Construction Employers Coalition
(for WSIB and Health & Safety and Prevention)

April 23, 2021

Ms. Elizabeth Witmer, Chair
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Mr. Tom Bell, President & CEO (interim)
Workplace Safety & Insurance Board
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Dear Ms. Witmer and Mr. Bell:

Recent WSIAT decision: Chronic Mental Stress Policy

I introduce our commentary on a recent Workplace Safety and Insurance Appeals Tribunal ["WSIAT"] decision, **W.S.I.A.T. *Decision No. 693/20* (February 26, 2021)**, (Attachment 1). As a CEC member has addressed this matter with a senior WSIB official, you are likely aware of this decision.

Our concern with *Decision 693/20* is due to the "predominance" analysis, which in our view, presents a circular and incomplete legal analysis which undermines and effectively negates the policy intent for a "predominance" requirement. It is our opinion that this requires the senior engagement of the WSIB. An excerpt of *Decision 693/20* follows with the key portions **bolded**:

> [67] The fact that the requirement that **the work stressors must be the "predominant cause"** of the injury, is highlighted by the "NOTE" which appears at page 4 of the policy document, which states:
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> > When assessing the impact (if any) of a pre-existing condition on a claim for chronic mental stress, the guidelines in 15-02-03, Pre-existing Conditions, apply except that, when determining whether the pre-existing psychological condition has overwhelmed the work-related mental stress injury, **the WSIB decision-maker uses the predominant cause test, rather than the significant contribution test**. By doing so the WSIB decision-maker ensures that the causation test used to determine initial entitlement in the claim is consistent with the causation test used to determine ongoing entitlement.
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> [68] As is noted above, section 13(4.1) of the Act provides:
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> > The worker is entitled to benefits under the insurance plan as if the mental stress were a personal injury by accident.
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> **[69] I interpret this provision to mean that a worker who sustains a chronic stress injury shall be treated in the same manner as a worker who sustains any personal injury arising out of and in the course of employment. The "NOTE" referred to above, however, appears to prescribe a different legal test for entitlement to benefits for CMS, than would apply to other injuries. It was well established by Decision No. 915, and the Tribunal's subsequent jurisprudence that the "significant contribution test" is the standard test for causation in workers' compensation cases. The question arises as to how the requirement set out in policy that the work-place stressors must be the "predominant cause" of the injury for the purposes of a stress impairment, a standard of causation which does not apply to other personal injuries, can be reconciled with the intention expressly provided by the Legislature through the enactment of section 13(4.1) that entitlement to benefits for mental stress be treated as if the mental injury were any personal injury.**
>
> [70] In my view, section 13(4.1) should be considered as an interpretive lens for the policy document. **In this context, the policy document, including the portions of the document indicating a requirement that**

workplace factors must be shown to have been the "predominant cause" of injury, should be interpreted in a manner which is consistent with section 13(4.1).

[73] For reasons that I have provided above, I have concluded that the worker's work related stressors were "substantial" and could be associated with an injuring process. It is apparent that the work-related stressors made a significant contribution to the worker's impairment. Further, although the worker was apparently in some distress from her work-stressors before the meeting on January 25, 2018, her acute reaction appears to have been triggered by the meeting where she was presented with the letter, which was itself a work-related stressor.

[74] Taking these factors into consideration, and also taking into account the direction provided by section 13(4.1) of the Act, I am satisfied that the work related stressors affecting the worker were the predominant or main cause of the worker's impairment.

We point out that the Vice-Chair's reasons do not reference **WSIA s.159 (2.1)**, which in our view is a clear failing in the analysis. **Section 159 (2.1)** was prescribed at the same time of the CMS amendment. They are indisputably connected.

159(2) Subject to this Act, the Board has the powers of a natural person including the power,

(a) to establish policies concerning the premiums payable by employers under the insurance plan;

(a.1) to establish policies concerning the interpretation and application of this Act;

(a.2) to establish policies concerning evidentiary requirements for establishing entitlement to benefits under the insurance plan;

(a.3) to establish policies concerning the adjudicative principles to be applied for the purpose of determining entitlement to benefits under the insurance plan;

Same

(2.1) **A policy established under clause (2) (a.2) or (a.3) may provide that different evidentiary requirements or adjudicative principles apply to different types of entitlements, where it is appropriate, having regard to the different basis for and the characteristics of each entitlement. 2017, c. 8, Sched. 33, s. 8 (2).**

It is our opinion that the analysis in *Decision 693/20* negates the policy intent of the statute, which expects separate and distinct adjudicative principles for CMS cases.

We address this point in detail in the **CEC's June 20, 2017 Submission with respect to WSIB draft Operational Policy Paper, Document No. 15-03-14: Traumatic or Chronic Mental Stress (accidents on or After January 1, 2018) ["CMS submission"]** (Attachment B and linked here). We argued that adjudicating CMS cases with the same "significant contribution" test as all other cases would lead to blanket coverage for mental conditions, work-related or not. Work is always a significant contributing factor (see the **2017 CMS submission, page 6, Section E, paras 2-5**, excerpted below):

2. It is respectfully submitted that the proposed stress policy is so vague and circuitous that it amounts to providing no substantial guidance to decision-makers at all. By explaining the requirement that "the mental stress is caused by a substantial work-related stressor" as meaning that a "work-related stressor will generally be considered substantial if it is excessive in intensity" amounts to analytical short-hand.

3. The proposed stress policy does not attempt to address the core adjudicative dilemma associated with chronic stress cases so clearly explained by the B.C. Royal Commission almost two decades ago. In W.S.I.A.T. Decision No. 2157/09 (April 29, 2014), the de facto chronic stress leading case (on the Charter challenge) and one of the Appeals Tribunal trilogy of stress cases (on the Charter challenge), Counsel for the Attorney General relied on expert evidence to argue that "work is always a significant contributing factor" and thus, may lead to blanket coverage of mental conditions, work-related or not.

4. It is respectfully submitted that the proposed stress policy does precisely that, and sets in motion a policy mechanism that will ensure that for chronic stress disability the Ontario WSI system will become an employer funded universal disability scheme for employed persons. Of course, this is not the structural intent of the Ontario WSI system.
5. Important and certain fundamental and rather brilliantly designed elements of the Ontario WSI scheme, respectfully, do not seem to have been considered or incorporated into the proposed stress policy.

Decision No. 693/20 brings us back full circle to our **2017 CMS submission**. We posited that **s. 159(2.1)** was introduced in ***Bill 127, Stronger, Healthier Ontario Act (Budget Measures)*** to expressly direct entitlement for CMS under different adjudicative principles. We wrote (at **page 13, Section J**):

J. Bill 127, Stronger, Healthier Ontario Act (Budget Measures), 2017 permitted and anticipated a different WSIB policy response

1. While the omnibus Budget Measures Act repealed WSIA ss. 13(4) and 13(5) and expressly directed entitlement for chronic stress, the amending Act also adjusted the statutory powers of the WSIB BOD through an amendment to WSIA s, 159, which added WSIA s. 159 (2.1):

   > (2.1) A policy established under clause (2) (a.2) or (a.3) may provide that different evidentiary requirements or adjudicative principles apply to different types of entitlements, where it is appropriate, having regard to the different basis for and the characteristics of each entitlement.

2. It is clear and obvious that s. 159 (2.1) was not a coincidental housekeeping amendment. That it temporally accompanied the stress amendments is convincing enough. If s. 159 (2.1) was not designed for the chronic stress question, to what other possible type of entitlement could or would it apply? The answer is simple, clear and obvious. None.
3. In other words, it is evident on the basis of the s. 159 (2.1) amendment, that the government, in precisely the same manner as the B.C. Royal Commission, recognized that chronic stress cases are unique and require a unique legal treatment. From this, one can only conclude that there was an expectation of the legislature, if not a legal duty, that the Board would heed those instructions. That the Board chose not to do so, it is respectfully suggested, may well test the limits of the exercise of the Board's administrative discretion and may well lead to a clearer statutory directive in the future.
4. In a recent consultation forum in which the stress policy was discussed, senior Board officials confirmed that the s. 159 (2.1) amendment provided the WSIB with the legal authority to implement the "predominant cause test" in the same manner as every other province that allows chronic stress as a compensable condition. The Board official indicated that while legally permissible to do so, the Board chose instead to develop the stress paper under active consultation. In that forum, in response to a question as to whether the WSIB undertook a Charter analysis with respect to s. 159 (2.1) with a specific application to the "predominant cause test," the Board responded in the affirmative. Without a comment to the contrary, one can only conclude that the Board's analysis affirmed the constitutionality of the predominant test.
5. It is respectfully submitted that, for the preceding reasons outlined throughout this paper, the unique attributes of chronic stress require a unique legal treatment. Every other Canadian jurisdiction that allows chronic stress has implemented the predominant cause test. There is every reason for the Ontario Board to do the same. There is no reason for it not to.

For CMS cases there must be a test for predominance. That was the intention of **s. 159(2.1)** and the current WSIB CMS policy. Simply put, it is our view that the Appeals Tribunal got it wrong.

This is an issue that requires discussion at the CACs and the Board should share its analysis of this decision. It is clear that this issue requires the WSIB's intervention with interpretive guidance to the Tribunal along with a declarative statement on the interpretation of its own policy. We further suggest that the WSIB request *amicus curiae* standing at the next CMS appeal at WSIAT.

This is an important and pressing issue. It is our opinion that the Appeals Tribunal interpretation is directly at odds with the WSIA and Board policy, and contrary to **WSIA 126(1)** (i.e., "*the Appeals Tribunal shall apply (WSIB policy) when making its decision*"). It is our opinion that the Appeals Tribunal was required to refer the policy question to the Board in accordance with **s.126(4**). We would expect that the Board to formally raise this directly with the Appeals Tribunal.

Through FOI, a CEC member has filed a request for a copy of the identity protected ARO decision at issue in *Decision 693/20* with the Board's Privacy and FOI office. However, we ask that the Board arrange for this decision to be immediately released, suitably redacted for identity protection.

While we look forward to discussing this issue at the next CIAC (June 21, 2021), we expect the Board will publicly comment and affirm its policy through a post on the Board's website.

Regards,

David Frame, CEC Chair