

# Injured Workers' Consultants

*Representing injured workers free of charge since 1969*

## **Injured Workers' Submission to Jill Hutcheon: WSIB/WCB Clothing Allowance Policy Changes**

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Injured workers attending the December 2005 Christmas Rally outside the Ministry of Labour were very pleased to hear the announcement that WSIB/WCB had decided to restore the clothing allowance to its former level. As described below, this had been actively pursued with the Board for more than ten years. We would like to acknowledge the efforts made by Jill Hutcheon and her administration to review this issue and bring it to a conclusion. We have heard from injured workers all over Ontario who were very glad to see the full amount of the clothing allowance is once again being provided by the Board.

However, injured workers are also asking us how to make sense of the fact that they were entitled to this amount until 1996, and from 2005 onwards, but only a decreased amount in between although the damage to their clothing did not decrease. The unfairness is particularly evident to the injured workers who were receiving the clothing allowance in 1996 when it was cut in half. As you will see from the brief history below, they immediately raised their concerns with the WCB senior management in writing. By 1998 the WSIB/WCB told these injured workers that it was reviewing the policy and the Chair said that it would be put back to the way it was. In 1999 the WSIB/WCB acknowledged in writing that it had evidence that the new style braces caused similar clothing damage to the old braces and released a draft policy restoring the full amount of the allowance. Yet that did not happen until 2005.

This situation raises obvious considerations of fairness to injured workers. The purpose of this submission is to urge the WSIB/WCB to give further consideration to the retroactivity of the change in the amount of the clothing allowance. The 'Question and Answer' document distributed by the WSIB/WCB to explain the changes suggests that a retroactive date is only used for a policy change if the old policy is found to be inconsistent with or not authorized by the Act. Our research into the law and policy indicates that the Board does make retroactive policies in other circumstances and that the Board's policy on policy changes is consistent with restoring the full clothing back to the full amount as it was in 1995.

## **History of the Opposition to Cuts to Clothing Allowances**

### January 15, 1995

The WCB released a discussion paper, the Financial Improvement Package (FIP) that includes a discussion of the Board's "financial crisis" and proposed a number of cuts to benefits. The "minor" cuts to clothing allowances are estimated to amount to \$950,000.

### February 6, 1995

The IWC representatives to the external consultation group and a dozen injured workers from Bright Lights (a group of injured workers who meet at our clinic) attend at a WCB briefing on FIP. The workers circulate a TIWAG/UIW (Toronto Injured Worker Advocacy Group/Union of Injured Workers) submission that challenges the "financial crisis"

arguments for these cuts. As a result of various pressures, the FIP document is not implemented.

#### September 1996

The WCB released a 38 page "clothing allowance discussion paper" that announced the new cuts to clothing allowances for back braces and supports. They announce an immediate 50% cut to all camp corsets ('they do not damage clothes') and the cancellation of back supports except for workers back at work involved in lifting ('back braces cause back conditions to worsen'). Later investigation revealed that the only evidence regarding clothing damage was a letter from the manufacturer of the Camp Corset claiming that their product did not damage clothing. No research had been done.

#### November 1, 1996

The Board revised the clothing allowance policy to provide, among other changes, that the allowance for damaged clothing from the canvass belt type back support with steel stays will be half that rate for the rigid frame Harris-type brace.

#### January 1998

Bill 99 is in effect. Unlike the prior legislation, it does not provide a dollar amount for the clothing allowance but leaves it to the discretion of the Board.

#### February 2-3, 1998

The new WSIB/WCB has its "Shifting the Paradigm" conference to showcase the new approach. By now many workers have personal experience with the cuts. Several meetings of injured workers had raised the frustration with clothing allowance cuts, they mention this from the microphones on the floor. Linda Jolley, in charge of WSIB/WCB policy, acknowledges the concern in her speech and says that 'Glen Wright is willing to look at our concerns'.

#### February 26, 1998

At a public meeting in Rexdale, TIWAG distributed a letter for injured workers to sign about the cuts to clothing allowances. This letter refers to Glen Wright's commitment to revisit the issue. Injured workers in the Greater Toronto Area eventually send hundreds of these to the WSIB/WCB. The letter of response from Linda Jolley acknowledges that many injured workers have complained and advises that the policy is under review and that injured worker and labour groups are being contacted for their views.

#### March 1, 1998

Slavica Todorovic from the Policy Branch of the Board contacts IWC for a submission on the clothing allowance policy for their review. This is discussed with Bright Lights and

sent on April 17, 1998. It is both an analysis of the policy and a series of testimonials from the injured workers.

### May 1998

Linda Jolley writes to the injured workers who wrote to Glen Wright about the clothing allowance. The letter says "We are right now revising the clothing allowance policy...we have been consulting...we expect to have a revised policy that will address your concerns within the next month."

### May 7, 1998

The Bright Lights meeting has an internal survey. Results: Out of 16 people wearing back braces, 7 were cut to 50% and 2 were totally cut off clothing allowances. (No one had noticed any reduction in the wear and tear caused to clothes.)

### May 13, 1998

A special meeting is called at Bloor Collegiate to consider a joint appeal for workers affected. About one hundred injured workers sign-up in order to avoid running out of appeal time limits.

### June 25, 1998

A group of 50 workers met Glen Wright and senior management in the WCB staff cafeteria on many issues, including cuts to clothing allowances. Generoso Ardente, injured worker, speaks on the issue and shows the ongoing damage to his clothes. Mr. Wright promises a reply by the end of September. About 100 appeal notices were delivered on behalf of injured workers cut-off on the clothing allowance.

### November 4, 1998

Since no reply had come, at the next meeting of this group the issue is raised again. The UIW/TIWAG made a presentation and written submission to WSIB/WCB senior management. Glen Wright announced that the policy will be changed back to the way it was for the older injured workers. We presented a document that clarified that it is an issue for all workers, not an issue of making a concession to one group of older workers. We also asked that the Board make sure to give the money back to all those whose allowance had been cut back.

### February 1, 1999

Linda Jolley wrote a letter to all stakeholders that describes the concerns that injured workers raised and says the Board has revised the policy to address these concerns. It includes a proposed policy that restores entitlement to the braces and restores the allowance to the full amount for back braces with steel stays whether they are canvas or

Harris-type. It says that "While the Board had some evidence that supported that new prosthesis and assistive devices did not cause the wear and tear on clothing that the old devices did, consideration must be given to the fact that this was not the current experience in all cases." The consultation deadline was March 15, 1999.

#### July 1999

The Board announced the new clothing allowance policy which withdraws the proposed equal clothing allowance for both types of braces and classifies the canvass belt type brace with steel stays as causing minor damage and continues to provide half the allowance. In a letter to Orlando Buonastella dated 29 August 1999 Linda Jolley says that despite the decision in the new policy to classify them as minor damage "The Board, however, is undertaking research into this issue to see if these softer supports do cause major damage."

#### November 30, 1999

TIWAG/UIW wrote to John Slinger to request that he schedule a 'mass appeal' of the 100 clothing allowance appellants and to request a copy of the research referred to in Linda Jolley's letter. A group of worker representatives met with John Slinger on December 20, 1999 to discuss this. As a result of that meeting, John Slinger wrote a memo to Slavica Todorovic dated December 23, 1999 advising her that before going ahead with the appeals, the representatives wanted to meet with the policy branch to discuss the research. On April 18, 2000, TIWAG/UIW wrote to Linda Jolley to reiterate the request for the meeting. On June 15, 2000 Linda Jolley replied, with apologies for the delay. She advised that the Board had found someone to test the impact of back braces on clothing in a lab setting but "the methodology did not work out and the researcher left the university without notifying the WSIB/WCB that the project was terminated."

#### September 21, 2000

A delegation from TIWAG/UIW met with Linda Jolley and John Martin to discuss pursuing the research into clothing damage. The meeting concluded with an agreement to meet again after the Board consulted with the Institute for Work and Health about the possibility of surveying back brace wearers. Terry Sullivan of the Institute for Work and Health would attend the next meeting. Linda Jolley indicated that she was not aware that the so-called 'soft-corsets' that injured workers were talking about had steel stays. She asked that we bring both types of braces and some damaged clothing with us for the next meeting. Several telephone calls were made to arrange the follow up meeting and finally a letter was sent to Linda Jolley on August 31, 2001 to request the follow up meeting. After various follow up requests, the meeting was scheduled for May 16, 2002. On May 16, 2002 the Board called to cancel the meeting because Ms. Jolley had medical appointments. Ms. Jolley was not well and the meeting could not be rescheduled until September 2002.

### September 16, 2002

A delegation from TIWAG/UIW met with Linda Jolley. She acknowledged that there might have been different understandings of the type of brace that was in issue and advised the group that to decide about further research she would review the research that was done for the last policy change.

On June 24 2002 an injured worker had written to WSIB/WCB President David Williams to object to the lack of progress by the Board on the clothing allowance issue. Slavica Todorovic replied in letter dated July 15, 2002. The injured worker responded by letter dated November 18, 2002, outlining the ongoing discussions with Linda Jolley about research and requesting that the research carry on.

### October 30, 2003

Slavica Todorovic came to a meeting of the Bright Lights injured workers to discuss their work on this issue. She explained that she had been fitted with the canvass back brace with steel stays and she was wearing it. She heard directly from injured workers about their experience with long term use of such devices.

### December 16, 2004

Injured workers met with WSIB/WCB President Chair Jill Hutcheon and discussed a number of policy concerns that had been under review with the WSIB/WCB for a long time. Injured workers called them "the slow boat issues." Ms. Hutcheon agreed to look into these issues.

### December 6, 2005

The WSIB/WCB Board of Directors approved the revised clothing allowance policy accepting that the camp corsets with steel stays can cause major damage to clothing and restoring eligibility for the full amount of the clothing allowance.

## **Law and Policy Regarding Retroactivity of Policy Changes**

This case is relatively unique in that the senior management of the WSIB/WCB acknowledged the problem with the evidence used to justify the reduced allowance to injured workers and agreed to restore the allowance many years ago. That alone should be good reason for the WSIB/WCB to take a different approach to the retroactivity issue.

However there are examples of the Board introducing policy changes with lengthy retroactivity. For example, until recently the WSIB/WCB had no policy regarding entitlement to compensation for mental stress disabilities. On June 10, 2004, the WSIB/WCB Board of Directors approved Policy 15-03-02 regarding entitlement to compensation for traumatic mental stress. This policy was made retroactive for the previous 15 years to January 1, 1989 and the Board undertook a review of claims since then to ensure that those injured workers received the benefit of the new policy.

The WSIB/WCB Board of Directors decided on a policy for the retroactivity of policy changes in 1990. Board Minute #8 of October 5, 1990 (copy attached) approved criteria for determination of retroactivity dates. For discretionary Board policies the retroactivity dates should be based on individual circumstances surrounding the policy change. The setting of an amount for the clothing allowance can be considered a discretionary policy since the amount is no longer specified in the legislation.

This Board Minute directs the Board to consider the unique circumstances of the clothing allowance policy review process since 1996. As soon as the allowances were cut, injured worker immediately raised their concerns with the WCB senior management in writing.

By 1998 the WSIB/WCB told these injured workers that it was reviewing the policy. The Chair said that it would be put back to the way it was. In 1999 the WSIB/WCB acknowledged in writing that it had evidence that the new style braces caused similar clothing damage to the old braces. The Board released a draft policy restoring the full amount of the allowance. Yet that did not happen until 2005. Surely this is a case where the individual circumstances this unfortunate policy review process present a compelling case for full retroactivity.

For policies based on “overrulings” the Board Minute directs the Board to consider a number of factors that pertain to this issue. The change in clothing allowance policy can be considered an “overruling” because it revokes the existing policy and effectively restores the policy in place until 1996. The Board Minute directs the Board to consider the social and equitable implications which are discussed above and obviously favour a fully retroactive policy change. The Minute suggest that the number of stakeholders affected is relevant, which is a manageable amount, fewer than 5000 according to the Board’s figures. It mentions implementation considerations, and it would be relatively simple to track the claimants receiving this allowance over the past ten years. The Board is also directed to consider the legitimacy of the previous policy. In this case, the basis of the 1996 policy cuts has been discredited and rejected by the Board. It also asks whether the new policy is more or less restrictive than the previous policy, which suggests that retroactivity is more appropriate which policy changes to less restrictive policies, which is the case here.

The injured workers involved are a persistent group. If the issue of retroactivity cannot be resolved through a change of policy, they want to proceed with the ‘mass appeal’ to the Appeals Branch of about a hundred objections to the allowance reductions in 1996. The jurisprudence of the Workplace Safety and Insurance Appeals Tribunal supports the argument for full retroactivity.

The main Tribunal decision on this point was in the leading case Decision 915A in May 1988. The legal principles of retroactivity developed by the Workers' Compensation Appeals Tribunal were subsequently used by the W.C.B. Board of directors in the development of Board Minute #8 discussed above. In Decision 915A the W.C.A.T. was dealing with the question of the retroactivity of the new principles of compensation for work related chronic pain disabilities that had been developed in Decision 915, the

pensions leading case. The Tribunal noted that it was dealing with an "over-ruling" of the Board's previous approach to chronic pain disabilities. The Tribunal described the common law principle that the retroactive effect of overrulings in the interpretation of statutes is subject to such limits as are required by the needs of good public administration.

The law regarding retroactivity was reviewed by the WCAT and it concluded that the most appropriate approach to limiting retroactivity was to adopt a one date for all strategy for the effective date of the new interpretation. This legal principle led to the conclusion by the Tribunal that the start date for benefits from the overruling of a previous policy should be retroactive to the start date of the process which led to the overruling. In this case, that requires that the change be retroactive at least to 1998 when the Board's Vice President of Policy told injured workers that they would look into their concerns with the policy. Based on the unique circumstances of this policy change, the injured workers have solid legal arguments to bring to the WSIAT based on the Tribunal's own decisions on this issue. They have pursued this issue for more than ten years already and they intend to continue. But in our submission, that should not be necessary. Our preference is for the WSIB/WCB administration to fix this, avoiding a long delay for a group of older injured workers who have been through long delays already. The WCB accepted the Tribunal's legal principles for retroactivity set out in Decision 915A and used them to establish an acceptable retroactivity date for the chronic pain policy changes. It made the mental stress policy retroactive for 15 years. We sincerely hope that the same approach can be taken for the clothing allowance without the need to litigate the issue all over again. We urge you to review the issue of retroactivity of these changes in light of the concerns we have raised.

### **Additional Food For Thought: Indexation**

In our discussions with injured workers on this issue, it has been brought to our attention that the Board has not adjusted the clothing allowance amount for inflation since 1997. The maximum allowance in 1997 was \$511.12. The maximum allowance in 2006 is \$511.12. If this had been adjusted to keep pace with the consumer price index, it would now be \$619.32. In effect, the clothing allowance benefit has been reduced by about 20% during this policy review by not being adjusted for inflation.

The technical reason is that prior to Bill 99, the allowance was a figure set out in the Act and therefore subject to indexation. It was adjusted from the \$368 figure in the Act to \$511.12 by 1997. But under Bill 99, effective January 1998, the amount of the allowance was not specified in the legislation, leaving it up to the discretion of the Board. The WSIB/WCB has continued paying the 1997 amount with no adjustment at all for the effects of inflation on the cost of replacing the damaged clothing. For pre-1990 injuries, the old legislation that sets out a dollar amount for the allowance continues to apply. It can be argued that the WSIB/WCB is required by law to adjust the allowance for inflation for at least the pre-1990 injuries. Whether or not the WSIB/WCB is required by law to index the allowance, it is not fair to leave it at the 1997 rate. A clothing allowance should not be diminishing over time in real terms. The cost of clothing goes up as part of the

cost of living.

There is something that the WSIB/WCB can do about this. The legislation leaves it up to the WSIB/WCB to determine the allowance. The WSIB/WCB has the authority to index the allowance to keep pace with the Consumer Price Index. Will the WSIB/WCB use its authority to set the clothing allowance amount and fairly adjust the allowance to keep pace with the real cost of living since 1997?

Thank you for considering our submissions.

Respectfully submitted this 11<sup>th</sup> day of September, 2006.