

October 5, 2001

"Mental Stress" Consultation Workplace Safety and Insurance Board Slavica Todorovic,
Director Benefits Policy Branch 18th Floor 200 Front St. W. Toronto ON M5V 3J1

Dear Ms. Todorovic:

Re: Proposed Stress Policy

Thank you for the opportunity to respond to this draft policy. The Industrial Accident Victims Group of Ontario (I.A.V.G.O.) is a community legal clinic funded by Legal Aid Ontario. We have been representing injured workers and their survivors for over a quarter century. As you know, we represent a number of workers suffering from psychological disabilities caused by workplace stress, including the female correctional officers mentioned in Ms. Jolley's letter to stakeholders of June 8, 2001. The Board must remain cognizant of the fact that it is these disabled workers who are most acutely affected by the outcome of the present consultation process.

Two important points regarding the draft policy may be noted at the outset. First, it is a great improvement on the Board's treatment of acute injuries caused by psychological stress. Its proper implementation would prevent many needless delays in the recognition of clearly compensable disabilities. In light of the additional damage caused to injured workers in the past by the Board's mishandling of these cases, the improvement is highly significant. However, we do have concerns regarding a number of inappropriately restrictive features of the policy as applied to post-1998 cases.

Second, since the policy interprets section 13 of the current *Workplace Safety and Insurance Act (WSIA)*, it must be recognized and written into the policy that to the extent it reflects the wording of s. 13, it applies only to injuries occurring on or after January 1, 1998. Application of this policy to exclude otherwise valid pre-1998 claims would be flatly wrong and illegal. Even if the Board wishes to use its new policy merely as a guideline for the use of Board employees in pre-1998 cases, questions of bad faith would arise in those cases which could be properly denied as a result of the s. 13(5) restrictions, but not without them. If the Board were to attempt to name this

as the policy governing pre-1998 claims for purposes of s. 126, this would be strongly resisted as an impermissible attempt at retroactive legislation, one which not only the Tribunal, but also the courts, would surely reject.

As we have noted in our past correspondence with the WSIB Board of Directors, s.13(4) and (5) themselves violate s.15 of the *Canadian Charter of Rights and Freedoms*. Any attempt by the Board to impose them retroactively or to impose a more restrictive approach than they set out would also clearly violate the *Charter*. Fighting the discrimination faced by workers suffering from psychological disabilities will continue to be a priority for this clinic. For far too long they have been victimized by a politics of discrimination that places a higher value on fearmongering about floodgates than on clear legal rights to fair compensation.

Our specific comments on the draft policy follow. We would also like to register our general agreement with the submissions of the Office of the Worker Adviser, the Ontario Federation of Labour, the Ontario Legal Clinics Workers' Compensation Network and the Ontario Network of Injured Worker Groups, which we have had the opportunity to review in draft form.

General Comments Regarding Interpretation

As noted above, the policy deals with s. 13 of the *WSIA*. The relevant subsections read as follows:

Exception, mental stress

(4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.

Same

(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. 1997, c. 16, Sched. A, s. 13.

Some employer representatives have taken the position that these provisions are clearly a restriction on entitlement and should therefore be interpreted in a narrow, constricted and restrictive way. This is wrong as a matter of law. Although subsection 4 restricts entitlement to benefits, subsection 5 is an entitlement **granting** provision, and it must be interpreted as such.

Section 10 of the *Interpretation Act* reads as follows:

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. R.S.O. 1990, c. I.11, s. 10.

In light of this provision, s. 13(5) of the *WSIA* must be given such fair, large and liberal construction and interpretation as will ensure that workers suffering from psychological injuries receive proper compensation. Words like “sudden”, “unexpected”, “traumatic” and “acute” must be interpreted in this light and cannot be used to import notions of fault or voluntary assumption of risk that are foreign to the *Act*.

Principles of statutory interpretation also dispose of the argument made by some that, based simply on its use of the singular term “event”, s. 13(5) rules out entitlement based on the cumulative effect of several traumatic events. Section 28 of the *Interpretation Act* reads in part as follows:

Implied provisions,

28. In every Act, unless the contrary intention appears,

number and gender

(j) words importing the singular number or the masculine gender only include more persons, parties or things of the same kind than one, and females as well as males and the converse....

In light of this provision, to say that the mere use of the singular is sufficient to express an intention to restrict entitlement to injuries caused solely by a single event is an absurdity.

Acuteness and Delayed Onset

Subsection 13(5) grants entitlement for any psychological injury which is an “acute reaction” to traumatic workplace events. *The Concise Oxford Dictionary* defines “acute” in part as follows: “(Of disease) coming sharply to a crisis, OPP. CHRONIC”. In other words, the term relates to a disability with a sudden rather than an insidious or uncertain onset. It does not rule out a series of causes building to the onset of disability, nor does it inherently require that the onset occur immediately following that which causes it. The onset may be delayed, and this is appropriately recognized by the policy.

The requirement at page 2 of the draft policy for “clear and convincing evidence” of work-

relatedness in cases of delayed onset of disability is, however, highly inappropriate. The *Act* provides no foundation for the introduction of a higher and inherently more subjective standard of proof. In each case, work-relatedness must be determined on the balance of probabilities using the available evidence, with the benefit of the doubt going to the worker. A “clear and convincing evidence” standard is simply an invitation for adjudicators to improperly deny claims where the weight or even the entirety of the available evidence supports work-relatedness.

Trauma, Physical Violence and Harassment

The list of sudden and unexpected traumatic events is focused entirely on events with a physical component. This appears to be based on an understanding that “Traumatic events are generally recognized as being horrific, or having elements of actual or threatened violence against the worker, a co-worker, or others.” This is patently unreasonable. The ordinary meaning of “traumatic” includes events which are not “horrific” and which occur at a strictly psychological level, as evidenced by any dictionary. For example, *The Concise Oxford Dictionary* defines “traumatic” as follows: “of or for wounds; or causing trauma, (colloq.) unpleasant (*a traumatic experience*)”. The leap from “unpleasant” to “horrific” is a large and totally unjustified one.

This is also the case if we depart from the ordinary meaning of the term and look for a more strictly medical definition. There is no medical support for the proposition that in order to wound or cause trauma an event must be “horrific”. Yet the policy even goes so far as to include in its list “being the object of harassment that includes physical violence or threats of physical violence (e.g. the escalation of verbal abuse into traumatic physical abuse).” This formulation is not simply too narrow, it is offensive, wrong and completely out of step with both the *Charter* and the *Ontario Human Rights Code*.

Being the object of harassment which does not include physical violence is still traumatic, as explicitly recognized in Example H at page 8 of the proposed policy, which allows entitlement to a “victim of sexual harassment” even though “she was never physically abused or threatened”. This result could be reconciled with the fact that the list of traumatic events is technically inclusive rather than exclusive. It is clear to anyone with experience in this field, however, that adjudicators will tend to resolve the apparent contradiction in favour of denying entitlement, even in cases which follow the pattern in Example H. They are further invited to do so by the statement at page 4 that “In such cases, the harassment does not need to **only** involve physical violence or threats of violence” (emphasis added). The only solution is to open up the list of traumatic events to include simply “being the object of harassment or other assaults on personal dignity”.

It is important that the list encompass not only all cases of harassment, but also other psychological traumas. For example, if a group home worker is falsely accused of sexually abusing a resident, and is then the subject of investigation, interrogation, threats of imprisonment, rumours and taunts, that is a sudden and shocking traumatic event. This is so whether or not the accusation is part of a pattern of harassment or was made in good faith and whether the police investigation was initiated by someone from inside the workplace or by a relative of the resident. Being the victim of this sort of attack is not the same as being disciplined within the meaning of s. 13(5) and need not include

anything resembling workplace discipline.

Assaults on a worker's dignity and psychological well-being are traumatic whether or not they involve threats of physical violence. Any policy which does not recognize this is unduly restrictive and does not properly reflect the entitlement provisions in s. 13(5).

Cumulative Effect

The treatment of disabilities resulting from cumulative effect trauma is similarly flawed. Example D deals with a police officer who witnesses a scene with multiple fatalities. He is allowed entitlement even though he has witnessed similar events in the past and other workers have not been adversely effected. Yet page 2 of the policy indicates that a traumatic event must be "unexpected or uncommon in the normal or daily course of the worker's employment or work environment". This is another invitation to poor decision-making.

Emergency workers are exposed to traumatic events in the course of their normal duties. They are entitled to compensation for adverse impacts on their health. There is no "voluntary assumption of risk" component to our no fault workers' compensation system. Traumatic events are expected only in the general sense encompassed by "voluntary assumption of risk". No specific traumatic incident is ever expected in the ordinary sense of the word which must be used to interpret s. 13(5) of the *Act*. Accordingly, the "unexpected or uncommon" criterion should be replaced with the requirement in Example D that the event "would generally be considered traumatic". The mere inclusion of this example is not sufficient. If it were, emergency workers would not be protesting the current policy, which has included a similar example since January 1998.

At page 3, the policy indicates that the last or triggering event in a cumulative effect claim need not be "the most horrific of all the events". For reasons stated above, "horrific" is a poor substitute for "traumatic" and should be replaced with it. Also, it should be added that the triggering event need not even be compensable. For example, the triggering event could be a dispute regarding working conditions which follows on the heels of a number of traumatic events which are the primary cause of disability. The triggering event could even be a relatively minor incident outside work without affecting the compensability of the condition.

It is a well-established principle of workers' compensation law that entitlement follows when workplace factors are a significant contributing factor in causing a disability. In *Athey v. Leonati* [1996] 3 S.C.R. 458, the Supreme Court of Canada indicates that a 25% contribution is above the *de minimus* standard necessary for significance. The obvious corollary is that 75% of the cause of a work-related disability need not arise from employment at all, and also need not fit any characterization set out in s. 13(5) of the *Act*. The significant contributing factor rule also confirms and supports the general interpretation of s. 13(5) as allowing for disabilities caused by more than one single event. It would be patently unreasonable to interpret this entitlement granting provision as requiring causation by one single event only, creating a sole contributing factor test that does not apply even in civil actions.

Diagnosis and "Trauma"

The policy should explicitly recognize the role of psychiatrists, psychologists and other medical professionals in determining whether something is “traumatic enough” to cause a disability. Medical evidence can play an important role in determining whether a particular event can cause psychological injury. In fact, some diagnoses (e.g. Post-Traumatic Stress Disorder) should be listed in the policy as presumptively meeting the criterion of an acute reaction to a traumatic event. The only further role of the adjudicator would be to determine work-relatedness through an examination of the stressors identified in the medical evidence.

That said, we cannot accept the assertion that a diagnosis under the DSM-IV or ICD is necessary in order to establish entitlement. Although the policy seems to indicate that this is not always the case, the treatment of this is confusing and adjudicators would likely require a specific type of diagnosis in every case. This would negatively affect not only those living in areas without ready access to qualified mental health professionals, but also those with claims for short term disability. It is ironic that despite its general position that all psychotraumatic disabilities should be presumed to be of short duration, the Board continues to set standards for their recognition that effectively restrict entitlement to serious, long-term psychological disabilities.

Time Limits

The March 7, 2001 resolution of the WSIB Board of Directors states that “The time limits for application for benefits or for appeals should not be allowed to impede proper resolution of this issue.” In light of the Board’s longstanding practices in the area of stress-related disabilities, an aggressive approach to the time limit problem is required. The Board should systematically identify and reconsider all negative entitlement decisions in mental stress cases, including those in the WSIAT queue. The Board must also institute a publicity/outreach campaign directed at the general public. In many cases, workers have been discouraged from filing claims by Board staff who told them this type of disability is not covered. These workers must be made aware of their rights.

All of which is respectfully submitted,

INDUSTRIAL ACCIDENT VICTIMS GROUP OF ONTARIO

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