tribunal concluded that:

- workers seeking entitlement for mental stress were subject to more onerous legal requirements than for physical injuries;
- the evidence of the work-relatedness of mental disorders does not justify this differential treatment;
- people suffering from mental illness have been historically disadvantaged and subject to stereotyping; and
- the differential treatment of workers with mental stress perpetuated the message that those injuries were not real, and should be regarded with suspicion.

The panel found that this differential treatment perpetuated stigma against mental illness:

> While the Legislature may have been attempting to bring clarity to mental stress claims, the unfortunate effect is the exclusion of many types of mental disability claims from coverage under WSIA, sending an implicit message that mental disability is not "real" in the sense that it does not warrant an individual assessment of work-relatedness.
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> … [The distinction] is premised on the notion that mental stress claimants are more prone to be fraudulent than physical injury claimants. This suggests an underlying assumption that claims for mental conditions are less deserving of merit and should be regarded more suspiciously than physical injuries. This … perpetuates the view that persons with mental disabilities are less worthy of recognition or value as human beings or as members of Canadian society than persons with physical disabilities.
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> … [T]he stigma against persons with mental illness includes the stereotype that mental illness is caused by a personal weakness and that persons with mental illness are weak, lazy, or lacking in willpower. The unsupported assumption that mental illness claimants will place a greater and unwarranted financial strain on the workplace insurance system than physical disability claimants perpetuates the notion that persons with mental disabilities are undeserving of equal recognition under the workplace insurance scheme.

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

[1] 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).

The government decided against applying for judicial review of *Decision No. 2157/09* and gave no indication that it disagreed with that decision. To the contrary, 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.

While it took longer than hoped, the government has 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."

Current legislation	**Amended legislation**
13(4) Except as provided in subsection (5)… a worker is not entitled to benefits under the insurance plan for mental stress.	13(4) Subject to subsection (5), 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.
13(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.	13(5) A worker is not entitled to benefits for mental stress caused by decisions or actions of the worker's employer 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.

These amendments can only be read as the government's attempt to address the discriminatory limitations on mental stress entitlement.

In addition, we must also consider that these amendments were made by a government that has publicly recognized the importance of eliminating the stigma associated with mental illness.[2] The government's "comprehensive mental health and addictions strategy," *Open Minds, Healthy Minds*, recognizes that the stigma against mental health keeps people from getting help for mental illness; whereas when people with mental illness feel accepted and respected, their well-being improves.[3]

[2] http://www.health.gov.on.ca/en/common/ministry/publications/reports/mental_health2011/mentalhealth_rep2011.pdf at p. 12.
[3] Ibid.

Given this context for the legislative amendments, we expected a significant revision to the relevant Board policies with a focus on reducing the discriminatory differential treatment of workers with mental stress. These legislative amendments provide the Board with an opportunity to change its approach and remove the unfair barriers that workers with mental stress face in accessing the compensation and support they need.

The "Chronic Mental Stress" Section

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 discriminatory and should be removed. This standard imposes a heavy burden on workers with chronic mental stress, requiring them to meet an onerous and ill-defined standard that no other injured worker must face. It deprives workers with stress-related mental illness of the benefit of the thin-skull rule. Treating workers with mental illness this way perpetuates stigma and violates their Charter rights against discrimination.

The substantial work-related stressor sets a higher standard for entitlement and is inconsistent with the "thin-skull" principle.

The "substantial work-related stressor" requirement singles out workers with mental stress and subjects them 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."

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. These workers are only required to establish that a work-related factor significantly contributed to their injury. And even if the working conditions were not somehow "excessive," but the worker developed a condition because they were unusually vulnerable, they would have entitlement because of the thin-skull rule.

Under the thin-skull rule, the Board takes workers as it finds them: a worker is entitled to benefits for the full extent of their injury, even if a relatively minor incident caused an unexpectedly severe injury.

The thin-skull principle is based on fairness and good policy. Then-Chair Ellis articulated for this principle in *Decision No. 915*:

1. Workers with pre-existing vulnerabilities should have the same level of protection they would have had had under tort law. To exclude workers with pre-existing conditions leaves them with "substantially less protection."[4] This "would not be understandable" under either the history of workers' compensation or the legislation.[5]
2. It is unfair to deny workers' compensation for pre-existing conditions which did not affect them before they were injured on the job: "injured persons become entitled to compensation because they have been engaged as workers" and were then injured.[6]

[4] Decision No. 915, 1987 7 W.C.A.T.R. 1, p. 101.
[5] Decision No. 915, 1987 7 W.C.A.T.R. 1, p. 101.
[6] Decision No. 915, 1987 7 W.C.A.T.R. 1, p. 101.

These same reasons apply to workers with mental stress. These workers should be covered by the thin-skill rule, just as if they had suffered a physical injury.

"Substantial work-related stressor" standard is vague and impressionistic.

Under the proposed policy, workers with chronic mental stress would not only have to meet a higher standard of "substantial work-related stressor," but would have to bear the burden of uncertainty about what that means. The explanation of "substantial work-related stressor" in the proposed policy raises more questions than it answers. Here are a few such questions:

- The policy states that a work-related stressor will generally be considered substantial "if it is excessive in intensity and/or duration in comparison to the normal pressures and tensions experienced by workers in similar circumstances." How will the Board assess and measure the intensity of stressors? How much will the intensity or duration of a stressor have, to exceed the norm? How will the Board determine the normal pressures and tensions workers face? What will be considered "similar circumstances" to those of the worker?
- The policy also makes allowances for workers "employed in an occupation, or a category of jobs within an occupation, reasonably characterized by a high degree of routine stress." What does "reasonably characterized" mean? What is a "high degree of routine stress?" What evidence will the Board require to establish that a worker's job fits within that category?
- For those workers "normally exposed to a high level of stress" a "high level of routine stress, combined with significant duration," may qualify as a substantial work-related stressor. Again, what is a "significant duration" or a "high level of stress"? And what combination of routine stress and significant duration is required?
- How will the Board handle cases with multiple distinct work-related stressors? Could multiple low-level stressors together be considered an excessive stressor? The policy seems to focus on claims that only involve one kind of stressor; but real life is more complicated.

The poorly-defined "substantial work-related stressor" standard would leave victims of chronic mental stress with little guidance as to when they have met the standard and what evidence they are required to produce. The policy hints that these workers may have to provide reams of evidence about their workplaces and similarly situated employees. 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 vague criteria for "substantial work-related stressor" would undoubtedly result in lengthy litigation. The lack of clarity in these standards and the resulting uncertainty will result in lower-quality decision making at the Board and more appeals by both employers and workers. These appeals will tie up system resources and prevent workers with chronic mental stress from getting the benefits and services they require and deserve.

The "substantial stressor" requirement discriminates against workers with mental stress.

The Board offers no explanation for this differential treatment of workers suffering from chronic mental stress. The only hint is in background information to the consultation description of "substantial work-related stressor" as the "injuring process" necessary for entitlement. Nothing is said as to why stressors must be "excessive in comparison to normal pressures/tensions experienced by workers in similar circumstances" to constitute an injuring process.

The Board seems to be suggesting that there is no injuring process for a worker whose stressors are not excessive. This defies logic: if there are workplace stressors, the worker is exposed to those stressors, and that exposure significantly contributes to a mental health condition, then there is an injury mechanism.

The "substantial work-related stressor" seems to be a re-warmed version of the "average worker test" previously used at the WSIAT to adjudicate entitlement for mental stress. But the WSIAT has largely abandoned the use of the average worker test. It has acknowledged that this standard is inconsistent with the thin-skull rule and improperly subjects workers with mental stress to a different standard.[7]

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," because they are too frail, or perhaps because they are malingering. These are precisely the discriminatory stigma-perpetuating stereotypes that the legislative amendments to the *WSIA* were meant to address.

If the draft policy is passed as is, it is vulnerable to another challenge under the section 15 of the *Charter*. The "substantial stressor" standard subjects those suffering from work-related chronic stress to a higher standard and deprives them of the benefit of the thin-skull rule. These vulnerable workers will have to overcome significant obstacles to receive entitlement. Subjecting mental stress workers to a different standard for entitlement sends a message that their disabilities are less real than others and less deserving of recognition.

Recommendation: scrap the substantial work-related stressor requirement

The OFL strongly recommends that the Board remove the "substantial work-related stressor" requirement. It discriminates against workers with chronic mental stress. This is inconsistent with the amendments to the WSIA, which were intended to eliminate – not perpetuate – discrimination against mentally ill workers.

This section of the policy should be replaced with a section that sets out an approach that is more consistent with the general principles of workers' compensation. A good place to start for adjudicating mental stress claims would be the non-exhaustive list of considerations proposed in *Decision No. 2157/09*:

- Is there a DSM diagnosis of the worker's condition? [Note: While we agree that a DSM diagnosis may be relevant, it should not be dispositive and it certainly should not be required before the Board will adjudicate the claim as proposed elsewhere in the policy.] In order to be eligible for a "personal injury by accident" under the WSIA, a disabling mental reaction is necessary: a transitory emotional response is not compensable.
- Was there a "workplace injuring process?" This involves careful consideration of the nature of the workplace events that are alleged to have caused the mental disorder and the evidence surrounding the alleged events. A workplace injuring process is not established if the mental disorder arises solely from the worker's misperception of events.
- Are there co-existing or prior non-work stressors present that may have caused or contributed to the onset of the mental disorder? How significant are they in comparison to the workplace stressors?
- Does the worker have any prior psychiatric history or predisposing personality features that are relevant to the question of causation? If so, is it in the nature of a "thin skull" or a "crumbling

[7] *Decision No. 665/10I2*, 2013 ONWSIAT 1630 (CanLII), and Decision No. 1572/12, 2016 ONWSIAT 987 (CanLII).

skull?" In other words, is it a case in which it is appropriate to consider entitlement on an "aggravation basis?"

- Is there a temporal connection between the events and the onset of the mental disorder? If not, is there a credible explanation for any delay?
- Do the medical professionals who comment upon causation have a complete and accurate understanding of the workplace events, the worker's psychiatric history, relevant family history, prior or co-existing stressors, and any other relevant factors? Do they provide a reasoned explanation for their opinions on causation?
- What is the worker's employment history? In some cases, it may be appropriate to draw inferences in this regard. For example, a long and stable employment history may suggest that the worker had been able to cope with "normal" stressors in the past.[8]

"Bullying" and "harassment" are defined too narrowly; "interpersonal conflict" is improperly excluded.

The "chronic mental stress" section of the policy addresses three specific types of stressors: bullying, harassment, and interpersonal conflict. The OFL agrees that bullying and harassment may cause chronic mental stress. We are concerned, however, that the definitions of "bullying" and "harassment" are too narrow and interpersonal conflict is improperly excluded.

The proposed policy's statements that bullying usually involves behaviour that was "intended to be offensive" and that the bullying involve a "real or perceived power imbalance" are not helpful. These "usually involved" characteristics will become requirements in the hands of Board decision makers. And while bad intentions and power imbalances are often present in bullying situations, they are not always.

A better approach would be to adopt a definition of "bullying." We recommend the definition adopted by the Board's prevention system partner, the Public Services Health & Safety Association, in its publication on Bullying in the Workplace. According to that publication, "bullying" is defined as "negative and persistent" acts that "could 'mentally' hurt or isolate a person in the workplace."[9]

The Board's definition of harassment 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;" [10] under the proposed policy, the conduct must be "intimidating, humiliating, or degrading." There is no reason that the Board should define harassment differently than under *OHSA*.

Interpersonal conflicts should not be excluded as a potential work-related stressor. A worker who has toxic relationships with colleagues, supervisors, or managers may understandably experience a considerable amount of work-related stress. If the Board's concern is that interpersonal conflicts may sometimes lack a connection to the workplace, then the issue of work-relatedness should be adjudicated on a case-by-case basis, rather than through a blanket exclusion.

Recommendations

The OFL recommends the following recommendations to the examples of work-related stressors:

- Adopt the Public Services Health & Safety Association of "bullying."
- Adopt the *Occupational Health and Safety Act* definition of "harassment."

[8] Decision No. 2157/09, 2014 ONWSIAT 938 (CanLII), at para. 276.
[9] http://www.pshsa.ca/wp-content/uploads/2013/02/BullyWkplace.pdf, at pp. 2-3
[10] *Occupational Health and Safety Act*, RSO 1990, c O.1, s. 1.

- Remove the reference to “interpersonal conflicts” as an excluded work-related stressor.

The “Traumatic Mental Stress” Section

The proposed section on “traumatic mental stress” is out of step with the legislative amendments. The amendments loosen the requirements for traumatic mental stress entitlement, but the proposed policy essentially leaves the status quo in place. And in so doing, the draft policy fails to address the discriminatory limitations on entitlement for traumatic mental stress.

The amendments remove the requirements that mental stress can be an acute reaction to a sudden and unexpected traumatic event. There no longer needs to be an “acute reaction” to a stressor, and the stressor need no longer be “a sudden and unexpected traumatic event.” There is no longer any reference to a “traumatic event”, but instead to “traumatic mental stress.”

This removal of the “sudden and unexpected traumatic event” language calls for a different approach. But the proposed policy essentially adopts the same criteria as the current policy. The current policy incorporates aspects of the DSM diagnosis for posttraumatic stress disorder into the policy, especially the aspects relating to the definition of “traumatic event.” This includes the requirements:

- That the event be “objectively traumatic.” The policy includes a list of events that would be considered traumatic that essentially fit the DSM-V criteria of “death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence.”
- That a worker “suffered or witnessed the work-related traumatic event(s) first hand, or heard the work-related traumatic event(s) first hand through direct contact with the traumatized individual(s), e.g., speaking with the victim(s) on the radio or telephone as the traumatic event(s) is/are occurring.”

This continued focus on the DSM standards to evaluate whether the stressor was “objectively traumatic” is inconsistent with the legislative amendment. The removal of language imposing restrictions on the nature of the event has been replaced by a reference to the type of mental stress. This amended legislation no longer calls for an examination of whether the worker was “right” to be traumatized and asks instead whether the worker was traumatized.

The amended legislation uses the term “traumatic mental stress,” not “posttraumatic stress disorder.” The choice of the broader, more colloquial terminology of “traumatic mental stress” 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 the same thing by “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 legislature’s intention to address the discriminatory aspects of the bar on entitlement for stress. The policy continues the practice of imposing different standards on injured workers who have mental stress as compared to those who do not. Workers seeking entitlement for traumatic mental stress would have to prove that the event that caused their condition was “objectively traumatic.” In effect, workers with traumatic mental stress will have to show that they were right to be traumatized.

Here again, the Board's approach deprives workers with mental stress injuries from the benefit of the thin-skull rule. Some workers may be more likely to experience an event as traumatic. These workers should be treated just as those with physical injuries – they should have entitlement if the stressor caused their mental health condition.

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, and is thus not deserving of recognition unless it meets strict criteria.

An "objectively traumatic" standard is unnecessary for determining whether there was an injuring process. Workers seeking entitlement for work-related stress must still establish that the trauma was work-related and significantly contributed to their mental health injury. The trauma cannot solely be the result of the worker's misperception of events.

Recommendation: use CAMH's definition of "trauma."

Instead of focusing on the question of whether an event was "objectively traumatic," the Board should focus on the effect that the event had on the worker. This would be consistent with the definition of "trauma" from the Centre for Addiction at Mental Health. CAMH defines "trauma" as "the emotional response when a negative event is overwhelming."[11] According to CAMH, "trauma is caused by negative events that produce distress. These events can be physical, sexual or emotional in nature." On this understanding of "trauma," common traumatic events include:

- physical, sexual and verbal assault;
- being threatened with physical or sexual assault;
- witnessing violence against others;
- long-term neglect in childhood;
- accidents and natural disasters;
- community violence; and
- war or political violence.[12]

On this understanding of "trauma", the Board can then determine whether the trauma was work-related and whether it caused the worker's mental stress. The considerations for the adjudication of mental stress entitlement in *Decision No. 2157/09* quoted above should apply to traumatic mental stress too.

The Correct Approach to Causation, the Wrong Standard of Proof

The OFL is encouraged that the Board has adopted the long-standing "significant contributing factor" test for causation for both chronic and traumatic mental stress. This approach to causation is a foundational principle of workers' compensation law. To adopt a different standard – especially the "predominant cause" approach advocated by some employers and employer groups – would be unprincipled and discriminatory.

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

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

The proposed policy, however, missteps when it says that the "WSIB decision-maker be satisfied, on a balance of probabilities" that the work-related stressors caused the traumatic or chronic mental stress. That is not the standard of proof for workers seeking entitlement for benefits – workers must prove only that it is equally likely that the work caused their injury as not. Section 119(2) of the *WSIA* provides:

> If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits.

Recommendation

The Board should replace the reference to "balance of probabilities" and replace it with language that better reflects the standard of proof set out in section 119(2) of the *WSIA*.

The Requirement for a DSM Diagnosis Should be Removed

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 a mental stress claim should be taken out of the policy. It is an unfair and unnecessary barrier to entitlement for workers with mental stress injuries.

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. Access to psychiatrists is limited and slow, especially in rural Ontario. Workers suffering from mental health injuries will rarely be able to afford to pay for a psychologist. To put it bluntly, 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 requirement of a DSM diagnosis undermines the Board's objective of early engagement with workers with mental stress. If the Board is going to refuse to even adjudicate cases until there is a DSM diagnosis, early engagement 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. Opportunities for early return to work and accommodation will be missed.

The proposed DSM diagnosis requirement is inconsistent with the Supreme Court of Canada's approach to adjudicating mental stress injuries. In a *Saadati v. Moorhead*, a unanimous decision released just last month, the Supreme Court of Canada emphatically rejected arguments that recovery for a mental injury requires proof of a condition identifiable with reference to a diagnostic tool like the DSM.[13] Justice Brown, writing for the court, described requiring such diagnoses as an "inherently suspect as a matter of legal methodology."[14] He explains that "a trier of fact adjudicating a claim of mental injury is not concerned with diagnosis, but with symptoms and their effects."[15]

[13] *Saadati v. Moorhead*, 2017 SCC 28 (CanLII).
[14] *Saadati*, at para. 31.
[15] *Saadati*, at para. 31.

Indeed, the Supreme Court specifically and emphatically rejected an argument that a DSM diagnosis should be required to recover for a mental injury. Justice Brown writes: "Rather than fostering objectivity, certainty, and predictability of outcomes, then, tethering determinations of legal liability to these iterative diagnostic tools relegates the law of negligence to following a sometimes meandering path as it is cleared by the cutting edge of au courant thinking in modern psychiatry . . ."[16] It is difficult to see how a similar tethering would be effective in the workers' compensation system, especially when adjudicating initial entitlement.

The Supreme Court specifically rejected that requiring a psychiatric illness was "necessary to prevent indeterminate liability."[17] It noted that other required elements to prove negligence would protect against frivolous cases. And those claiming mental injuries must show "the requisite degree of disturbance" to prove that they have an injury.[18] So too here: the worker must still have a work-related mental stress injury.

The DSM diagnosis requirement is discriminatory. Diagnoses are not required for entitlement for physical injuries. Nor should they be for mental ones. Again, we refer to *Saadati v. Moorhead*: 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 … I would not endorse it."[19]

The OFL recognizes that diagnostic tools like the DSM may be helpful in the adjudication of claims. However, given the considerations discussed above, it should not be required. If the Board wants workers' claiming for mental stress to have a DSM diagnosis, it should facilitate access to psychiatrists or psychologists. That diagnosis, however, should not be required before the Board will even adjudicate a case.

The "Employer Decisions or Actions Relating to Employment" Exclusion

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 same analysis that established that the limitations on mental stress entitlement to "acute reactions to sudden and unexpected traumatic events" was discriminatory and unconstitutional applies to the employer decisions or actions exclusion. The Board has both the power and the obligation to decline to apply unconstitutional legislation.[20] It should consider whether it is appropriate to do so in this case before entrenching discriminatory legislation into policy.

The OFL appreciates that the constitutionality of the "employer decisions or actions" exclusion has not yet been adjudicated. But given the reasoning of the Tribunal decisions in *Decision No. 2157/09* and the two cases that followed it, there is reason to be concerned.

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. Such a review should involve broad

[16] *Saadati*, at para. 33.
[17] *Saadati*, at para. 34.
[18] *Saadati*, at para. 37.
[19] *Saadati*, at para. 36.
[20] *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.

stakeholder involvement and a thorough review of the evidence. The Board may also want to consider retaining an independent expert to conduct this review and advise the Board on constitutionality of the "employer decisions or actions" exclusion.

If the exclusion is kept, provide more guidance on its scope.

If, having reviewed the issue thoroughly, the Board decides that the "employment-related decisions or actions" exclusion is constitutional, it should consider providing more detailed guidance on the scope of the exclusion. The draft policy provides little guidance. It provides only obvious examples of decisions or actions that are employment-related. The only example of actions or decisions not part of the employment function are violence or threats of violence. There is nothing about how the Board would approach decisions or actions that fall within the wide gulf between these examples.

It would also be helpful to clarify that employer harassment and bullying are not considered employment-related actions or decisions and will be considered a compensable stressor.

Recommendations

- A public review, led by an independent expert, on whether the "employment-related decisions or actions" exclusion is constitutional.
- A more detailed list of examples of things that are and are not included under employment function.
- Include harassment and bullying as examples of activities not considered employment function.

Retroactivity

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.

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.[21] Shortly following that decision, the Board passed Board Minute #8, which governed its approach to policy retroactivity for many years.

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* – a law is unconstitutional from the date of its enactment, not the date that it is declared to be unconstitutional.[22] The decision states:

> …the Constitution is, under s. 52(1) of the Constitution Act, 1982 , "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the

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

[22] *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.

> inconsistency, of no force or effect." The invalidity of a legislative provision inconsistent with the Charter does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. In that sense, by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state.[23]

To put it otherwise, the Board has been taking an approach to mental stress decisions that is contrary to the *Charter* since Bill 99 came into force on January 1, 1998.

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. Workers who have been unfairly denied entitlement for mental stress should not suffer from the Board's failure to meet its constitutional obligations.

We appreciate that making the policies retroactive will impose significant financial and administrative costs for the Board. 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. Let us not forget that the cost savings from this discriminatory legislation were passed along to employers through many years of artificially low premiums and, more recently, premium cuts. Justice demands retroactivity.

Recommendation

The policy should be retroactive to January 1, 1998.

Conclusion

The OFL thanks the Board for the opportunity to provide feedback on the draft mental stress policy. While we have significant concerns about the policy, we believe that it can be revised to ensure that it complies with the legislative amendments to the *WSIA* and the Board's constitutional obligations. We remain willing to work with the Board constructively to make sure that workers suffering from work-related mental stress are treated fairly.

[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.