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)

Presented:
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A. Preamble

1. This paper is presented to offer informed, evidence-based suggestions to the Ontario Workplace Safety & Insurance Board ["WSIB" or the "Board"] to assist in the consideration of the WSIB draft **Operational Policy Paper: Document No. 15-03-14: Traumatic or Chronic Mental Stress (accidents on or After January 1, 2018)** (hereinafter "stress policy").

2. While the stress policy encompasses both traumatic mental stress and chronic mental stress (hereinafter "chronic stress"), this paper addresses only the chronic stress element. The WSIB has acquired extensive institutional experience adjudicating and managing traumatic mental stress cases, which has been a recognized compensable head of entitlement for many decades. The stress policy offers nothing new or novel to the consideration of those cases. Chronic stress, on the other hand, represents a new head of entitlement, and the Board rightly and appropriately has sought guidance and input from the stakeholder public.

3. It is very respectfully asserted at the outset of this paper that the stress policy requires reconsideration and revision. This paper however, while offering critique where necessary, respects the prodigious scope of the Board's challenge, and presents an informed analysis accompanied with robust recommendations consistent with the legal instructions and policy opportunities set out in the *Workplace Safety & Insurance Act*, S.O.1997, c. 16, Sch. A., as amended ["WSIA"].

4. The aim of this paper is not to simply illustrate the hazards, risks and vulnerabilities of the proposed stress policy but to offer specific recommendations sensitive to the Board's mandate and the unique qualities and challenges chronic stress brings to the Ontario workplace safety and insurance ["WSI"] system.

B. An immediate process suggestion

1. Presently, notwithstanding that some Canadian jurisdictions have acquired some experience with these types of cases, the Ontario WSIB lacks any significant experience with adjudicating and managing chronic stress claims. It is effectively starting from scratch. In many respects, that itself is unique. In today's modern WSI world, while occasional statutory amendments revise even some core elements of the statute, it is rare that a previously excluded head of entitlement is integrated into the WSIA in the manner as has been chronic stress.

2. The need for analysis, input and suggestion does not end with the approval of a stress policy. It is respectfully suggested that the need continues for many years post-implementation.

3. At the outset, the Board should candidly recognize that the room for inadvertent design misstep is enormous. Fortunately, the Board has several routine consultative mediums available to operate as an integrated "fail-safe" review mechanism.

4. The following is proposed as an essential ingredient to the policy development process:

   a. That the WSIB Chair forthwith strike a standing stress policy sub-committee of the Chair Advisory Groups ("CAG");

   b. That the CAG subcommittee meet no less frequently than twice a year to assess and present feedback on the Board's experiences with chronic stress cases, with the specific areas of focus to be broad but set by the CAG sub-committee;

   c. That by no later than March 31, 2020, the Board prepare and publicly release a comprehensive report on the full range of its experiences acquired in the first two years of implementation. This report will be presented to the stakeholder public in a consultative forum accompanied by a process to receive feedback;

   d. That a similar process be followed by no later than March 31, 2023 to report and seek feedback on the first five years of implementation, with the need and viability of a subsequent process to be reviewed and decided at that time.

5. While this simple albeit essential review process does not supplant the need for thoughtful policy design, it recognizes that the stress policy represents a momentous undertaking with a huge potential for inadvertence. It is a high risk project. The proposed review protocol does not eliminate the risks but it ensures that they will be recognized and missteps remedied early.

C. How and why the stress policy came about

1. The short narrative on the immediate need for the stress policy flows of course from amendments to the WSIA as prescribed in the omnibus **Bill 127, *Stronger, Healthier Ontario Act* (Budget Measures), *2017***, introduced April 27, 2017 and which received Royal Assent May 17, 2017.

2. *Bill 127* repealed WSIA ss. 13(4) and 13(5) which expressly excluded chronic stress as a head of entitlement under the Ontario WSI system. WSIA s. 13(4) directed that "*Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.*" Section 13(5) allowed entitlement for stress "*. . . that is an acute reaction to a sudden and unexpected traumatic event . . .*" except "*. . . for mental stress caused by his or her employer's decisions or actions relating to the worker's employment . . .*" The latter "employment decision exception" survives.

3. As at January 1, 2018 the WSIA will read as follows:

> **Mental stress**
> 13 (4) Subject to subsection (5), a worker is entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker's employment. 2017, c. 8, Sched. 33, s. 1.
> **Same, exception**
> 13 (5) A worker is not entitled to benefits for mental stress caused by decisions or actions of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment. 2017, c. 8, Sched. 33, s. 1.

4. Presented with only this history, one may incorrectly conclude that compensation for chronic stress in Ontario is a relatively new issue. This of course is not at all the case.

5. The issue of chronic stress has a long and winding history in the Ontario WSI system. To permit a contextual understanding of the WSIB stress policy, a truncated but relevant history of chronic stress in Ontario follows.

6. Prior to 1998, the (then named) *Workers' Compensation Act* ["pre-1998 Act"] was silent on the compensability of chronic stress (the Act remained silent until *Bill 99*, discussed below). However, the (then named) **Workers' Compensation Board** ["WCB"] treated chronic stress as a non-compensable entity.

7. The WSI treatment of chronic stress changed after the creation of the (then named) **Workers' Compensation Appeals Tribunal** ["WCAT"] in 1985. By the late 1980s, the WCAT had issued several decisions granting entitlement for chronic stress (see for example, **W.C.A.T. *Decision No. 918* (1988), 9 W.C.A.T.R. 48** and **W.C.A.T. *Decision No*. 1087/87 (1989), 10 W.C.A.T.R. 82**, along with many others).

8. The WCAT treatment of chronic stress spurred the WCB into policy action and over the next several years, the WCB released a series of comprehensive policy papers and engaged in an extensive policy consultation and outreach program that consumed several years.

9. The following core policy and policy discussion papers were released by the WCB:

   a. **1989 WCB Ontario:** "***Discussion Paper on Compensation for Chronic Occupational Stress, January 30, 1989***" (29 pages), consultation timeline: open ended – no dates set;

   b. **1989 WCB Ontario:** "***Options Paper, The Compensability of Disabilities Resulting from Workplace Stressor, July 14, 1989***" (14 pages), consultation timeline four (4) months;

   c. **1990 WCB Ontario:** "***Policy Proposal, Compensation for Disablements Arising from Workplace Stressors, April 20, 1990***," (15 pages), consultation timeline ten (10) months;

   d. **1991 Ontario WCB:** "***Policy Proposal, Compensation for Disablements Arising from Workplace Stressors, May 8, 1991***" (50 pages), consultation timeline five (5) months.

10. The WCB never did approve a chronic stress policy. 1990 to 1995 was a volatile time. At the time, the WCB Board of Directors ["BOD"] was bipartite in structure and effectively deadlocked on core policy issues, including chronic stress.

11. During this time, both political opposition parties opposed entitlement for chronic stress. In 1995 the Progressive Conservative Party of Ontario formed the government, and immediately announced a Minister Without Portfolio for Workers' Compensation Reform.

12. A comprehensive consultation and outreach commenced, and following the release of two reports, **Ontario 1996, "*New Directions for Workers' Compensation Reform, A Discussion Paper" (January, 1996)***, and **Ontario 1996, "*New Directions for Workers' Compensation Reform, Report" (June, 1996)***, the government introduced and the legislature passed ***Bill 99, Workers' Compensation Reform Act***, resulting in the passage of the WSIA effective January 1, 1998.

13. The WSIA removed chronic stress as a compensable entity:

> 13 (4) Except as provided in subsections (5) and 14 (3), a worker is not entitled to benefits under the insurance plan for mental stress.

14. The need for this extreme statutory approach was explained by the Minister of Labour as follows:

> "Second principle: the refocusing of the system. We want to restore the system to its original mandate as a workplace accident insurance plan. Bill 99 addresses the fact that in recent years the system has moved beyond its original mandate. *In the past number of years, compensation has been paid for conditions whose connection to the workplace is often difficult to determine. Chronic mental stress is an obvious example. That is why compensation will be provided for stress, in the future, when the bill is passed, when it results from a traumatic workplace incident*". (Hansard, April 24, 1997, emphasis added)

15. This remained the state of the law until the release of a series of decisions of the **Workplace Safety & Insurance Appeals Tribunal** ["WSIAT" or the "Appeals Tribunal"] in 2014 (commonly referred to as the trilogy of stress decisions) which held that s. 13(4) was unconstitutional (see the *de facto* leading case, ***Decision No. 2157/09*** **(April 29, 2014)**). While able to strike down the effect of the offending section for the immediate case before it, the Appeals Tribunal of course could not strike down the section itself.

16. For the period 2014 – 2017 the WSIB continued to apply s. 13(4), resulting in the unacceptable and absurd result of the same set of facts being deemed non-compensable by the WSIB and yet compensable by the WSIAT.

17. As outlined, **Bill 127, *Stronger Healthier Ontario Act* (Budget Measures), 2017**, introduced April 27, 2017, repealed WSIA s. 13(4) and expressly allowed entitlement for chronic mental stress.

18. As one can see, while not reflected in the WSIB stress policy consultation document, Ontario has a 30 year history of considering the compensability of chronic stress. All of that history remains relevant and of assistance in developing a stress policy today. All of that history was taken into consideration and is reflected in this paper.

19. Moreover, and much to the point, while *Bill 127* has, without equivocation, established the compensability of chronic stress, these cases still represent the archetypical example of cases "*whose connection to the workplace is often difficult to determine*." That has not changed.

D. Chronic stress cases are distinctive to other difficult cases

1. Stress cases are not the same as "other" WSI cases. While the Bill 99 remedy to this "reality" embraced statutory exclusion and while this has been set aside, correctly it is submitted, the proposed stress policy adopts the "normal" template for compensability. As will be addressed in the remainder of this paper, it is respectfully suggested that this represents a momentous miscalculation and policy design error.

2. It is posited that a certain legal fiction has emerged of late, that being, that with the setting aside of the Bill 99 exclusion, as the WSIA effectively legally treats stress and other cases the same, *they are the same*. The reality is however that they are not the same. "*Reality is that which, when you stop believing in it, doesn't go away*."[1] Even though one may "stop believing" that chronic stress cases are distinctive, that does not change the reality that they so remain. The 30 year Ontario history reflects that reality. The absence of systemic recognition of chronic stress before the late 1980s, the inability of the Board to develop and approve an acceptable policy in the early 1990s, the extraordinary statutory response of exclusion in 1998, world-wide literature and the extraordinary investigative analysis required for each case reflects that reality.

3. The **1999 British Columbia Royal Commission Final Report on Workers' Compensation**,[2] provided an exhaustive and unique Canadian analysis on chronic stress, and offers the following analysis for distinguishing stress and non-stress cases:

> In the commission's view, the most important feature distinguishing chronic stress claims from all other types of claims is the pervasive nature of stress in everyone's life. Unlike other forms of workplace hazards and conditions which might lead to injury or disease, stress is omnipresent. It acts on all workers in various contexts both inside and outside the workplace, often in ways which cannot be disentangled. While many multi-causal situations may present difficulties in adjudicating work relatedness, chronic stress claims are uniquely challenging in that almost all claimants will have experienced stressors both related and unrelated to the workplace which may have played a causative role.
>
> Coupled with the pervasive nature of stress, several other factors add further challenges to the area of chronic stress claims. For example, unlike most forms of physical injury, psychological injury is a highly subjective complaint and is not readily observable (at least to lay adjudicators and even many medical practitioners who do not specialize in psychology or psychiatry).[3]
>
> The commission is of the view that in the case of the applicable standard of proof, distinctions can be made between chronic stress claims and other types of claims on a principled basis. Applying the current standard of "as likely as not" to the causal significance onus is apt in the commission's view to lead to an unacceptable flood of claims and the potential for widespread compensation for conditions which meet the current low

[1] As attributed to author Philip K. Dick.
[2] 1999, British Columbia, "For the Common Good: Final Report of the Royal Commission on Workers' Compensation in British Columbia"
[3] *Ibid*., Volume II, Chapter 4, The Scope of Compensation Coverage in British Columbia: Determining Work-Relatedness, p. 38.

standard of proof but have actually resulted from non-work-related stressors. Increasing the level of certainty which an adjudicator must have regarding the causal significance of work-related stressors is warranted in light of the uniquely pervasive nature of stress in and out of the workplace, and the subjective nature of reactions to stressors.[4]

In summary, the commission is of the view that special restrictions should be placed on chronic stress claims. This is both appropriate in light of the unique features of such claims and necessary in light of the escalating costs which are likely to result in the absence of such restrictions if the current policy restrictions are discontinued.[5]

E. A critique of the proposed WSIB stress policy

1. The proposed stress policy sets out the rules for eligibility as follows:

> **Chronic mental stress**
>
> A worker will generally be entitled to benefits for chronic mental stress if the mental stress is caused by a substantial work-related stressor, including workplace bullying or harassment, arising out of and in the course of the worker's employment. For more information see 15-02-02, Accident in the Course of 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.
>
> However, a claim for chronic mental stress made by a worker employed in an occupation, or a category of jobs within an occupation, reasonably characterized by a high degree of routine stress should not be denied simply because all workers employed in that occupation, or category of jobs within that occupation, are normally exposed to a high level of stress. In some cases, therefore, a high level of routine stress, combined with significant duration, may qualify as a substantial work-related stressor.
>
> **Standard of proof and causation**
>
> In all cases, the WSIB decision-maker must be satisfied, on a balance of probabilities, that the traumatic event(s), or the cumulative effect of the series of traumatic events, caused, or significantly contributed to, the traumatic mental stress.

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

[4] *Ibid*., p. 40.
[5] *Ibid.*, p. 41.

the Attorney General relied on expert evidence to argue that "*work is <u>always</u> a significant contributing factor*" and thus, may lead to blanket coverage of mental conditions, work-related or not.[6]

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.

6. An influential background paper presented to the B.C. Royal Commission, "**Mental Disorders, Mental Disability at Work, and Workers' Compensation**,"[7] posited that:

> When employment has not contributed to mental impairment, policymakers have legitimate concerns that the uncertainties regarding cause and the degree of impairments could lead to many false positives if a trivial causal threshold was established.[8]

7. The author then explained the significance of the potential implications of a high degree of "false positives" for a workers' compensation program:

> Why would the high positive rate under the minimal causation rule be undesirable? This approach would place upon employers the costs of some impairments that they could not act in good faith to prevent. **This would contradict a compelling economic rationale for workers' compensation,** which states that optimal incentives for employers to create a healthy work environment occur when employers bear the costs of preventable work-related injury. **If, as seems likely, some mental impairments are not preventable by anyone, then the minimal work causation rule would in effect become an employer mandate to provide disability insurance to all mental impairments suffered by workers**. ***Such a mandate runs contrary to the historical aim of workers' compensation***. Workers' compensation systems were never intended to insure losses that were not primarily attributable to the workplace. Creating such a mandate would also immediately raise equity issues with other classes of disability: why fund a mandatory disability system for mental disabilities, and not for other types?[9] (emphasis added)

8. It seems clear that the proposed stress policy itself <u>expects</u> a high number of "false positives." The stress policy (at p. 4) while requiring only a DSM diagnosis to be provided by a "regulated health care professional" at time of initial determination, at an unspecified "later point" a WSIB decision-maker may "*require an assessment by a psychiatrist or psychologist to confirm ongoing entitlement.*"

9. With respect, this "cart-before-the-horse" adjudicative approach ignores, with no explanation, the apt concerns ably expressed by the B.C. Royal Commission, and inevitably will lead to an erosion of the foundational bedrock upon which the Ontario WSI system rests.

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[6] W.S.I.A.T. *Decision No. 2157/09* (April 29, 2014), at para. 116, emphasis added.
[7] "Mental Disorders, Mental Disability at Work, and Workers' Compensation," William Gnam for the Institute for Work and Health to the Royal Commission on Workers' Compensation in British Columbia, April 1998
[8] *Ibid.*, at p. 15.
[9] *Ibid.*

10. This is not presented as a "sky is falling" panic-laden fear. This has happened before. California is a text-book example. In "Mental Disorders," Gnam notes:[10]

> ". . . the experience of jurisdictions such as California suggests that ill-considered compensation policies for mental conditions may result in a dramatic escalation of insurance costs. Following several key court rulings, the costs of mental stress claims in California grew by 700 percent from 1979 to 1984, and temporarily became the most pressing concern for employers and insurers regarding workers' compensation".

11. If allowed to stand unaltered, the proposed stress policy will ensure that Ontario's experience will replicate that of other jurisdictions that were later forced to implement remedial policies. It is important to be clear that the issue is not one of cost or cost-containment. The proper question relates to work-relatedness, or in words reflected in the **WSIB 2013 Benefits Policy Review Consultation Report**, whether "*the line between workplace and non-workplace factors is being drawn in the right place.*"[11] Unanticipated sky-rocketing costs are a reasonable indicator that the line was drawn in the wrong place.

12. Another important element reflecting the design genius of the WSI system is the manner in which confidential medical information is managed with a minimum of intrusiveness and adversarial responses by the workplace parties. A stress policy requiring minimal evidence establishing a workplace connection will compel employers to be engaged in more adversarial appeals to present a defence against costs that can be attributed to non-workplace cause. A properly formulated test for entitlement that respects the inherent uniqueness of chronic stress cases will greatly assist avoiding "*intrusive investigations to ferret out evidence.*"[12] While dealing with an appeal in a stress case[13] the Appeals Tribunal, in *Decision No. 431/89*[14] described the concern in this manner:

> If documented evidence is required, employers and the representatives may feel compelled to make private investigations, contacting friends and neighbours of an injured worker in an effort to develop a psychological profile and thereby ascertain whether a basis exists for an SIEF application. They may feel compelled to use the Board adjudication process to conduct lengthy, rigorous and intrusive examinations of witnesses to ferret out evidence of a psychological condition. While the compensation system has inherently adversarial elements in it, both the Board and the Appeals Tribunal strive to minimize this adversarial component.

13. While "*a stress claim, by its very nature, does not merely invite, but will usually require, a more intrusive approach in adjudication of the claim,*"[15] as much as possible that investigation must be left in the Board's hands. It is submitted that the proposed stress policy will result in more extensive and intrusive appeal advocacy on the part of Ontario employers. This can be minimized with a well-constructed test for entitlement.

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[10] *Ibid.*, at pp. 1 and 2.
[11] 2013 WSIB Ontario, "WSIB Benefits Policy Review Consultation Process, Report to the President and CEO of the WSIB," Jim Thomas, Independent Chair, May 2013, at p. 6.
[12] As described in WCAT *Decision No. 70/91* (July 6, 1992), at p. 6.
[13] While the appeal dealt with the issue of Second Injury and Enhancement Fund, the observations of the Appeals Tribunal panel are appropriate for stress cases generally.
[14] WCAT *Decision 431/89* (July 7, 1989), at p. 9.
[15] WCAT *Decision No. 771/91* (August 13, 1992), at p. 4 & 5.

14. This paper will offer several specific recommendations and set out a comprehensive test for entitlement that entirely respects the legal underpinnings of the WSIA all-the-while being mindful of the Board's institutional requirement to "get to the right answer in the shortest period of time," to ensure effective treatment management and early return to work facilitation.

F. The treatment of chronic stress in other Canadian jurisdictions - Overview

1. When the (then named) WCB of Ontario was first considering a chronic stress policy in the late 1980s and early 1990s, although it did not successfully approve a policy, it was on the pioneering edge of workers' compensation policy development in Canada.

2. This is no longer the case. Since, several jurisdictions have adopted approaches to chronic stress. Several of those approaches will be examined, with a particular focus on British Columbia and Alberta, with those two jurisdictions being the most instructive. Five (5) provinces (Manitoba, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland and Labrador) do not compensate chronic stress.

3. British Columbia statutorily requires that the employment stressors be the predominant cause and requires a DSM diagnosis by a psychiatrist or psychologist. Alberta adopts similar requirements through policy. Saskatchewan, by policy, similarly requires a predominant employment cause with psychiatric evidence. Through policy, Quebec requires preponderant evidence to establish causation.

G. The treatment of chronic stress in other Canadian jurisdictions - British Columbia

1. In British Columbia, with respect to chronic stress, the British Columbia *Workers Compensation Act* ("BCWCA") allows entitlement if the stress is "*predominantly caused by a significant work-related stressor . . . or a cumulative series of significant work-related stressors*" (BCWCA, s. 5.1 (1) (a) (ii)), so long as the condition is "*diagnosed by a psychiatrist or psychologist*" (BCWCA, s. 5.1 (1) (b)) as a condition that is described in the most recent DSM.

2. WorkSafe BC policy, **Worksafe BC Rehabilitation Services & Claims Manual, Section 5.1 – Mental Disorders; Item C3-13.00 (July 1, 2012), Volume II, at p. 2** (hereinafter "B.C. Stress Policy)," sets out the distinctive nature of chronic stress cases:

> **POLICY**
>
> The complexity of mental disorders gives rise to challenges in the adjudication of a claim for a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM"). The mental disorder may be the result of a number of contributing factors, some of which are work-related and some of which are not.
>
> This policy provides guidance on the adjudication of claims for mental disorders where the mental disorder either:
>
> - is a reaction to one or more traumatic events arising out of and in the course of the worker's employment; or
> - is *predominantly caused* by a significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment. (emphasis added, B.C. Stress Policy, p. 2)

3. The B.C. Stress Policy, in requiring that "*a worker's mental disorder be diagnosed by a psychiatrist or a psychologist*" (B.C. Stress Policy, p. 3), sets out an expectation that ". . . *a DSM diagnosis generally involves a comprehensive and systematic clinical assessment of the worker*" (B.C. Stress Policy, p. 3), thereby ensuring that a comprehensive psychiatric assessment forms a core part of the material evidence.

4. The B.C. Stress Policy defines that "*predominant cause means that the significant work-related stressor, or cumulative series of significant work-related stressors, was the primary or main cause of the mental disorder*" (B.C. Stress Policy, p. 5, emphasis added).

5. **Worksafe BC Practice Directive #C3-3 (Issue date January 2, 2013, amended May 13, 2016)** presents additional guidance to B.C. decision-makers, highlighting the need for the decision-maker to acquire an understanding of non-work-related stressors in a worker's life, again establishing the importance of a comprehensive psychological assessment *before* decision-making:

> Deciding whether the work-related stressors were the predominant cause requires consideration of other non-work-related stressors in a worker's life and the role of the different stressors in causing the mental disorder. In most cases, a psychological assessment will provide important evidence with respect to identifying and discussing the relative impact of different stressors in causing the diagnosed mental disorder. The work-related stressors need not be the sole cause. Nor is it necessary that the work-related stressor or stressors outweigh all other stressors combined. It may be that the work-related stressor was still the primary cause of the mental disorder even though the worker had a number of other stressors which, when considered together, were also significant in causing the mental disorder.

6. Two recent decisions of the **B.C. Workers' Compensation Appeal Tribunal** ("BC WCAT") offer some guidance as to the application of the B.C. Stress Policy.

7. **BC WCAT Decision No. 2016-01144 (April 29, 2016)** highlights the need for "complete and reliable evidence":

> **[**36] To explain this further, I first note policy item #97.00 of the RSCM II, which states that in a matter which involves compensation which may be due to a worker, *the basic requirement is that there must be sufficient complete and reliable evidence on which to arrive at a sound conclusion with confidence*. In relation to this, the policy states that a belief formed in hindsight, and on nothing more than that, is not sufficient. (emphasis added)

8. **BC WCAT Decision No. 2015-03008 (September 30, 2015)** explains the two-part test for compensability, explaining the need to firstly establish that significant stressors arose out of the employment, and secondly, to determine those significant workplace stressors, if established, were the predominant cause of the worker's mental disorder:

> [91] Policy item #C3-13.00 explains that the Act requires the mental disorder be predominantly caused by a significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment. There are two parts to this requirement. The first part is the determination of whether the significant stressor or cumulative series of significant stressors arose out of and in the course of employment. "In the course of" refers to whether the significant stressor, or cumulative series of significant stressors, happened at a time and place and during an activity consistent with, and reasonably incidental to, the obligations and expectations of the worker's employment. The policy notes that significant stressors may be due to employment or non-employment factors. The Act requires that the significant stressors be work-related.

> [93] The policy sets out the second part of the test as the determination of whether the cumulative series of work-related significant stressors was the predominant cause of the worker's mental disorder. Predominant cause means that the significant work-related stressor, or cumulative series of significant work-related stressor, was the primary or main cause of the mental disorder.

9. It is clear that the B.C. experience and policies relating to chronic stress represent a solid effort to fairly reconcile the unique adjudicative and medical elements chronic stress cases present, heeding the guidance offered by the earlier referenced **1999 British Columbia Royal Commission Final Report on Workers' Compensation**.

H. The treatment of chronic stress in other Canadian jurisdictions – Alberta

1. Similar to Ontario's WSIA s. 13(1), section 24(1) of the *Alberta Workers' Compensation Act* ("AWCA") provides a broad direction of compensability, but other than PTSD (AWCA, s. 24.2(1) which presents a presumptive approach to PTSD for first responders in a manner similar to the WSIA, (Alberta was the first jurisdiction to implement the PTSD first responder presumption)), the AWCA is silent on chronic stress.

2. Adjudicative direction is presented in the **Alberta WCB Policies & Information, Policy: 03-01, Part II (August 26, 2015)**, at p. 1 (hereinafter the "Alberta Stress Policy"):

> WCB will consider a claim for psychiatric or psychological injury when there is a confirmed psychological or psychiatric diagnosis as defined in the most current version of the Diagnostic and Statistical Manual of Mental Disorders, (DSM) and the condition results from one of the following:
> • organic brain damage
> • an emotional reaction to a work-related physical injury
> • an emotional reaction to a work-related treatment process
> • traumatic onset psychological injury or stress
> • chronic onset psychological injury or stress

3. The Alberta Stress Policy (at p. 5) explains "*When is chronic onset psychological injury or stress compensable?*":

> Chronic onset psychological injury or stress is compensable when it is an emotional reaction to:
> a) an accumulation, over time, of a number of work-related stressors that do not fit the definition of traumatic incident,
> b) a significant work-related stressor that has lasted for a long time and does not fit the definition of traumatic incident, or
> c) both a) and b) together,
>
> and when all the (following) criteria . . . are met.
>
> As with any other claim, WCB investigates the causation to determine whether the claim is acceptable. Claims for this type of injury are eligible for compensation only when all of the following criteria are met:
> • there is a <u>confirmed psychological or psychiatric diagnosis</u> as described in the DSM,
> • <u>the work-related events or stressors are the *predominant cause* of the injury</u>; *predominant cause means the prevailing, strongest, chief, or main cause of the chronic onset stress*,

- the work-related events are excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation, and
- there is objective confirmation of the events.

In addition to the duties reasonably expected by the nature of the worker's occupation, normal pressures and tensions include, for example, interpersonal relations and conflicts, health and safety concerns, union issues, and routine labour relations actions taken by the employer, including workload and deadlines, work evaluation, performance management (discipline), transfers, changes in job duties, lay-offs, demotions, terminations, and reorganizations, to which all workers may be subject from time to time.

Ongoing compensability for chronic onset stress will be accepted when the medical evidence shows that the work or work-related injury is the predominant cause of the current symptoms.

4. Recent decisions of the **Appeals Commission for Alberta Workers' Compensation** ("ACAWC") offer some guidance as to the application of the Alberta Stress Policy. **ACAWC Decision No. 2016-0426 (July 18, 2016)**, sets out the questions that must be addressed in chronic stress cases (at para. 16):

> Accordingly, and with reference to WCB Policy 03-01, the panel must answer the following questions in determining the issue of appeal:
>
> Is there a confirmed psychological or psychiatric diagnosis as described in the DSM?
>
> Are the work-related events or stressors the predominant cause of the injury?
>
> Are the work-related events excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation?
>
> Is there is objective confirmation of the events?

5. **ACAWC Decision No. 2014-0737 (October 15, 2015)**, at page 3 defines "predominant cause" as:

> Predominant cause means that the occupational exposures are the prevailing, strongest, chief, or main cause of the injury. It is not necessary that the proportion attributable to the occupational exposures is a certain percentage, such as 50% or more, provided that the occupational exposures are the strongest cause.

6. As with the B.C. experience, it is clear that Alberta policies relating to chronic stress also represent a solid effort to fairly reconcile the unique adjudicative and medical elements chronic stress cases present with the adoption of the "predominant cause test" and the need for psychiatric/psychological reports confirming a DSM diagnosis.

I. A summary of the treatment of chronic stress in other Canadian jurisdictions

1. While 50% of Canadian provinces do not include chronic stress as a compensable entity (i.e., in the same manner of Ontario prior to the recent amendments), of those that do (British Columbia, Alberta, Saskatchewan and Quebec) *all* require that the employment stressors represent the predominant cause of the claimed chronic stress condition.

2. With the proposed stress policy Ontario will be the only Canadian jurisdiction that will allow chronic stress through applying the normal adjudicative template that is applied to all cases, that being that the employment is a significant contributing factor considered on a balance of probability. Ontario is proceeding in this direction absent any reasoned analysis outlining the soundness of this approach. Yet, the complexity of these cases does not vary province to province.

3. The remainder of this paper will present an analysis and outline of the most effective, legally supportable test for determining the compensability of chronic stress in Ontario. The proposed test will respect the unique qualities of chronic stress as a compensable condition, reconciled with an awareness that the WSIB of Ontario, as the steward of a mass adjudication system must get to the correct answer in each and every case in the most efficient means available. The Board must ensure not only the prompt commencement of benefits but the prompt engagement of medical and rehabilitation management.

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.[16]

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

[16] If a fresh and recently passed amendment to the WSIA was considered by the agency governed by that statute to be unconstitutional, especially in view of the WSIB's power set out under WSIA s. 159(2)(b) "*to review this Act and the regulations and recommend amendments or revisions to them*," that would present a rather significant controversy.

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.

K. The competing facets of the WSIB mandate

1. Unlike the Appeals Tribunal which only possesses an adjudicative mandate, while the WSIB maintains that same legal jurisdiction to decide cases in the first instance, beyond that, the Board must manage the case after entitlement has been established and effect return to work ["RTW"] in a dynamic and timely fashion.

2. Examining just six (6) Appeals Tribunal chronic stress decisions issued between 1995 and 2013,[17] one observes they ranged from 30 to 77 pages in length; consumed between two (2) and seven (7) hearing days each, with most six (6) days or more; and took between three (3) and eight (8) years to resolve, with the average time for the six (6) cases being 4.8 years from the date of the WSIB Appeals Resolution Officer decision to the date of the Appeals Tribunal decision.

3. If these decisions represented the adjudicative standard the Board was to emulate, this would amount to a denial of access to justice for this class of case. While the WSIB is faced with the same legal task as the Appeals Tribunal to decide entitlement, it must do so in a timely fashion, with its performance measured in days and weeks, not years.

4. The Board's crucial rehabilitation role, both medical and vocational, however, cannot commence until the Board's adjudicative mandate is fulfilled. While the test for chronic stress must be mindful of these structural tensions, the Board cannot abandon one over the other.

5. While the proposed stress policy will allow the Board to get to an answer quickly, as already argued, it does so through an adjudicative template that simply will not be able to distinguish non-work-related chronic stress from work-related chronic stress. While this approach allows the Board to focus more quickly on its return to work mandate, it cannot allow this focus to supplant its adjudicative role. Such an abdication, it is respectfully submitted, would represent an unlawful exercise of the Board's discretion.

6. The legal test and process for chronic stress proposed later in this paper is mindful of the Board's broad mandate and is respectful of the "*time is of the essence"* quality of that mandate. While every chronic stress case will not be anything but a "hard case," it is possible to get to a correct legal answer on compensability within a reasonable timeframe.

L. A truncated discussion of the "average worker test" as it emerged and evolved at the Appeals Tribunal

1. The so-called "average worker test" ("AWT") emerged early in the jurisprudence of the Appeals Tribunal. While not formulating the AWT as it was later to be described, the first Appeals Tribunal decision to grant

[17] 2157/09 (April 2014); 480/11 (July 2014); 1619/01 (May 2004); 2839/01 (April 2004); 826/94 (October 1995)

entitlement for chronic stress, **W.C.A.T. *Decision No. 918* (July 8, 1998)** captured the concept. The problem of stress cases was described at p. 5:

> The difficulty with stress cases is the fact that there are infinite sources of stress in everyone's life and it is virtually impossible to identify them all and assess the extent to which each source has contributed to any resulting disability.

2. While recognizing that the "*Act makes no distinction between organic and psychological disabilities*" (at p. 11), after assessing the inherent complexities of these type of cases, the Panel noted:

> For this reason, we think that it is important that, in stress cases, a panel be satisfied that the workplace stress "stands out" as an important cause of the disability. To put it another way, does the presence of other stressful events, personal to the worker, lead to the conclusion that work was not a significant contributing factor?

3. Applying the reasoning from a Maine decision,[18] and concluding that it strikes a reasonable balance, the panel (at p. 15/16) concluded:

> What the Maine decision establishes is the requirement that, generally, *the pressures experienced by the worker must be greater than those experienced by the average worker*, but that in a particular case, entitlement will be recognized where the workplace stress is not unusual, provided that it can be shown by clear and convincing evidence that the ordinary and usual work-related pressures in fact predominated in producing the injury. (emphasis added)

4. In **W.C.A.T. *Decision No. 1018/87* (February 23, 1989)**, the panel commented on *Decision 918*, but took a slightly different approach (at p. 21):

> The Panel in Decision No. 918, initially reaffirms the "significant contributing factor" test normally used by the Tribunal, in deciding whether a disability results from a work injury as required by the Act. However, in importing the test from the Maine Townsend case, referred to above, it can be read as adding the requirement that the work place stress be either unusual, or predominant, i.e., more important than other stressors in the worker's life. We understand the introduction of the "predominance" factor as that Panel's response to the serious fact-finding difficulties of gradual mental stress cases. ***In all cases, part of the assessment of what is more likely than not, on the balance of probabilities, is an evaluation of how persuasive the evidence offered to support that conclusion is. The background of the "normal" stress, or the normal reaction may help in some way to elucidate what is likely.*** However, it is important that this not be taken as far as creating a higher standard for some types of cases than others. This could lead to the replacement of the true merits and justice standard of the statute by specific standards for particular types of cases. In stress cases and other non-organic claims a Panel will have to deal with the usual lack of corroborating objective indicators which in cases with a physical cause assist immeasurably in evaluating probability. In the end, however, one must decide whether the evidence is persuasive on a balance of probabilities that work was a significant contributing factor to the stress disability in the particular worker, as one would do with any other type of disability. (emphasis added)

[18] *Townsend v The Maine Bureau of Public Safety*, 404 A.2d 1014 (ME)

5. **W.C.A.T.** ***Decision No. 826/94*** **(October 13, 1998)**, which is perhaps aptly described as the AWT leading case, in setting the stage for the need for the AWT, explained (at p. 24):

> Since the impingement of external stressors on anyone's psyche must be accepted as, intrinsically, an "injuring process", it follows that a disabling mental breakdown in response to such a process is compensable under the Act provided only that the injuring process in question is one that "arises out of and in the course of employment".

6. The panel explained the rationale for the AWT (at p. 25):

> The average-worker test works for this purpose (*ed., i.e., identifying the injuring process*) because if one can be satisfied that the workplace events or circumstances were such that they would put even employees with an average person's resistance to mental stress and its injurious effects at risk of psychological injury, one can then reasonably conclude that those events or circumstances constitute an injuring process that may reasonably be seen to arise out of and in the course of employment.

7. The panel set out the AWT as it should apply to chronic stress cases (at p. 22):

> The majority of this Panel would suggest that the test which emerges from this line of chronic stress cases is a two-part test which might usefully be described as follows:
>
> **Part I:** Is it plausible that workers of average mental stability would have perceived the workplace circumstances or events to be as mentally stressful as the injured worker perceived them to be?
>
> **Part II:** If so, would such average workers be at risk of suffering a disabling mental reaction to such perceptions?

8. After examining the AWT as applied in stress cases, the panel in ***Decision No. 640/97*** **(November 29, 2001)**, while generally dismissive of the AWT explained (at para. 66) "*. . . we are not convinced that the test as set out by the above panel is a fundamental deviation from the significant contribution test, but it does set out the context within which the significant contribution test is to be understood in cases of chronic stress*"

9. Thirteen years later, another panel of the Appeals Tribunal, in a PTSD case, ***Decision No. 480/11*** **(July 15, 2014)**, concluded (at para. 83) that the AWT was appropriate so long as it did not override the specific facts of the case:

> In our view, in a claim for traumatic mental stress, it is relevant and not improper to consider whether the events complained of would normally be expected to be stressful to the average worker as long as the specific facts of the worker's case may also be considered.

10. The panel in ***Decision No. 665/10I2*** **(May 28, 2010)** expressed a similar theme (at para. 54):

> To the extent that the average worker test suggests only that objective and good evidence needs to be present in order for entitlement to be extended, we find it might be said to provide a useful guide. To the extent the average worker test is used rigorously and mechanically, this Panel finds it does not prove to constitute a useful adjudicative tool.

M. Conclusions with respect to the Average Worker Test – it is a credible tool to allow but not deny a chronic stress case

1. Reading these decisions together, along with other Appeals Tribunal cases dealing with chronic stress, one concludes that the AWT embraces some controversy and competing views, even among collegial panels of the Appeals Tribunal.

2. This is not an observation that should dislodge the AWT as an effective adjudicative tool in WSI chronic stress cases, as will be explained.

3. ***Decision No. 826/94*** explained that if the workplace put an average employee at risk of mental injury, one can conclude that the workplace would "*constitute an injuring process that may reasonably be seen to arise out of and in the course of employment.*" While this decision could be contrasted with more recent alternative views of the AWT, one reasonably concludes that there is no aversion to *allowing* a case through the application of the AWT. There may well be a legitimate aversion to the AWT being applied as a template driving an entitlement denial. This sentiment was supported in ***Decision No. 480/11*** (". . . *it is not improper to consider whether the events complained of would normally be expected to be stressful to the average worker as long as the specific facts of the worker's case may also be considered*").

4. The AWT therefore is an effective adjudicative tool that has the capacity to shorten the extensiveness and intrusiveness of a chronic stress investigation where the evidence, on a balance of probability, establishes "*that workers of average mental stability would have perceived the workplace circumstances or events to be as mentally stressful as the injured worker perceived them to be*" (Part I of the AWT) , and that "*such average workers would be at risk of suffering a disabling mental reaction to such perceptions*" (Part II of the AWT).

5. If the AWT is met, the case may be allowed (providing other essential elements summarized later are met). However, if the AWT is not met, the case is not denied. The investigation will continue.

N. The fact investigation required if application of the AWT does not result in allowance

1. If the application of the AWT does not result in the allowance of the chronic stress claim, one need look no further than **WSIAT *Decision 2157/09***,[19] which sets a reasonable template for consideration of these types of cases:

> In view of the apparent, though speculative, concerns about "blanket coverage," the Panel notes that many conditions which the Tribunal and Board must adjudicate are multifactorial and require a careful analysis of the evidence and the applicable legal principles. The Tribunal's jurisprudence in the area of mental stress indicates that a multifactorial approach to determining causation may include the following lines of inquiry:

[19] WSIAT *Decision 2157/09* (April 29, 2014), at paras. 276 & 277. The footnotes which appeared in the decision for this excerpt have been included in the excerpted text in (parentheses). *Decision 2157/09* is one of the trilogy of stress cases.

- Is there a DSM diagnosis of the worker's condition? In order to be eligible for a "personal injury by accident" under the WSIA, a disabling mental reaction is necessary: a transitory emotional response is not compensable. (See, for example, Decision No. 2599/01, 2001 ONWSIAT 3995).
- Was there a "workplace injuring process"? This involves careful consideration of the nature of the workplace events that are alleged to have caused the mental disorder and the evidence surrounding the alleged events. (An impartial inquiry into the alleged events does not connote an "objective" test, but rather, reflects that it is necessary to ascertain the nature of the accident; this is analogous to the examination of a worker's job duties in a claim for a repetitive strain injury. Decision No. 2035/06, supra, which addressed a physical injury claim, noted: "the worker's injuring activity must also be work-related and there should be an objectively identifiable workplace injuring process.") A workplace injuring process is not established if the mental disorder arises solely from the worker's misperception of events. (See, for example, Decision Nos. 1354/07, 2013 ONWSIAT 360 and 2416/03, supra.)
- Are there co-existing or prior non-work stressors present that may have caused or contributed to the onset of the mental disorder? How significant are they in comparison to the workplace stressors?
- Does the worker have any prior psychiatric history or predisposing personality features that are relevant to the question of causation? If so, is it in the nature of a "thin skull" or a "crumbling skull"? In other words, is it a case in which it is appropriate to consider entitlement on an "aggravation basis"?
- Is there a temporal connection between the events and the onset of the mental disorder? If not, is there a credible explanation for any delay?
- Do the medical professionals who comment upon causation have a complete and accurate understanding of the workplace events, the worker's psychiatric history, relevant family history, prior or co-existing stressors, and any other relevant factors? (We note that this factor is relevant in evaluating the medical evidence in both physical and mental injury claims. For example, if an orthopaedic surgeon gives an opinion upon the causation of a worker's back injury based upon an inaccurate understanding of the accident and the worker's prior history of back pain, then the opinion is less persuasive than a medical opinion based upon an accurate understanding of the facts.) Do they provide a reasoned explanation for their opinions on causation?
- What is the worker's employment history? In some cases, it may be appropriate to draw inferences in this regard. For example, a long and stable employment history may suggest that the worker had been able to cope with "normal" stressors in the past.

This is a non-exhaustive list of factors which may be relevant to consider in the adjudication of mental stress claims. In the Panel's view, the consideration of these questions, as well as any other factors relevant to the individual case, in conjunction with the applicable legal principles of causation, address concerns about the risk of "blanket coverage" for mental stress claims.

2. Using the above as a template, a workable analysis to be applied in the more complex chronic stress case (i.e., not allowed through the application of the AWT), is expressed as follows. This will be referenced as the "complex chronic stress analysis."

   a. Is there a DSM diagnosis of the worker's condition? A disabling mental reaction is necessary. A transitory emotional response is not compensable.

   b. Was there a "workplace injuring process"? This involves careful consideration of the nature of the workplace events that are alleged to have caused the mental disorder and the evidence surrounding the alleged events.

c. A workplace injuring process is not established if the mental disorder arises solely from the worker's misperception of events.

d. Are there co-existing or prior non-work stressors present that may have caused or contributed to the onset of the mental disorder? How significant are they in comparison to the workplace stressors?

e. Does the worker have any prior psychiatric history or predisposing personality features that are relevant to the question of causation? If so, is it in the nature of a "thin skull" or a "crumbling skull"? In other words, is it a case in which it is appropriate to consider entitlement on an "aggravation basis"?

f. Is there a temporal connection between the events and the onset of the mental disorder? If not, is there a credible explanation for any delay?

g. Do the medical professionals who comment upon causation have a complete and accurate understanding of the workplace events, the worker's psychiatric history, relevant family history, prior or co-existing stressors, and any other relevant factors? Do they provide a reasoned explanation for their opinions on causation?

h. What is the worker's employment history? In some cases, it may be appropriate to draw inferences in this regard. For example, a long and stable employment history may suggest that the worker had been able to cope with "normal" stressors in the past.

O. The question of medical evidence

1. The stress policy requires a DSM diagnosis provided by a "regulated health professional."[20]

> **Diagnostic requirements**
>
> Before any traumatic mental stress or chronic mental stress claim can be adjudicated, there must be a diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM) which may include, but is not limited to,
>
> • acute stress disorder
> • posttraumatic stress disorder
> • adjustment disorder, or
> • an anxiety or depressive disorder.
>
> The WSIB will accept the claim for adjudication if an appropriate regulated health care professional provides the DSM diagnosis. However, the WSIB decision-maker may, at a later point, require an assessment by a psychiatrist or psychologist to confirm ongoing entitlement

2. As already explored, several Canadian jurisdictions require a DSM diagnosis to be provided by a psychiatrist or psychologist in all cases. While psychiatric evidence may be preferred, such a standard is impractical and would undermine the WSIB's requirement to get the correct answer as quickly as possible. Therefore, while this paper does not subscribe to that requirement for *all* chronic stress cases,

[20] Stress policy, p. 4.

some cases demand the type of comprehensive factual presentation and opinion that can only be found in a psychiatric report. The mechanism to distinguish these two types of cases follows.

3. *For cases adjudicated and allowed through the application of the AWT approach,* as introduced earlier, it is proposed that a DSM diagnosis from a regulated health professional is suitable. However, the normal "Health Professional's Report, Form 8" is inadequate for chronic stress cases. The British Columbia "Family Physician Guide"[21] outlines that the medical interview should have the following structure (what follows is a truncated list – refer to the document for complete details), with the diagnosis made with direct reference to the DSM:

    - Identifying information
    - History of presenting illness
    - Substances of abuse
    - Past psychiatric history
    - Past medical history
    - Current and recent medications
    - Family history
    - Social issues
    - Mental status exam
    - Physical exam
    - Impressions
    - Multi-axial diagnosis (Axis I: Psychiatric disorders; Axis II: Personality disorders; Axis III: Comorbid medical conditions; Axis IV: Social stressors; Axis V: GAF (Global Assessment of Functioning) score)

4. It is recommended that the WSIB develop a special stress disorder medical report that ensures that the essential information to consider a chronic stress case is provided in all cases. Moreover, as a psychiatric assessment even by a family doctor will be more time consuming than other medical assessments, it is recommended that the WSIB establish an appropriate schedule for fees for such assessments.

5. *For cases adjudicated under the "complex chronic stress analysis"* a comprehensive report from a psychiatrist or psychologist must be required. Such reports typically present a thorough history documenting occupational and non-occupational factors, prior relevant history, etc.

P. A summary of the adjudicative steps and appropriate analytical template for the chronic stress case:

1. **Step 1:** Has a DSM diagnosis with sufficient background (stress disorder medical report) information been provided? **If NO**, obtain a DSM diagnosis. **If YES**, go to **Step 2**.

2. **Step 2:** After a normal fact finding exercise, has the Average Worker Test (AWT) been satisfied, i.e., on a balance of probability would workers of average mental stability have perceived the workplace circumstances or events to be as mentally stressful as the injured worker perceived them to be (Part I of

[21] British Columbia, Family Physician Guide, CARMHA Faculty of Health Sciences, Simon Fraser University, November 2008, at p. 2.2

the AWT), and would such average workers be at risk of suffering a disabling mental reaction to such perceptions (Part II of the AWT)? **If NO**, go to **Step 3**. **If YES**, go to **Step 4**.

3. **Step 3:** As the application of the AWT has not been satisfied, a psychiatric evaluation is required by a psychiatrist or psychologist, and the "complex chronic stress analysis" (as described earlier) is undertaken.

   a. If the evidence and analysis lead to the conclusion on a balance of probability that the employment was a significant contributing factor to the development of chronic stress, **go to Step 4**.

   b. If the evidence and analysis lead to the conclusion on a balance of probability that the employment was not a significant contributing factor to the development of chronic stress, **the claim is denied**.

4. **Step 4:** Were the work-related stressors the predominant cause of the injury? **If YES**, the claim is allowed. **If NO**, the claim is denied.

Q. Summary of core conclusions and recommendations

1. At the outset, while recognizing the prodigious scope of the Board's challenge, the paper explains that the proposed stress policy requires reconsideration and revision. **See Section A.**

2. It is strongly recommended that an ongoing review mechanism be instituted through both the Chair's CAGs and the normal consultative venues available to the Board. Through the CAG, a special sub-committee should be immediately struck and meet no less than twice a year to review implementation progress with the WSIB. At post-implementation Year 2 and again at Year 5 a comprehensive report should be prepared and publicly distributed, seeking stakeholder commentary and suggestion. **See Section B.**

3. The paper provides a history of the consideration of chronic stress in Ontario, showing this is not a new issue but rather one with an accumulated thirty (30) year history. **See Section C.**

4. The paper argues, with strong support from the **1999 British Columbia Royal Commission on Workers' Compensation**, that stress cases are distinctive from other WSI cases and require a distinctive legal treatment. **See Section D.**

5. The Board's proposed stress policy is critiqued resulting in the conclusion that it is not a workable template through which to distinguish work-related chronic stress from non-work-related chronic stress. A different approach is called for. **See Section E.**

6. The Canadian experience is reviewed, establishing that for four provinces that allow entitlement for chronic stress, *all* apply the "*predominant cause test*." The remaining provinces do not allow entitlement for chronic stress. The paper argues that Ontario has not presented a reasoned analysis for a

distinctive approach and comments that the complexity of chronic stress cases does not vary from province to province. **See Sections F to I.**

7. It is argued that amendments to the WSIA allowed the Board to develop and implement a distinctive policy approach to chronic stress and construct a policy that provided "*different evidentiary requirements or adjudicative principles*" "*having regard to the different basis for and the characteristics*" of chronic stress entitlement. That the Board chose not to do so may well lead to a clearer statutory directive in the future. **See Section J.**

8. The paper is sensitive to the need of the Board to not only get to the correct answer but to do so as quickly as possible to ensure that its rehabilitation mandate is not usurped. However, it cannot do so through an abdication of its adjudicative mandate. **See Section K.**

9. The paper examines the establishment and evolution of the "average worker test" and recommends its adoption as an adjudicative tool to allow claims but not to deny claims. **See Sections L and M.**

10. The paper presents a "complex chronic stress analysis" as a suitable investigative and adjudicative template for all cases that do not meet the average worker test. **See Section N.**

11. The paper examines the type of medical evidence required in chronic stress cases and concludes that while a DSM diagnosis is required in all cases, it is appropriate in some cases for that diagnosis to be provided by a non-psychiatrist health care professional. However, the Board is encouraged to develop a special stress disorder medical report to ensure it receives the necessary information to make an informed decision. For all cases considered under the proposed "complex chronic stress analysis," a comprehensive report from a psychiatrist or psychologist is required. **See Section O.**

12. A summary of the adjudicative steps and appropriate analytical template for chronic stress cases is set out. **See Section P.**

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June, 2017