L. A. Liversidge, LL.B.
Barrister & Solicitor, Professional Corporation

5700 Yonge Street, Suite 200
Toronto, Ontario
M2M 4K2

Tel: 416-590-7890
Fax: 416-590-9601
email lal@laliversidge.com

Via email: Colin_Grant@wsib.on.ca

September 28, 2022

Mr. Colin Grant, General Counsel
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Mr. Grant:

Re: WSIAT Chronic Mental Stress Decision;
W.S.I.A.T. Decision No. 693/20 (February 26, 2021)

I am following up on this issue which I first introduced to the Board in an email to Diane Weber on April 2, 2021 (see **Appendix A** for the email). You will recall that the CEC's letter of April 23, 2021 echoed my initial concerns (**Appendix B**). For additional correspondence exchanged between the CEC and LAL and the Board on this topic see **Appendix C**.

Summary

Decision 693/20 outlined an analysis of "predominance" relating to entitlement of Chronic Mental Stress ["CMS"] which presented a circular and incomplete legal analysis which undermines and effectively negates the Board's CMS policy and legislation (**WSIA s. 159(2.1)**) intent for a "predominance" requirement.

As I expressed back in my April, 2021 communication the Appeals Tribunal interpretation is directly at odds with the WSIA and Board policy, and contrary to **WSIA s. 126(1)** (i.e., "*the Appeals Tribunal shall apply (WSIB policy) when making its decision*"). It remains my opinion that the Appeals Tribunal was required to refer the policy question to the Board in accordance with **s. 126(4)**.

The Board subsequently wrote to the WSIAT with respect to this issue. The Tribunal interpreted the Board's correspondence as a reconsideration request which resulted in ***Decision 693/20R***. The Tribunal denied a reconsideration request in ***693/20R*** and the Vice-Chair noted that there appeared to be issues for consideration in subsequent CMS decisions:

> **[40] In my view, the submissions of the WSIB's Legal Counsel appear to raise substantive questions that warrant serious and careful analysis with the benefit of full submissions. The combined effect of sections 13, 126, and 159 of the WSIA gives rise to issues of statutory interpretation that have not been directly addressed by the Tribunal.**
>
> **[41] Nevertheless, I find that this is not the appropriate case in which to grapple with these issues. In my view, it is not advisable for the Tribunal to reconsider the reasoning in Decision No. 693/20 with respect to the interpretation of the predominant cause standard set out in the CMS Policy, for several reasons.**

> **[52] Although I find that this reconsideration request is not the appropriate context in which to address the issues raised, I acknowledge that the WSIB's reconsideration request puts forward substantial arguments that ought to be directly addressed in future WSIAT decisions in chronic mental stress appeals, with the benefit of full submissions.**
>
> **[53] In future appeals which turn on the predominant cause test and/or the definition of substantial workplace stressors, as defined in the CMS Policy, the Tribunal may consider requesting submissions from Tribunal counsel; requesting submissions from the WSIB submissions as amicus curiae; inviting participation by intervenors; and/or such other means of receiving full submissions as may be deemed appropriate by the hearing panel.**

Decision 693/20R notes that the *WSIB Chronic Mental Stress Policy Consultation Summary* (the WSIB Consultation Summary) is attached as an Appendix to the decision for reference in future appeals [**para. 54**].

Reasons for this communication

As I expressed last year, the Board is in the best position to identify the best case that reflects the policy differences between the Board and the Appeals Tribunal. As I noted in my November 22, 2021 email to Diane Weber:

> **…The Board must thoughtfully and strategically design its intervention, with the Board, not the WSIAT, selecting the leading case that warrants intervention. The Board is aware now of the inventory of CMS cases in front of and as yet unheard at the WSIAT. Those cases should be carefully perused and a short list of candidate cases created. The best case is one where the "significant contribution" *693/20* standard would allow entitlement but the WSIB predominance standard would not. Then, a meaningful legal contest will unfold.**

Has the Board identified any such decisions, or has the Tribunal invited the Board to participate in an Appeal as the Tribunal outlined in ***Decision 693/20R***?

I look forward to hearing from you. You can reach me directly at lal@laliversidge.com or 416-986-1166.

Regards,

L.A. Liversidge

Appendix A

From: L.A. Liversidge <lal@laliversidge.com>
Sent: Friday, April 2, 2021 8:41 AM
To: Diane Weber <Diane_Weber@wsib.on.ca>
Subject: CMS - WSIAT Decision 693/20

Good morning, Diane,

I would like to introduce you to my commentary on a recent Workplace Safety and Insurance Appeals Tribunal ["WSIAT"] decision (***W.S.I.A.T. Decision No*. 693/20 (February 26, 2021) -** attached). You are likely aware of this decision as I would expect that there has been senior internal discussion within the Board. As this is the first WSIAT CMS decision, this has likely been brought to the attention of the Chair, and if not, it is my view it should be, accompanied by an in-depth legal and policy analysis.

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

> [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:
>
> > 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.
>
> [68] As is noted above, section 13(4.1) of the Act provides:
>
> > The worker is entitled to benefits under the insurance plan as if the mental stress were a personal injury by accident.
>
> [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.

I point out that the Vice-Chair's reasons do not reference WSIA **s.159 (2.1)**, which in my 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**(1) The body corporate known as the Workers' Compensation Board is continued under the name Workplace Safety and Insurance Board in English and Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail in French and is composed of the members of its board of directors. 1997, c. 16, Sched. A, s. 159 (1).
>
> **Powers of the Board**
>
> (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 my 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.

As outlined in my **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"]** (**attached or link here**) to adjudicate CMS matters with they same adjudicative standard as all other workplace injuries using the "significant contribution" test would lead to blanket coverage for mental conditions, work-related or not. Work is *always* a significant contribution factor (see my **2017 CMS submission, page 6, Section E, paras 2-5**):

> 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.

This decision brings us back full circle to my **2017 CMS submission**, in which I assessed 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. I 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 WSIB CMS policy. Simply put, it is my 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. I further suggest that the WSIB request *amicus curiae* standing at the next CMS WSIAT.

This is an important and pressing issue as the Tribunal is setting entitlement adjudication guidance which is directly ignoring WSIA and Board policy, in my view, in a manner contrary to the expectations of WSIA 126(1) (i.e., "*the Appeals Tribunal shall apply* (WSIB policy) *when making its decision*").

Through FOI, I have 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.

I look forward to discussing this at your convenience.

A copy of this email has been presented to the CEC, along with the expectation that this issue is placed on the agenda for the next CIAC meeting.

Best Regards,

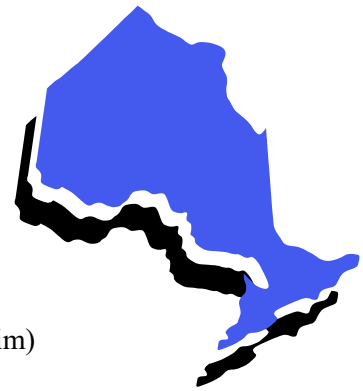
LAL

L.A. Liversidge, LL.B.
Barrister & Solicitor Professional Corporation
5700 Yonge Street, Suite 200
Toronto, ON M2M 4K2

Direct: 416-986-1166
Main: 416-590-7890/Fax: 416-590-9601
Email: lal@laliversidge.com
www.laliversidge.com

Appendix B

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
200 Front Street West
Toronto ON M5V 3J1

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:
>
> > 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.
>
> [68] As is noted above, section 13(4.1) of the Act provides:
>
> > The worker is entitled to benefits under the insurance plan as if the mental stress were a personal injury by accident.
>
> **[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

Appendix C

Included in Appendix C:

November 22, 2021 (12:04PM) LAL email to Diane Weber
November 22, 2021 (9:04PM) LAL email to Diane Weber
December 21, 2021 (12:24PM) WSIB Legal Services email to LAL

L.A. Liversidge

From: L.A. Liversidge <lal@laliversidge.com>
Sent: Monday, November 22, 2021 12:04 PM
To: 'Diane Weber'; [redacted]
Cc: Elizabeth Witmer; Tom Bell
Subject: RE: WSIAT Response - CMS & COVID VAX Q&A
Attachments: Decision No 693 20 R.pdf; Decision 874 21.pdf

Thank you Diane. I appreciate it. I have excerpted below some key elements of the reconsideration decision. I wish we had it at the time of the discussion. It would have been helpful. As I explained, it is not yet on CanLii. Please consider this email as an adjunct to this morning's CIAC discussion, and please receive the comments as being within and part of the earlier CIAC dialogue.

While the reconsideration request was denied in **693/20R**, I am of the view that ***Decision 874/21*** **(September 16, 2021)** (attached) is ripe for a formal reconsideration request by the WSIB. The "future case" approach suggested by **693/20R** is no solution to the problem posed by ***Decision 874/21***.

As **874/21** turns on an interpretation the Board has concluded is incorrect, the Board should not proceed to implement the decision while it is requesting a reconsideration. In the event that the Tribunal refuses a WSIB reconsideration request, or reconsiders and affirms the original, the Board should then proceed with the appropriate request for judicial intervention.

I would be pleased to learn of the Board's response to this interpretation and request.

Best regards, LAL

Excerpt Decision 693/20R

[52] Although I find that this reconsideration request is not the appropriate context in which to address the issues raised, I acknowledge that the WSIB's reconsideration request puts forward substantial arguments that ought to be directly addressed in future WSIAT decisions in chronic mental stress appeals, with the benefit of full submissions.

[53] In future appeals which turn on the predominant cause test and/or the definition of substantial workplace stressors, as defined in the CMS Policy, the Tribunal may consider requesting submissions from Tribunal counsel; requesting submissions from the WSIB submissions as amicus curiae; inviting participation by intervenors; and/or such other means of receiving full submissions as may be deemed appropriate by the hearing panel.

[54] The WSIB Chronic Mental Stress Policy Consultation Summary (the WSIB Consultation Summary) is attached as an Appendix to this decision for reference in future appeals. The WSIB Consultation Summary reflects that stakeholders expressed diverging views on the standard of causation that the WSIB should apply to evaluate claims for chronic mental stress.

[55] For all of the above reasons, I find that the Tribunal's threshold test for granting a reconsideration request has not been met in this case. The WSIB's arguments regarding the interpretation of the CMS Policy may be addressed in future Tribunal decisions that directly engage these issues.

L.A. Liversidge, LL.B.
Barrister & Solicitor Professional Corporation

L.A. Liversidge

From: L.A. Liversidge <lal@laliversidge.com>
Sent: Monday, November 22, 2021 9:04 PM
To: Diane Weber
Cc: Elizabeth Witmer; Tom Bell; Scott Bujeya; Colin Grant; Frank Veltri
Subject: FW: WSIAT Response - CMS & COVID VAX Q&A
Attachments: Decision No 693 20 R.pdf; Decision 874 21.pdf

Diane:

I am sending a copy of this email to Frank Veltri and Colin Grant (I don't have Colin's email; I constructed it; if wrong, could you please forward to him – thanks). I am also sending an information copy to Elizabeth and Tom as I raised the issue earlier today, and they should be aware of my thinking on this case. I am also sending along a copy to Scott as this matter will be of interest to him.

If you are available for a few minutes tomorrow or later in the week, I would appreciate the opportunity to discuss this matter with you, along with the suggestions that I am going to set out in the email.

You will recall I raised ***Decision 874/21*** **(September 16, 2021)** in the CIAC this morning. There wasn't too much discussion on that case and I received the impression that there wasn't significant awareness of the decision before the meeting. I only discovered it myself a day ago. I wrote to you after the CIAC meeting (see below) suggesting that with respect to the CMS element (addressed in paras. 58 – 63) and the reliance on the much discussed ***Decision 693/20***, that the Board should formally request a reconsideration.

While I am of the view that the express holding of the Panel as set out in para. 61 (excerpted below) is technically incorrect, this case presents a significant conundrum. I will explain.

Firstly, it is my considered view that the case is perfectly allowable as a PTSD case. I am surprised that the Board did not grant entitlement at the operations level and most certainly surprised that entitlement was denied at the ARO level. (I have sent in an FOI request for a redacted copy of the September 27, 2019 ARO decision so I can assess the reasoning myself. As I do not have the ARO decision and as WSIAT decisions are technically not "appeals" in a legal sense and are *de novo* adjudications, the Appeals Tribunal does not normally assess the analytical efficacy of the actual decision under review. They did not in this case and therefore, I am not in possession of the Board's analysis, except that the WSIB considered the matter and denied entitlement.)

Secondly, and most significantly, I am of the opinion that the case in fact *is allowable as CMS, <u>but not</u>* (technically) *for the reasons set out by the Panel* (again in para. 61). A robust and distinctive predominance analysis was needed and due to the reliance on ***Decision 693/20***, was not articulated. This is another conundrum. It also compounds the ***Decision 693/20*** problem and notwithstanding the "future case" process promised by the WSIAT (see ***Decision 693/20R***), the horse may well be out of the barn, if not metaphorically roaming far away fields by now.

I will explain my reasoning, along with suggestions as to what should be done, as I am of the view that the Board must initiate an internal process as a result of this decision.

I excerpt para. 61. In the preceding paras. 59 & 60, the panel adopted the reasoning of ***Decision 693/20***. Of course, as known, I disagree with ***693/20***, as does the Board.

> **[61] The Panel agrees with and adopts this approach. In the case before us, the worker's work-related stressors were "substantial" and the evidence indicates that the work-related stressors made a significant contribution to the worker's impairment. We are therefore satisfied that the work-related stressors were the predominant cause of the worker's impairment.**

Why para. 61 is incorrect

By adopting the ***693/20*** analysis on "predominance," the ***874/21*** Panel skirted the Board's policy analytical template and simply effectively assessed "substantial" through a "significant contribution" lens effectively equating it with "predominance." That is, in my considered view, the error. As I will explain in a moment, while the Appeals Tribunal is wrong for the technical reasons provided (i.e., adoption of the ***693/20*** template), I am of the view that CMS is likely in order, *albeit*, because the facts likely rise to the predominance test as envisioned by the Board. A continuing and expanding conundrum.

The panel did not decide on the PTSD element of the case

At para. 63, the Panel declined to consider the PTSD element, holding:

> **[63] The worker sought entitlement for TMS in the alternative to seeking entitlement for CMS. Entitlement for CMS was the worker's primary position in this appeal, and therefore, as entitlement for CMS has been granted in this decision, it is not necessary to adjudicate the appeal for entitlement for TMS.**

In LAL's opinion, PTSD *is* allowable

Yet, the facts of the case present a superb backdrop for allowance as PTSD, particularly, the facts set out in paras. 25, 27, 37, 41, 43-44, 47-48, 50-52 and 55. The psychological assaults ranged from direct face-to-face death threats, direct physical threats, accumulated and persistent vicariously experienced traumas etc. So, I am of the view that the PTSD element, denied by the WSIB and not decided by the Appeals Tribunal, was perfectly allowable. The conundrum grows. Again, it is my view that the Board, at the operations level, should have speedily granted entitlement. I will return to this in my suggestions.

CMS is likely allowable as the workplace stressors *were* the predominant cause

I excerpt relevant portions of WSIB CMS Policy 15-03-14

> **A worker will generally be entitled to benefits for chronic mental stress if an appropriately diagnosed mental stress injury is caused by a substantial work-related stressor arising out of and in the course of the worker's employment.**
>
> **Substantial work-related stressor**
> **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.**
>
> **Standard of proof and causation**
> **In all cases, the WSIB decision-maker must be satisfied, on a balance of probabilities, that the substantial work-related stressor arose out of and in the course of the worker's employment, and was the predominant cause of an appropriately diagnosed mental stress injury.**
>
> **For the purposes of this policy, "predominant cause" means that the substantial work-related stressor is the primary or main cause of the mental stress injury—as compared to all of the other individual stressors. Therefore, the substantial work-related stressor can still be considered the predominant cause of the mental stress injury even though it may be outweighed by all of the other stressors, when combined.**

I won't review all of the facts (but I encourage a read of the paras. cited above), but they are compelling. The ***Decision 874/21*** facts rise to the level of predominance in my considered view. The problem is not the result, but the path taken to get to the result.

At the day of the day, we have, again I dare, a "conundrum"

On the PTSD element: So, we have a claim denied by the Board that in my view was perfectly allowable as PTSD. I strongly recommend that the ARO and operations decisions undergo an internal high level review. As I said, I don't have

those decisions and am relying on the facts as presented by the Appeals Tribunal. That noted, I am confident that there is a learning opportunity here for the Board. It is my judgement that the case was improperly decided by the Board on the PTSD element and never should have made its way to the Appeals Tribunal. To me, this looks like, at a minimum, a training opportunity. The denial may reflect a deeper problem and if so, a senior internal review should be able to identify the need for, and implement, any necessary remedial actions.

<u>*On the CMS element*</u>*:* Based on the facts, including the medical facts, as presented by ***Decision 874/21***, I am of the view that the predominance test as set out in the policy was met. Entitlement should have been granted by the Board. It wasn't. The internal review I suggest occur, should analyze the CMS element of the case, carefully and methodically, a *de facto* post-mortem, if you will. In fact, I would suggest that for at least a few years, every WSIAT CMS decision that differs from the Board's conclusions should undergo a high level team appraisal, to assess the reasons the two institutions reached different conclusions against the same facts.

<u>*On the 693/20 problem*</u>*:* This issue is complicated and compounded by ***Decision 874/21***. The ***693/20*** analysis is still quite wrong, but the application in a clearly allowable case like ***874/21*** makes an already murky pond a muddy mire. While I suggested earlier that a formal reconsideration was worthy of consideration due to the reliance on ***693/20,*** there is little to be gained by asking for different reasons to allow the case (unless the Board remains of the view the case is not allowable). As noted earlier, I fear that the horse has long left the barn, and any future WSIB *amicus curiae* intervention into a future CMS case may well lose its impact. Too much time has passed. There is always only one first case. However, as it stands now, the Board has lost its policy power under WSIA s. 159(2)(a.1) "*to establish policies concerning the interpretation and application of this Act*," with the Tribunal turning its instructions in WSIA, s. 126(1) to apply Board policy on its head. The Board must thoughtfully and strategically design its intervention, with the Board, not the WSIAT, selecting the leading case that warrants intervention. The Board is aware now of the inventory of CMS cases in front of and as yet unheard at the WSIAT. Those cases should be carefully perused and a short list of candidate cases created. The best case is one where the "significant contribution" ***693/20*** standard would allow entitlement but the WSIB predominance standard would not. Then, a meaningful legal contest will unfold.

There is a lot set out in this email but CMS is turning into a quagmire with a risk of losing the policy purpose of the predominance test.

I look forward to speaking with you.

Regards, LAL

L.A. Liversidge

From: Eric Kupka <Eric_Kupka@wsib.on.ca>
Sent: Tuesday, December 21, 2021 12:24 PM
To: lal@laliversidge.com
Cc: Colin Grant; Diane Weber; Denise Caron-Adam; Greg Bullen
Subject: FW: WSIAT Response - CMS & COVID VAX Q&A

Hello Mr. Liversidge:

Thank you for your emails dated November 22, 2021 regarding WSIAT Decision 874/21, which have been forwarded to our attention. I am responding on behalf of our General Counsel, Colin Grant.

Decision 874/21 (dated September 16, 2021) raises issues similar to those raised in WSIB's request for clarification/reconsideration of Decision No. 693/20 (dated February 26, 2021). At the last CIAC meeting, both decisions, and the subsequent reconsideration decision of the Chair of the Tribunal in Decision No. 693/20R (released November 2, 2021), were discussed.

The WSIAT Chair in Decision No. 693/20R has acknowledged that the WSIB's reconsideration request put forward substantial arguments that ought to be directly addressed in future WSIAT decisions in chronic mental stress appeals. In accordance with this relatively recent decision of the Tribunal Chair, we will continue to monitor future Tribunal decisions that come after Decision No. 693/20R (November 2, 2021).

Thank you for your helpful insights on this matter.

Eric

Eric Kupka
Associate General Counsel, Legal Services Division
Avocat général adjoint, Bureau des services juridiques
T 416-344-3143 | **Mobile / *Portable*** 647-923-7792 | **F** 416-344-3160

Workplace Safety and Insurance Board
200 Front Street West
Toronto, Ontario M5V 3J1

Commission de la sécurité professionelle et de l'assurance contre les accidents du travail
200, rue Front Ouest
Toronto, Ontario M5V 3J1