The Liversidge *e*-Letter

An *Executive Briefing* on Emerging Workplace Safety and Insurance Issues

February 27, 2014 An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B. 5 pages

Another WSI Private Members' Bill:
Bill 67 - An Act to amend the WSIA re: Post-Traumatic Stress

Bill 67 proceeding to 2nd reading today

On May 7, 2013 NDP MPP Cheri DiNovo (MPP for Parkdale-High Park) introduced ***Bill 67: An Act to amend the Workplace Safety & Insurance Act, 1997 with respect to post-traumatic stress disorder***. As readers know, Ms. DiNovo is a tireless advocate for worker and injured worker rights and Bill 67 fits right in with that well earned reputation. Bill 67 is proceeding to 2nd reading today at Queen's Park. This private members' bill follows a recent lengthy list of private member bills (see the December 20, 2013 issue of **The Liversidge *e*-Letter**, ***'Tis the Season*** for a commentary on the other two most recent private members' bills (Bills 128 & 155) along with a government omnibus bill (Bill 146)). Bill 67 is very narrow and its objectives are simple enough – to make it easier for **Emergency Response Workers** to claim for **post-traumatic stress disability** ["PTSD"].

I respect the intent - however - Bill 67 just isn't needed

While I respect the intent of the bill, not only am I of the view that Bill 67 is unnecessary, it may well lead to many unfortunate unintended consequences that will actually work against the interests of those the bill purports to help.

This is not the first time a "mental stress" related private members' bill has been introduced

Other than occupational disease ["OD"], workplace safety and insurance ["WSI"] benefits for mental injury perhaps represents one of the most complex intersections between medical science, law and individual particulars facing any contemporary workers' compensation regime. Commonly referred to as "stress cases" (but including much more than that), "mental/mental" injuries arise when a mental stimulus or repeated mental stimuli result in a mental disorder. Mental injury compensation went through a transformation during the initial years of the **Workers' Compensation Appeals Tribunal** (which will not be catalogued here), and attracted legislative reform in 1997's Bill 99, the current law. When Bill 67 was introduced, it was suggested that this was the "*fourth time for this bill*" (Hansard, May 7, 2013). However, the earlier versions (such as Bill 129, introduced October 4, 2012) were different, which I will explain.

The current legislative framework for PTSD cases

The current law (*Workplace Safety & Insurance Act*, S.O.1997, c. 16, Sch. A., as amended ["WSIA"], s. 13, expressly removes mental stress claims from the ambit of benefit coverage except with respect to "*benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event"* (WSIA, ss. 13(4) and (5)). The relevant elements of s. 13 read as follows:

Insured injuries

13. (1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

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.

How the earlier private members' bills approached mental injury

The earlier versions, as I will refer to them, were not very similar at all. The earlier bills effectively amended s. 13 to remove the mental stress exemption. For example, Bill 129 introduced October 4, 2012 for 1st reading (and going no further) was short but advanced a very different point:

Bill 129: An Act to amend the Workplace Safety and Insurance Act, 1997 with respect to post traumatic stress disorder

1. Section 13 of the *Workplace Safety and Insurance Act*, 1997 is repealed and the following substituted:

Insured injuries
13. (1) A worker who sustains mental stress or a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.
Presumptions
(2) If the mental stress or accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.
Exception, employment outside Ontario
(3) Except as provided in sections 18 to 20, the worker is not entitled to benefits under the insurance plan if the mental stress or accident occurs while the worker is employed outside of Ontario.
Post traumatic stress disorder
(4) Mental stress includes post traumatic stress disorder.
Time limits do not apply
(5) The time limits set out in subsections 22 (1) and (2) do not apply to the filing of a claim in respect of post traumatic stress disorder.
Definition
(6) In this section,
"post traumatic stress disorder" means an anxiety disorder that develops after exposure to a traumatic event or experience and may include symptoms such as flashbacks, nightmares and intense feelings of fear or horror.

Bill 67 takes a different approach

Bill 67 is narrower. Bill 67 does not repeal the current law. It expands other "presumption" subsections (WSIA ss. 15.1 and 15.2) by adding s. 15.3 and s. 15.4 to the WSIA.

Proposed Section 15.3 creates a presumption for entitlement (entitlement is presumed unless the evidence shows a contrary cause) for PTSD. Unless the evidence on a balance of probability (the general legal standard for claims considered under the WSIA) establishes a contrary, non-employment cause, entitlement is *presumed* - by law. In other words, any diagnosis of PTSD for "emergency response workers" (firefighter, paramedic or police officer, hereinafter "ERWs"), will give rise to entitlement, unless non-employment causation is established.

Proposed Section 15.4 allows for all past cases (submitted or not; denied or not) to be considered under the Bill 67 rules.

This is the actual text of Bill 67:

Bill 67: An Act to amend the Workplace Safety and Insurance Act, 1997 with respect to post-traumatic stress disorder

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. *The Workplace Safety and Insurance Act, 1997* is amended by adding the following sections:

Presumption re: emergency response workers, etc.
Definitions
15.3 (1) In this section,
"emergency response worker" means a firefighter, police officer or paramedic;
"firefighter" has the same meaning as in subsection 1 (1) of the Fire Protection and Prevention Act, 1997;
"paramedic" has the same meaning as in subsection 1 (1) of the Ambulance Act;
"police officer" has the same meaning as in section 2 of the Police Services Act;
"post-traumatic stress disorder" means an anxiety disorder that develops after exposure to a traumatic event or experience with symptoms that may include flashbacks, nightmares and intense feelings of fear or horror.
Presumption re: post-traumatic stress disorder
(2) If an emergency response worker suffers from post-traumatic stress disorder, the disorder is presumed to be an occupational disease that occurs due to the nature of the worker's employment as an emergency response worker, unless the contrary is shown.
Time of diagnosis
(3) The presumption in subsection (2) applies only to post-traumatic stress disorder diagnosed on or after the day the Workplace Safety and Insurance Amendment Act (Post-Traumatic Stress Disorder), 2013 receives Royal Assent.
Conditions and restrictions
(4) The presumption in subsection (2) is subject to any conditions and restrictions prescribed under clause (5) (a).
Regulations
(5) The Lieutenant Governor in Council may make regulations,
(a) prescribing conditions and restrictions relating to the presumption established by subsection (2), including, but not limited to, conditions and restrictions related to nature of employment, length of employment, time during which the worker was employed or age of the worker;
(b) providing for such transitional matters as the Lieutenant Governor in Council considers necessary or advisable in relation to this section and the regulations under this section.
Claims based on presumption
15.4 (1) This section applies where the presumption established under section 15.3 applies to the post-traumatic stress disorder with which a worker is diagnosed.
New claims
(2) If the worker or his or her survivor never filed a claim in respect of the disorder, the worker or his or her survivor may file a claim with the Board, and the Board shall decide the claim in accordance with section 15.3 and the regulations under it, as that section and those regulations read at the time the Board makes its decision.
Refiled claim
(3) Subject to subsection (4), if the worker or his or her survivor filed a claim in respect of the disorder and the claim was denied by the Board or by the Appeals Tribunal, the worker or his or her survivor may refile the claim with the Board and the Board shall decide the claim in accordance with section 15.3 and the regulations under it, as that section and those regulations read at the time the Board makes its decision.
Time limits do not apply
(4) The time limits set out in subsections 22 (1) and (2) do not apply in respect of a claim that is refiled under subsection (3).
Pending appeal
(5) If a claim is pending before the Appeals Tribunal, the Appeals Tribunal shall refer the claim back to the Board, and the Board shall decide the claim in accordance with section 15.3 and the regulations under it, as that section and those regulations read at the time the Board makes its decision.
Pending claim
(6) If a claim is pending before the Board, the Board shall decide the claim in accordance with section 15.3 and the regulations under it, as that section and those regulations read at the time the Board makes its decision.

How PTSD cases are considered today for emergency response workers

An impression is left through an explanatory flyer promoting Bill 67, "**Demand Dignity and Support for Ontario's Front-Line Emergency Responders**" that currently these type of cases are not accepted by the WSIB.

The Flyer notes: "*This Bill will introduce "presumptive" legislation making it possible for first-responders . . . . to claim benefits as a result of post-traumatic stress from their jobs*".

In fact, PTSD cases are perfectly allowable and are presently allowed. These cases are determined under WSIA s. 13(5) and **WSIB Policy Document 15-03-02, Traumatic Mental Stress (October 12, 2004)**. The relevant elements of the WSIB policy are:

> **Policy**
> A worker is entitled to benefits for traumatic mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment.
>
> **Sudden and unexpected traumatic event**
> A traumatic event may be a result of a criminal act, harassment, or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member, or others.
>
> **Cumulative effect**
> *Due to the nature of their occupation, some workers, over a period of time, may be exposed to multiple, sudden and unexpected traumatic events resulting from criminal acts, harassment, or horrific accidents.*
>
> The WSIB recognizes that each traumatic event in a series of events may affect a worker psychologically. This is true even if the worker does not show the effects until the most recent event. As a result, entitlement may be accepted because of the cumulative effect, even if the last event is not the most traumatic (significant).
>
> **An employer's work-related decisions or actions**
> There is no entitlement for traumatic mental stress due to an employer's decisions or actions that are part of the employment function.

Appeals Tribunal decisions well apply the policy

The current approach to benefit entitlement is well captured in decisions of the **Appeals Tribunal**:

> We conclude that the worker is entitled to benefits for PTSD pursuant to the Board's **OPM Document No. 15-03-02** on the subject of "*Traumatic Mental Stress*". We have reached this conclusion on the basis that several of the events between 1990 and 2001 meet the criteria under the policy as: clearly and precisely identifiable; objectively traumatic; unexpected in the normal or daily course of the worker's employment or work environment; and generally accepted as being traumatic. **[WSIAT *Decision No. 2013/07* (March 19, 2009), at para. 72]**.

PTSD claims from ERWs are precisely the type of cases that are currently allowed

ERWs are not treated any differently than any other worker, nor is there any compelling legal reason to treat them differently. Arguments that ERWs should have a *higher* threshold for entitlement have long been set aside:

> We also note that Tribunal jurisdiction has addressed the question of whether, occupations such as the police, fire fighters, or emergency dispatchers should have a higher threshold for entitlement to benefits for psychological conditions, than would be the case for other occupations, because dangerous occurrences might be expected in these fields.
>
> In *Decision No. 1839/07*, the worker seeking entitlement to benefits was a police telecommunications officer who had received "911 call" communications, and who suffered from PTSD subsequent to receiving a several distressing calls over a period of years. *The Panel determined that the appropriate test to apply is the average worker test. Under that test, the event in question must be one that would be traumatic to the average worker in the general labour pool, rather than an average worker who does the same kind of work as the worker in the particular case.* The Panel was satisfied that the incidents in that case were traumatic. Applying the test in Decision No. 1839/07, we similarly conclude that the events referred to above, experienced by the worker between 1990 and 2001, were traumatic and met the criteria set out in the Board's policy document. **[WSIAT *Decision No. 2013/07* (March 19, 2009), at paras. 95 and 96]**

Equally compelling arguments present themselves against a *lower* threshold for entitlement. It is widely recognized and understood and PTSD cases from ERWs are the very type of cases that are *and should be* allowed by the current law and policy:

> In summary, the Panel concludes this type of argument ought to be put to rest in PTSD claims, as there is no legitimate medical, policy or legal basis for excluding workers in certain occupations from entitlement. In the Panel's view, it is counterintuitive to categorically deny entitlement to workers in the very occupations that are more likely to entail exposure to the type of events that trigger Post-Traumatic Stress Disorder. **[WSIAT *Decision No. 800/08* (June 19, 2009), at para. 46]**.

It is my view that there is no legal or policy reason for PTSD to be treated distinctively for ERWs.

The problem with presumption clauses in a workers' compensation context

Presumptions are not new to workers' compensation. In fact, they date from the very founding of the Ontario system. **WCAT *Decision No. 38/87L*** traced the origins and intentions of the presumption clause (the excerpt is abridged):

> Section 3(3) (now s. 13(2)) has remained virtually unchanged since its inception in 1914. In the first **Interim Report of the Meredith Commission in 1912**, the commissioner, W.R. Meredith, discussed a proposed presumption clause.
>
> > **The Commissioner:** Now, one of these things that has created trouble under the British Act is where there is nothing to show how it did happen, and therefore it is left in doubt as to whether it happens in the course of a man's employment.
> > **Mr. Miller:** A man being killed without witnesses.
> > **The Commissioner:** Without witnesses. Ought it not fairly to be presumed that accident arose out of his employment unless the employer shows the contrary?

Decision No. 1342/98 summarizes the application of the presumption clause in a single sentence (at para. 26):

> This is the interpretation consistently applied in Tribunal decisions: *the presumption clause is invoked only where the facts are not known*.

There are two types of presumptions

There are however two types of presumption clauses in play in the Ontario WSI system. The "*facts are not knowable*" type (i.e., s. 13(2) discussed in the earlier Meredith excerpt), and a "*judicial notice*" type. Certain occupational diseases are considered under a "rebuttable-presumption" (WSIA s. 15(3)) and others under a "non-rebuttable-presumption" (WSIA, s. 15(4)). Certain occupational diseases for firefighters are adjudicated under a presumption clause (WSIA, s. 15.1(4) and O. Reg. 253/07). The "*judicial notice"* type of presumptions have a different objective. Once scientific evidence matures to the point where causal linkages between certain exposures and certain diseases reaches a point of comfortable certainty (*albeit* not necessarily absolute certainty), causal linkages are presumed by law once exposure thresholds are factually determined. This latter type of presumption offers several related policy objectives. *First*, they ensure system efficiency – the same ground does not have to be covered in each and every similar case. *Second*, this efficiency benefits claiming workers and expedites decision-making. *Third*, claim outcomes are more predictable, ensuring appropriate employer funding is made available. *Fourth*, internalized costs assist in spurring prevention initiatives. *Fifth*, the development of "schedules" or lists of certain substances (such as the WSIA's Sch. 3 & 4) allows for easy and efficient world-wide system comparisons (instead of sifting through thousands of individual cases). There are likely more benefits.

The Bill 67 presumption seems to be a hybrid of the two

Both the "*facts are not knowable*" type and the "*judicial notice*" type of presumption are quite simple and, well, brilliant in design and intended function. *But, they are quite different*. The Bill 67 presumption seems to be a hybrid of both types. It infers a "*judicial notice*" approach (". . . (PTSD) *is presumed to be an occupational disease"* (for ERWs) and re-defines the "*facts are not knowable*" type to a "*the facts are knowable but there is no need to obtain them*" approach. This is a mistake. As shown earlier, the very design of Board policy makes it easier for ERWs to claim PTSD. But, the need for a factual analysis should not be subverted. Yet, this seems to be the intent of Bill 67.

WSI case determination should not be overly intrusive

One of the hallmarks of the Ontario WSI scheme is its general policy desire to ensure the adjudication of personal medical issues in a non-adversarial, non-intrusive fashion. The current requirement for a worker to advance a case on a balance-of-probability acts as a safeguard to these objectives. This is never the more apparent than in the case of mental illness cases. ***Bill 67 may trigger far-reaching and unfortunate consequences.***

Currently, a claiming worker is required to confidentially advance evidence of injury and employment linkage to the Board. This is appropriate and makes sense as the worker is aware of the worker's unique medical and employment circumstances and is able to advance that evidence, easily and expeditiously, with no hardship or delay. The system maintains a proper integrity by receiving the relevant and necessary evidence to be objectively and independently assessed by the WSIB. In no case, including cases for mental injury, does the Board require *all* available medical evidence, i.e., a claiming worker's entire medical history - only that relevant evidence needed to determine employment linkage on a balance of probability.

If entitlement is presumed (upon diagnosis) for PTSD cases for ERWs, a responding employer of the view that the employment *may not* be the source of the stress, is now in a quandary. Unable to be assured by the independent, objective analysis of the Board, and thus inferentially confident that the evidence presented a more "probable-than-not" linkage to the employment, the employer will be required to rebut the presumption of compensability. This will require an extensive and intrusive demand for evidence to "rebut the presumption" thus casting aside some of the important and historic procedural safeguards intelligently imbedded into the current adjudicative process. Past medical, including psychiatric, evidence will be requested, now by necessity. As well, other very intrusive personal investigations will be spawned with the need to seek out disqualifying evidence to prove contrary causation.

None of this is necessary under the current regime. Certainly, it must be accepted as a starting thesis that while ERWs are likely the most frequent source of legitimate PTSD claims, not every case advanced by an ERW is guaranteed to be legitimate. In fact, the very design and inclusion of a rebuttable presumption expects that some cases submitted will not be employment related PTSD (see for example some recent decisions of the Appeals Tribunal, *Decision No. 1791/12* (October 21, 2013); *Decision No. 1252/12* (November 18, 2013)). Currently, for those non-work PTSD cases an intrusive investigation is not required. If evidence submitted does not pass the more "probable-than-not" test, entitlement is not granted. However, under Bill 67 these cases would be automatically allowed unless evidence is advanced to convincingly establish non-employment related cause. By necessity, for these cases, the WSI system will become appallingly intrusive and court-like, violating traditional non-adversarial evidence production processes ensconced in the current scheme. This should be avoided.

The specific problem with Bill 67 – no real need has been established

If it were shown to be the case that ERWs with legitimate employment caused PTSD were being improperly denied claims, Bill 67 would speak to an important and legitimate policy goal. However, as the analysis in the previously cited WSIAT *Decision No. 800/08* shows, it is well understood and recognized that ERWs are likely the *best* source for legitimate PTSD claims. In other words, the current legal and administrative processes create no bars for entitlement for PTSD claims for ERWs. These cases happen. These

cases are submitted. These cases are allowed. Routinely and efficiently.

The current processes also justly and efficiently weed-out non-work related PTSD claims with no significant and needless untoward intrusion into one's personal circumstances.

Bill 67 will not ensure more legitimate cases are allowed – they are currently allowed. However, it will ensure that non-work caused PTSD cases will be accepted, requiring extensive court-like post-allowance appeals and proceedings. This is not the way to go.

The *ex post facto* problem of section 15.4

Bill 67 creates a new WSIA s. 15.4 which allows for any previously denied ERW PTSD claims to be reopened and decided under the new rules. This approach applies to past cases not even submitted.

While *ex post facto* civil laws are not unconstitutional in Canada, and while not uncommon, they are not routine. Prospective laws are routine. In fact (as does Bill 67) express direction of retroactivity is required under Canadian law.

If Bill 67 is addressing a long-standing serious and proven inequity, a retroactive approach may be needed. No such case has been attempted, or advanced, let alone proven.

Bill 67, even if needed and just (which as argued earlier it is not), will create a massive unfunded liability for Ontario municipalities of perhaps oppressive magnitude.

Bill 67 seems to be following an Alberta example

The change in approach by Bill 67 compared to past similar versions (for example, Bill 129) is likely explained by recent changes in Alberta. In December 2012 the Alberta *Workers' Compensation Act* was amended in a similar fashion:

> **s. 24.2(2):** If a worker who is or has been an emergency medical technician, firefighter, peace officer or police officer is diagnosed with post-traumatic stress disorder by a physician or psychologist, the post-traumatic stress disorder shall be presumed, unless the contrary is proven, to be an injury that arose out of and occurred during the course of the worker's employment in response to a traumatic event or series of traumatic events to which the worker was exposed in carrying out the worker's duties as an emergency medical technician, firefighter, peace officer or police officer.

Bill 67 is a "political" initiative – not a "policy" initiative

No strong policy case has been advanced for Bill 67. When the similar Bill 1 was introduced in Alberta by the Alberta Premier on May 24, 2012, this was said:

> **Ms Redford:** Thank you, Mr. Speaker. I request leave to introduce Bill 1, the Workers' Compensation Amendment Act, 2012. This bill will provide presumptive Workers' Compensation Board coverage to first responders who suffer from posttraumatic stress disorder. This proposed legislation supports the men and the women who risk their lives every day to make Alberta a safer place, a better place. Our first responders, whether they're paramedics, firefighters, or police officers, arrive at the time of our greatest need. This legislation is about returning that courtesy and that favour, and it's about being there when they need us, Mr. Speaker. This bill will establish Alberta as the first jurisdiction in the country to offer this much-needed and extremely deserved coverage. Bill 1 is reflective of this government's ongoing commitment to the brave men and women who put their lives on the line so that we can enjoy ours.

No doubt, the Ontario rhetoric will be advanced within a similar thematic template. While there may be attempts to side-line critics of Bill 67 as being "anti-emergency-response-worker" the fact is there is no legitimate public policy reason for Bill 67.

Currently, ERWs are fairly, adequately and properly protected under the current WSIA, WSIB policy and WSIAT jurisprudence. Bill 67 will not address any proven benefit inequity issue. *There is none*. From a policy calculus there is no reason for Bill 67.

How does one address Bill 67 when it likely evokes a very strong emotional desire for support?

Strong and clear support for ERWs is a given and a clear policy priority. The WSIA, WSIB policy and WSIAT jurisprudence currently support the provision of PTSD benefits for ERWs. And, evidence – *actual decisions* - suggest that current protocols are working. There has been no objective analysis presented that they are not.

Reverse onus provisions should be carefully and sparingly developed and then only *after* a compelling case for the need of such provisions is objectively established. Bill 67 will inadvertently lead to a more court-like intrusive, adversarial system. *This is wrong*.

The retroactive elements of Bill 67 run against-the-grain of contemporary Ontario legislative reform, with no analysis demonstrating the need for such an extraordinary move. The resulting increases in municipal WSI costs associated with Bill 67 may be oppressive. *Are they even known or estimated?*

Support for ERWs *is* universal. Support is equal in all political parties, and from every corner of this society. Literally everyone has an innate sense of commitment and a special relationship with ERWs. While the word "hero" is overused in today's lexicon, there can be no depreciation of the word as it applies to ERWs. They *are* today's heroes. Each and every day.

ERWs earn and deserve respect in any and every manner it can be rightly demonstrated. The WSIA is however remedial legislation – it is not the forum through which to demonstrate that respect. The purpose of remedial legislation is to correct a defect in existing law or to provide a remedy where none previously existed. This need has not been shown. If the current WSIA is defective, or if fairness and justice is not being delivered to ERWs, then by all means correct it. **The founding premise of Bill 67 – that ERWs are not being compensated for work-related PTSD – is simply not true. *This is not a proper foundation for remedial legislation reform*.**